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Prison Health Care, Political Choice and the Accidental Death Penalty in Michigan

by Elizabeth Alexander¹

In *Hadix v. Caruso*, I represent a class of prisoners in a decades-long case challenging conditions of confinement, including medical care, at various Michigan prison facilities.² Since August 2006 I have been haunted by the death of one of those prisoners, because in retrospect his death appears to be the inevitable by-product of a prison system swollen beyond any historical precedents or its ability to manage such a huge number of people safely. Prisons are in fact extraordinarily difficult to operate safely and humanely, and the United States will continue to fail to do so absent a fundamental change in criminal justice policy.

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This article seeks to trace some connections between a dysfunctional criminal justice policy and the death of one man.

Prison systems like Michigan's have been allowed to operate unsafe prisons because the Eighth Amendment fails to provide an effective form of oversight, and no other form of serious oversight exists in the United States. In a series of decisions, the Supreme Court has preserved the form of Eighth Amendment challenges to conditions of confinement but little of the substance, by allowing severely overcrowded prisons,³ suggesting that considerations of cost can defeat an Eighth Amendment claim,⁴ and allowing Eighth Amendment claims to be defeated even when prison conditions are objectively intolerable and deny prisoners basic human needs, including health care.⁵ Unfortunately, Michigan may ultimately illustrate that the only real restraint on prison growth is its cost, not the Constitution.

I. The Lonesome Death of Timothy Souders

Timothy Souders arrived at the Southern Michigan Correctional Facility in March 2006 with medical problems that included a thyroid disorder and cardiac risk factors.⁶ He also had been diagnosed with bipolar disorder and depression, and had attempted suicide multiple times. It was duly noted in his medical record that, because of his medications and medical problems, he was at very high risk of injury if exposed to excessive heat.

In March 2006, the prison psychiatrist at the Southern Michigan Correctional Facility where Mr. Souders was confined changed his medications, prescribing

lithium for his bi-polar disorder and subsequently increasing his lithium. However, there are no records of laboratory monitoring of the level of lithium in his blood for the relevant period, although elevated lithium levels are toxic and can cause symptoms ranging from mental confusion to life-threatening side effects such as kidney failure. Monitoring lithium levels in the blood is considered absolutely necessary when lithium is prescribed, and high lithium levels are particularly dangerous in someone who is dehydrated.

Near the end of May 2006, the psychiatrist went on medical leave and thereafter there was no psychiatrist on-site for the 1,400 prisoners at the prison. In July Mr. Souders was involved in a fight with another prisoner and was ordered to punitive detention. After 30 days he was released, but he was sent back to the segregation unit for taking an unauthorized shower during an August day in which the heat index was over 90.

He was put in a boxcar cell, meaning an essentially unventilated cell with no window and a solid metal door, rather than an open barred cell front, on the sixth level of the prison. When staff opened the food slot in one of the solid doors, which is how staff talked to people in those cells, on hot days they could feel a blast of hot air from inside the cell. During the next few days the heat index in the cells rose to around 100.

On August 2, 2006, Mr. Souders damaged the metal stool in his cell and was put into standing restraints. When he tried to flood his sink, according to prison records, a supervisory nurse approved cut-

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Michigan Prison Health Care (cont.)

ting off the water to the cell – a restriction removed only because someone noticed that the whole prison was on heat alert status. Mr. Souders was then put into top-of-bed restraints, with metal restraints on his wrists and ankles on a concrete slab. Use of this type of restraints is well known to carry a risk of death from asphyxiation, heart attack and dehydration.

That day, the psychologist who was in charge of mental health services for the prison characterized Mr. Souders as “floridly psychotic.” From August 2 through August 5, the segregation log and the video camera used in his cell document that Mr. Souders was repeatedly screaming incoherently. Between August 2 and August 6, Mr. Souders rarely accepted water. During the first two days he was in restraints, the video camera used by staff to film him fogged up and staff complained of the heat and humidity in his cell. As the use of restraints continued, Mr. Souders was held in restraints naked. He urinated in his restraints and developed burn-like sores on his body from lying in his own waste. At one point, prison records indicate that Mr. Souders was transported to the prison’s unaccredited on-site “hospital,” but the physician there declined to examine him, apparently because he urinated on the examining table.

On August 6, prison guards walked him to the showers; the video shows him staggering. Shortly thereafter the restraints were removed. He then fell to the floor of his cell and was unable to get up. Guards returned him to the slab. A nurse examined Mr. Souders in his cell and told him that his pulse was faint, a symptom that indicated he had experienced a drastic fall in his cardiac output. The nurse then left the cell without doing anything to assist him. For the next hour there was no movement in the cell. Then staff reentered the cell because Mr. Souders did not appear to be breathing. He was pronounced dead shortly thereafter, at the age of 21. [See: *PLN*, May 2007, pp.1, 7, 8].

Michigan allows “limited license psychologists” to treat prisoners absent supervision even though they are not eligible to treat people in the community without supervision by a fully-licensed psychologist. The limited-license psychologist who last saw Mr. Souders alive had an undergraduate degree in theology and a master’s degree in community

counseling. This limited-license psychologist had seen the psychologist who was officially “supervising” him once, from a distance, in the preceding year. The head psychologist who diagnosed Mr. Souders as floridly psychotic was a psychiatric social worker and also was not licensed to practice in the community without formal supervision. Aside from the prison system’s employment of staff who are not fully licensed, staff demonstrated a pervasive indifference to community standards of care, as illustrated by the psychiatrist’s failure to perform routine tests for toxic levels of lithium that any psychiatrist in the community would have required.

Staff resources were severely stressed. The Director of Nursing at the prison where Mr. Souders died testified that the prison complex needed about 11 more registered nurses to deliver health care. Almost a third of the registered nursing positions were filled by licensed practical nurses. Even today, despite Mr. Souders’ death, the Department has no policy that requires large prisons with segregation units, which are typically full of the mentally ill, to have on-site psychiatrists.

The medical staff operate in a culture of deference to prison security staff that interferes with care. That culture explains the behavior of the nurse who told security that there was no reason Mr. Souders could not be placed on a water restriction despite his medical problems and the conditions within his boxcar cell. It similarly explains the conduct of the doctor who knew of Mr. Souders’ urine burns but neither treated him nor objected to the use of restraints by security. That culture also explains how a registered nurse could fail to initiate treatment when he learned that Mr. Souders had developed a weak pulse. All of these individual failures took place in a context in which no medical or mental health staff perceived a need to intervene. Nor did any medical staff question why security made the decision to put a mentally ill man into restraints. Nor did anyone question leaving a man in restraints within a boxcar cell where staff could not readily observe him. As the medical director for the Michigan prison system admitted, he thought that there was ample opportunity for medical, mental health and security staff to intervene, but it never happened.

An autopsy determined that the cause of Mr. Souders’ death was hyperthermia, with dehydration a secondary cause, but

Michigan Prison Health Care (cont.)

it characterized the death as “accidental.” While no one has asserted that any staff member actively desired the death of Mr. Souders, I cannot accept the claim that the death was an accident. Rather, the death of Mr. Souders and other victims followed inevitably from the decision of the State of Michigan to imprison almost 50,000 people but fail to provide the resources necessary to provide them with minimally adequate health care, combined with a staff culture of willful blindness to the risks that this lack of care entailed.

II. Just Another Brick in The Wall

As might be expected from the number and variety of deficiencies in medical and mental health care implicated in the death of Timothy Souders, his death took place against a backdrop of systemically inadequate care. For some years, the Michigan prison system has chosen to concentrate its sickest prisoners in the *Hadix* facilities. As of early 2007, at the largest *Hadix* prison, half of the prisoners suffered from at least one chronic disease requiring ongoing treatment. The apparent reason for this concentration of chronically ill prisoners was the proximity of Duane Waters Hospital, run by the Department of Corrections. The hospital was required under a Consent Decree entered early in the *Hadix* litigation. For a substantial period of time, the hospital was accredited by the Joint Commission on Health Care Organizations, but that accreditation has now lapsed. Despite the lack of accreditation, the Department of Corrections continued to allow a surgeon who lacked admitting privileges at any hospital to perform surgery there.

Thus, although the *Hadix* facilities have served as the linchpin of the

Michigan prison health care system, that linchpin is malfunctioning. The *Hadix* court made findings in 2002 regarding hundreds of incidents in which prisoners received inadequate or delayed care, or no care at all. These findings included cases in which the medical system failed to provide timely access to prisoners with urgent and emergent serious medical problems, including failures resulting in death. Subsequent findings by the court-appointed medical monitor, Robert Cohen, M.D., described multiple medical failures, including a prisoner who died of an untreated “staph” infection and gastro-intestinal bleeding; an HIV patient with difficulty in swallowing who, despite a weight loss to 108 pounds, was denied the pureed diet he needed to eat; and a diabetic who predictably died of hypoglycemia after gross failures of treatment and monitoring, accompanied by a failure to respond to his emergency needs.

The court medical monitor and the Director of Medical Care for the Department of Corrections, a physician, jointly reviewed six randomly-selected medical records of *Hadix* class members whose specialty care appointments had been delayed. In one case, there were no apparent consequences from the delay; in a second case, the only effect may have been to force the prisoner to experience unnecessary pain. In the other four cases, the *Hadix* court concluded, the delay exposed the prisoners to the “prospect of unnecessary death and grossly unnecessary suffering.”⁷

These cases included a man allowed to go untreated for an extended period without diagnosis or treatment for a kidney stone that was rendering his kidney non-functional. Another man with textbook signs of an impending heart attack was improperly scheduled to be seen in thirty days rather than immediately. By the time he was seen, he was lucky to survive his emergency by-pass surgery. Another patient with known symptoms of bowel cancer had his diagnosis delayed for over a year. He proved to have an abnormal, potentially pre-cancerous lesion. Perhaps equally striking, after the diagnosis the patient was not scheduled for follow-up until his case was discovered in the random case review.

The last patient whose file was randomly chosen for review had complained that a mole on his back was increasing in size. He kited repeatedly and was diagnosed with “melanocystic skin mole”

that needed to be “watched closely.” Nonetheless, a subsequent medical order to remove the mole in two weeks resulted in no treatment; a nurse told him to apply a hot compress to the mole. Over six months after he began kiting, in January 2006, he saw medical staff again, by which time the mole had grown into a black-red mass with irregular margins and bleeding. About two weeks later, a pathology report indicated malignant melanoma. He did not receive the next necessary step in the diagnostic process, a sentinel-node biopsy to determine whether he had metastatic cancer, until April 2006. That biopsy showed that the cancer had spread while he was not receiving treatment.

Unfortunately, the mistreatment of this patient did not end despite the *Hadix* court’s December 2006 opinion noting the previous delays in diagnosing his cancer. The medical monitor subsequently discovered that the patient’s chemotherapy had been significantly interrupted when staff did not order his cancer treatment drugs in a timely manner. When the drugs were ordered, staff specified an insufficient quantity for the chemotherapy.

These delays in care took place in the context of a system that allowed 30-40% of cancer patients at any given time not to receive treatment within the time frames set by their physicians, even though, the *Hadix* court found, those physicians often set dates for patients to be seen that were too far in the future, and often failed to take appropriate initial diagnostic steps for timely diagnosis of cancer. For example, another patient waited nine months for a biopsy of his suspected cancer. He finally received a biopsy diagnosing prostate cancer on March 19, 2007. As of early July 2007, the patient had developed bloody urine and was still not yet scheduled for surgery.

The medication distribution system is also broken. A randomized study of medication prescription and renewal by the medical monitor’s office concluded that each month hundreds of prisoners kited within the *Hadix* facilities because their medications had been interrupted. There is no functioning system to assure renewals of medications even when staff know of the need for renewals. As a result, even HIV medications go unrenewed. Although the problem is widely known among health care staff, nothing is done to address the problem. In fact, a physician in the *Hadix* facilities refused to renew medications in a timely fashion. The medi-



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cal monitor documented that medications records containing medication renewal requests, abnormal laboratory test results and specialty consultation reports piled up unread in physicians' offices. The monitor also documented waits of three to four weeks to see a physician, with physicians canceling scheduled patient appointments without cause.

As of the last date for which I have data, half of the registered nurses positions were not filled by permanent staff. Of those filled by temporary contract staff, 60% of the positions were filled by licensed practical nurses rather than registered nurses. As a result, licensed practical nurses take actions that they are not qualified to perform. The nursing shortages also result in medical kites from prisoners going unanswered for days at a time.

Medical treatment was equally bad at the dialysis unit, where a number of prisoners with the most complex medical problems are housed. An outside nephrologist review reported that the medical director "appeared disengaged," and that there were serious deficiencies in water testing and documentation, management of vascular access complications, blood pressure management, delayed specialty care referrals and testing, medication continuity, and emergency care.⁸ Registered nurses assigned to the dialysis unit have been administering medications in a variety of unapproved ways, including relabeling medications dispensed by the pharmacist for prisoners who have left the facility in order to administer them to other prisoners, failing to check medication orders correctly before administering

them to prisoners, and relying on an outmoded system to check that the correct medications are administered.

Further, in part because medications are not being consistently ordered electronically, the medication regimes for the dialysis patients are frequently interrupted. According to a review by the medical monitor, 61% of the dialysis prisoners experienced delays or interruptions of their prescribed medications. Although dialysis puts patients at risk for sepsis, most of the intravenous medications on hand to treat septic patients following hospital discharge are months or years past their expiration date, even though there can be a three-day delay in the dialysis unit's ability to obtain new supplies of such medications.

Dialysis patients needing specialty care (other than urgent surgery when vascular access for dialysis fails) frequently do not receive that care or receive it only after significant delays. As of December 2007, a dialysis patient with a cerebral aneurysm had been waiting since June 2007 for surgery. Another patient was receiving dialysis through a perma-catheter in his chest wall, which is a dangerous method for dialysis access because of the heightened risk of infection it poses. The patient was delayed between September and December 2007 in obtaining surgery to create a standard arteriovenous shunt for dialysis. Shortly after the surgery he was found to have a blood infection and was started on intravenous antibiotics.

A nephrologist consultant for the monitor's office reviewed the deaths of a number of dialysis patients. One of those

deaths involved a prisoner whose cardiac symptoms were ignored over a long period, except for one physician's attempt to obtain a stress test for him. The prison's contract medical provider, Correctional Medical Services, Inc. (CMS), denied the request. Subsequently, the patient died of cardiac arrest after his dialysis was delayed despite a life-threatening elevation in his potassium level. Another dialysis patient died of a brain hemorrhage after his blood pressure problems were ignored and mistreated by medical staff for a year. He was treated with a single medication that cannot safely be used as a sole medication for severe hypertension, and his death, according to the report, was directly

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related to his severe, uncontrolled and inappropriately managed blood pressure and failure to ensure accurate medication administration.

Another dialysis death occurred after staff failed to note increasing evidence of unstable cardiac disease. Although one of the patient's physicians did note that he needed an echocardiogram, the test was not performed. A nurse who thereafter saw the patient at a time the patient was experiencing classic symptoms of unstable angina did not make a referral to a physician. A month later, the physician again remarked that the patient needed an echocardiogram, but the test was not ordered. The following month the patient was finally sent to a hospital where he was diagnosed with a heart attack, and he died of cardiac arrest following by-pass surgery. Another patient died after a delay in summoning an ambulance after the patient experienced a heart attack. The autopsy indicated that he had a structurally normal heart, so that prompt treatment of the heart attack might have saved his life.

After years of reviewing the failures of medical and mental health care, it is perhaps not surprising that the federal judge assigned to *Hadix* wrote that

[T]here are a large number of complicated cases with interdisciplinary problems that unfortunately are being regularly mistreated and/or ignored by staff. The phenomenon is now a regular feature of the system.⁹

Understanding how such a prison staff culture could become embedded requires a consideration of the larger policies that have shaped the Michigan criminal justice system.

III. Money for Nothing

As of the last available statistics, Michigan had per-prisoner medical costs that were about 108% of the national average. I consider the more significant statistic that Michigan spent \$2,841 per prisoner on medical care in 2001, at a time when national spending on medical care was \$4,370 per person per year. Of at least equal significance, Michigan has been receiving limited value for the money that it does spend on prison health care. According to a report by the National Commission on Correctional Health Care (NCCHC), commissioned by the Michigan Department of Corrections (MDOC), Michigan is getting poor value for the

\$300 million per year that it currently spends on prison medical care. Part of the problem, according to the report, was that Michigan contracts out physician services (other than psychiatrists) to CMS.

An NCCHC reviewer became concerned about the level of cognitive functioning of one of the CMS physicians. The physician's medical records had so many errors of spelling and language use that parts of them were incomprehensible. When the reviewer asked supervisors about this physician, the supervisors were familiar with the problem but none believed he or she had the power to take action.¹⁰

In addition, under its contract with the state, CMS pays for off-site specialty care and also decides whether a physician will be allowed to refer a prisoner for such care. As the NCCHC report notes, the fact that the physicians work for CMS may explain why they rarely challenge the decision of CMS reviewers to deny their requests for specialty referrals. Similarly, this fact may explain why 30-40% of cancer patients, as noted earlier, experienced disruptions in their chemotherapy under this system.

A subsidiary of CMS, PharmaCorr, provides pharmacy services for the prison system. PharmaCorr is not required to provide a consulting pharmacist under the contract. Staff reported to the NCCHC that they experienced delays in receiving medications for "same day" delivery under the contract, which is not surprising because PharmaCorr ships all its medications to Michigan from its warehouse in Oklahoma. The report also found that the formulary (a list of medications that a physician can prescribe without any additional authorization from a reviewer) lacked classes of medications that are commonly included in the formularies of large health care organizations, and the procedures for ordering non-formulary medications could pose serious safety concerns, aside from the paperwork burden posed by the inadequacies of the formulary.

The process for dispensation of medication is unnecessarily time-consuming and wasteful. The medical records, which are partly electronic and partly paper, pose a barrier to patient care and decrease the productivity of staff, in significant part because of problems with the electronic medical records system that Michigan uses. In fact, Serapis, the electronic medical records system, is so flawed that the

NCCHC recommended that if Michigan intends to continue using it for any purpose, it should at least stop using it to record certain medical functions, instead reverting to paper records.

The report also commented that the MDOC was "one of the most bureaucratic systems we have ever encountered," and questioned whether the proliferation of bureaucratic procedures of dubious value undermined the system's ability to complete necessary procedures. The proliferation of paperwork is "even worse" in health care, with the 51 Michigan prisons generating hundreds of reports each month that the NCCHC doubted would be read by anyone.

At the same time, the productivity of CMS medical staff was strikingly low. While the reviewers expected physicians to see an average of 20 patients per day, most CMS providers averaged 8-12 per day, and one provider averaged five per day. The NCCHC identified three factors contributing to the low productivity: Serapis, the poorly functioning electronic medical record system; certain prison rules; and the fact that the medical care providers are not employees of the MDOC.

The third point is the heart of the matter, according to the NCCHC report:

The providers have no incentive other than their own professionalism to see more patients. All MDOC facilities have been completing [provider] Productivity Reports for several years. The [MDOC Bureau of Health Care] administration says they cannot do anything about the situation, because they do not supervise the [providers]. They send the information on to the CMS administration, but nothing ever changes. We were told by several MDOC staff that CMS administrators say they cannot tell the [providers] what to do, because they are independent contractors and not employees. Whatever the truth is, this situation must change.

The MDOC should seriously reconsider the advantages and disadvantages of continuing to contract out provider services.

Not surprisingly, the report also found that the system lacked an effective quality improvement program, or a functioning peer review system to assure health care quality. Instead, the system's ostensible quality improvement system amounted to mere "paper pushing."

Many if not all of the problems the report identified stemmed from Michigan's

failure to write a proper contract with CMS and other contractors, including the company that provided the Serapis program. The NCCHC reviewers were told that CMS often unilaterally reduced its staff coverage for a particular position from five days a week to two days a week, and the contract did not provide any disincentive for CMS doing so. In fact, the contract allows the prison system to require CMS to fill those hours, but the system has not insisted on full staffing. Perhaps most damning, over the ten years of the contract, the NCCHC monitors were not provided with a single monitoring report, although the state was supposed to perform regular audits and CMS was supposed to be assessed liquidated damages at any facility that failed to achieve a designated level of compliance. Notwithstanding this provision, not a single claim for liquidated damages was ever made by the state:

Many staff verbalized that they had "heard from Lansing" [where the headquarters of the MDOC is located] that the MDOC simply needs to make the relationship with CMS "work." Whether or not anyone in the MDOC central office actually said this, this is what staff perceives. The most glaring example of this is practitioner staffing shortages. ... Staff speculates that if the MDOC and CMS were operating in a truly arm's length relationship, there should be an immediate response from the MDOC followed by a rapid termination of the contract.

Although the causes differ in part, the

mental health program is also strikingly inefficient. The program is divided between the Michigan Department of Community Health, which provides psychiatrists and certain other staff, and the MDOC, which provides most of the psychologists. Certain prisoners are placed on the out-patient mental health team case load, and these prisoners have their mental health care provided by the Department of Community Health. All of the other prisoners supposedly have their health care provided by the MDOC, including identification and initial treatment of patients experiencing a mental health crisis. This organizational structure is cumbersome and wastes resources. It also creates problems because of disagreements between the two entities as to whether a prisoner needs treatment, and allows staff to disclaim responsibility for services that they consider not within their duties.

IV. Trouble Ahead, Trouble Behind

Michigan citizens are justly proud that their state supports one of the nation's finest public universities, including a leading medical school. In my view, they should also be proud that the state lacks a judicially-imposed death penalty. Unfortunately, as the death of Mr. Souders and many others illustrate, Michigan now has a randomly imposed death penalty for too many prisoners who have the misfortune to suffer from serious medical needs, and this accidental death penalty stems directly from public policy choices that have resulted in an underfunded prison system confining prisoners for whom it is unable to provide minimally adequate

medical care.

Michigan has the sixth largest prison population among the states, although it ranks eighth in total population. Three states with larger total populations – Ohio, Illinois and Pennsylvania – have smaller prison populations. Michigan's comparatively high rank in prison size reflects its comparatively high incarceration rate. This rate is an outlier in the Midwest region, and ten of the eleven other states in the region have rates lower than Michigan's.

Nor can Michigan's high incarceration rate be explained simply by its crime rate. Michigan has the eleventh highest incarceration rate in the country, although it ranks seventeenth in crime rates.¹¹

Incarceration rates are as much influenced by criminal justice sentencing policies as by crime rates. Only three of the eleven states with the highest incarceration rates have crime rates that also rank in the top eleven among the states. While crime rates matter in determining incarceration rates, criminal justice policies related to prosecution, sentencing and parole matter at least as much.

Michigan has adopted a relatively punitive set of criminal justice policies,

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Michigan Prison Health Care (cont.)

in significant part related to its history of extraordinarily tough punishment for drug offenders. In 1978, the state legislature imposed a mandatory punishment of life imprisonment without parole for persons convicted of possession of 650 grams of cocaine or heroin. Not even convictions for rape or mayhem were punished as harshly as persons punished under this drug possession statute; the only other crime that Michigan punished equally harshly was first degree murder. No other jurisdiction imposed a mandatory sentence of life imprisonment without parole for first-time possession of illegal drugs in comparable quantities. Although Michigan's mandatory life sentence for drug possession statutes were repealed in 1998, and prisoners convicted under the law subsequently received parole eligibility, in the last five years the Parole Board has granted parole to eligible lifers at the rate of 0.2% per year.

In 2002-2003, more than 9% of the Michigan prison population was serving a life sentence, amounting to almost 4,600 prisoners. As of 2002-2003, Michigan had the fourth-largest number of lifers of any prison system in the nation. More than half of those prisoners were serving life without the possibility of parole. For lifers who were eligible for parole, the average sentence length for those who gained release increased to an average of 23.2 years during 2000-2004. Apparently many of the lifers released in those years were released on medical parole, which typically implies that the prisoner has a terminal illness or some other incapacitating medical or mental health condition. Thus, the combination of a large state population, a relatively high crime rate, and a particularly severe set of sentencing and release policies have resulted in nearly 50,000 prisoners behind bars.

V. And It's a Hard Rains A-Gonna Fall

Michigan's criminal justice system combines a number of elements that fuel a particularly expensive prison system – that is, a state with a large population; a state with a very high incarceration rate and aging prisoner population, reflecting a history of unusually punitive criminal justice policies; and a state that receives poor value for its expenditures on prison health care. In addition, Michigan, unlike the majority of the states with comparatively high incarceration rates, also has com-

paratively high per-prisoner incarceration costs. Locking people in prison is, under any circumstances, an expensive business, and Michigan policy makers appear to have done virtually everything within their power to make it more expensive.

By 2003, the nation spent \$61 billion just on corrections, out of a total spending on the criminal justice system of \$186 billion. The most recent available figures for the cost of incarceration per prisoner average \$23,876. That average cost, however, is subject to wide variation. If we look at the eleven states including Michigan with the highest incarceration rates in the country, we find that six of them rank among the ten states with the lowest per-prisoner costs.¹²

Michigan is the only state with a high incarceration rate that also ranks above the state median in per-prisoner cost. In fact, Michigan ranks well above the national average cost of incarceration, and it is the only state among the 11 with the highest incarceration rates that has a per-prisoner cost that exceeds the national average.

The major reason for the high per-prisoner cost is staff wages and benefits. The approximately 50,000 Michigan prisoners cost the state an average of \$28,743 per prisoner, in contrast to the national average per-prisoner cost of \$23,876. A Pew Charitable Trust analysis found that the two critical factors in determining comparative per-prisoner incarceration costs among the states are variations in the cost of employee wages and benefits, and variations in the prisoner-to-staff ratio.¹³ In a 2002 survey, base pay for correctional officers in Michigan was the sixth highest in the country. Wages and benefits have made up 71% of the total operating costs of the Michigan prison system, although on average these expenses in state correctional systems account for about two-thirds of the systems' total operating costs.

Aside from the fact that MDOC wages and benefits account for a somewhat high percentage of operating expenses, there is other evidence that its comparatively high per-prisoner cost does not reflect a high ratio of staff to prisoners. The union that represents correctional officers in Michigan claims that the number of state correctional officers declined from 10,600 to 9,200 between 2000 and 2005, despite an increase of several thousand in the prison population.

Michigan can no longer afford to pursue this discordant cluster of poli-

cies. Most states that provide abysmal medical care at least get what they pay for; Michigan cannot even make that statement. Even in the best of times, high incarceration rates combined with high incarceration costs result in difficult financial burdens, as large numbers of states have recognized. Because of the state's high number of lifers and long sentences for drug crimes, Michigan's prison population contains many older prisoners who tend to need more expensive medical care. When one adds in high staff costs and the waste of large amounts of money in the dysfunctional medical care system, the cost of the system would not be sustainable over the long term in relatively good economic times.

Of course, these are not good economic times, particularly in Michigan. For over a year, the state has been caught up in a "one-state recession," with the highest unemployment rate in the nation. As the economic downturn has worsened, the state has experienced a major budget crisis. Part of the MDOC's response to the reduction in its share of the state budget was to close the Southern Michigan Correctional Facility, the prison where Mr. Souders and many others died. I have no doubt that the major motivating factor for the closure was the desire to save money by moving the concentrated population of sick prisoners to prisons not covered by the *Hadix* consent decree. Now that these high-risk prisoners have been dispersed throughout the system, it is highly likely that their medical care will deteriorate further. [See: *PLN*, Dec. 2007, p.26].

Aside from the moral responsibility that Michigan politicians and the MDOC bear for Mr. Souders' death and their refusal to prevent future deaths, the current cluster of policies and practices are on a collision course with reality. Michigan taxpayers have been stuck with large jury damages awards related to some of these deaths. The estate of Jeffrey Clark, a prisoner at the Bellamy Creek Correctional Facility in Michigan, was awarded \$2,750,000 by a federal jury based on his death from dehydration in a hot cell after prison staff turned off the water in his cell and failed to give him water to drink at a time when he suffered from apparent mental illness. [See: *PLN*, Dec. 2008, p.9]. A damages action on behalf of the estate of Timothy Souders was settled for \$3.6 million in June 2008. [See: *PLN*, March 2009, p.41]. More recently, the state settled with a large number of current and former

female prisoners who had been subjected to rape or other forms of sexual abuse for an astounding \$100 million [*PLN*, Dec. 2009, p.30]. The MDOC also risks new class actions seeking injunctive relief at the prisons to which large numbers of chronically ill prisoners were transferred after the closure of the Southern Michigan Correctional Facility.

More importantly, until Michigan fundamentally reforms its sentencing and parole policies, as well as its system for delivering health care, prisoners like Timothy Souders will continue to suffer a death sentence for the “crime” of being mentally or physically ill. Until fundamental change occurs, I can only echo the words of Richard A. Enslen, the *Hadix* federal judge who brought to public attention the failures in the Michigan system: “Say a prayer for [Timothy Souders] and the others who have passed. Any earthly help comes far too late for them.”¹⁴

Postscript

In September 2007, a panel of the Sixth Circuit Court of Appeals, composed entirely of judges appointed by former President George W. Bush, remanded but did not vacate the relief ordered by Judge Enslen in an opinion that did not rule on the merits.¹⁵ On remand, a new federal district judge, also appointed by former President Bush, terminated the injunctive relief on mental health care ordered by Judge Enslen. Plaintiffs appealed to the Sixth Circuit from that ruling.

Ironically, at the same time that the prisoners have been denied relief by the federal courts, the deadly medical care revealed by the *Hadix* litigation led to a substantial public outcry that, in addition to forcing the Governor to ask the National Commission on Correctional Health Care to prepare its critical report, forced the Department of Corrections to act. The unfavorable media attention culminated in a *60 Minutes* story in February 2007.

In response, and also presumably spurred by the financial crisis that hit Michigan particularly hard, the MDOC took steps that significantly increased parole grants, reduced parole revocations and increased the number of prisoners given compassionate medical release. Of particular note, parole revocations are down by 42% since their high-water mark in 2002. As a result, the prison population has fallen by about eight percent, and even this calculation does not take into account that, before these

steps, the population had been increasing by about 160 prisoners a month.

It remains to be seen whether these policies will be maintained after the financial crisis eases, despite the MDOC’s astounding admission that increased incarceration “may actually increase crime in Michigan because of the high unemployment rate among former prisoners and the reduced funding available for education.”¹⁶

Ed. Note: See the related article in this issue of PLN, “Hadix Litigation Winding Down,” for more recent developments in the Hadix case after this article was written.

ENDNOTES

1. Elizabeth Alexander is the former Director of the National Prison Project of the American Civil Liberties Union Foundation. This article is reprinted in modified form with the permission of the author and the *University of Pennsylvania Journal of Constitutional Law*, where it was originally published (Vol. 11:1, Dec. 2008).

2. See, e.g., *Hadix v. Caruso*, 465 F.Supp.2d 776, 778-79 (W.D. Mich. 2006), *rem.*, 248 Fed.Appx. 678 (6th Cir. 2007) (*per curiam*) [*PLN*, May 2007, p.7; Dec. 2007, p.26]. Until recent years, the case was known as *Hadix v. Johnson*, and generated a large number of judicial opinions. See, e.g., *Hadix v. Johnson*, 367 F.3d 513 (6th Cir. 2004) (remanding finding of constitutional violation regarding fire safety).

3. *Rhodes v. Chapman*, 452 U.S. 337, 348-49 (1981) (overcrowding not shown to inflict wanton pain or lead to deprivation of basic necessities such as food does not violate the Eighth Amendment).

4. *Wilson v. Seiter*, 501 U.S. 294, 301-302 (1991) (responding to argument that requiring a showing that prison officials were deliberately indifferent before prison conditions would violate the Eighth Amendment would allow prison officials to prevail by showing fiscal constraints stating that interpretation of the Eighth Amendment is controlled by its language, not policy considerations).

5. *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (defining the deliberate indifference standard required to show an Eighth Amendment violation in prison conditions in a manner parallel to the criminal recklessness standard) [*PLN*, July 1994, p.1].

6. *Hadix v. Caruso*, 461 F.Supp.2d 574, 577, 579 (W.D. Mich. 2006), *rem.*, 248 Fed.Appx. 678 (6th Cir. 2007) (*per curiam*). My descriptions of Mr. Souders’ death and medical care within the Michigan prisons are based on the record in *Hadix*, including this decision.

7. *Hadix v. Caruso*, 465 F.Supp.2d at 786.

8. Eric M. Gibney, Report to the Office of the Independent Medical Monitor: Dialysis Patient Medication Report 10-12 (undated) (on file with the

author) [See also: *PLN*, April 2009, p.22].

9. *Hadix v. Caruso*, 461 F.Supp.2d at 598.

10. Nat’l Comm’n on Corr. Health Care, A Comprehensive Assessment of the Michigan Department of Corrections Health Care System, 8 (2008), available at www.michigan.gov/documents/corrections/Final_MDOC_HCS_Report_222383_7.pdf. [*PLN*, Oct. 2008, p.16].

11. U.S. Census Bureau, Statistical Abstract of the United States: Violent Crime Per 100,000 Population—2004, www.census.gov/prod/2004pubs/04statab/law.pdf.

12. This data is derived from the Public Safety Performance Project, Pew Charitable Trusts, “Public Safety, Public Spending: Forecasting America’s Prison Population 2007–2011,” at 27 (rev. 2007), www.pewcenteronthestates.org/uploadedFiles/PublicSafetyPublicSpending.pdf and from the Pew Center on the States, “One in 100: Behind Bars in America 2008,” at 11 (Feb. 2008), www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

13. *Id.*

14. *Hadix v. Caruso*, 461 F.Supp.2d at 576.

15. *Hadix v. Caruso*, 248 Fed.Appx. 678 (6th Cir. 2007) (*per curiam*) [*PLN*, Dec. 2007, p.26].

16. Michigan Department of Corrections, Policy Reforms that Reduce Corrections Spending, (April 2009), available at www.nga.org/Files/pdf/0904JUSTICE.MI.PDF.



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From the Editor

by Paul Wright

The cover story in this month's issue is written by Elizabeth Alexander. Elizabeth is the former director of the ACLU's National Prison Project and one of the top prisoner rights litigators in the United States. I first became aware of Elizabeth in the late 1980s, I had been in prison for a few years and was involved in my first prison conditions case, enforcing an overcrowding consent decree at the Washington State Reformatory in Monroe, Washington. I was a subscriber to the NPP *Journal* and an avid student on everything I could read and learn about prisoner rights. I corresponded with Elizabeth off and on over the next decade and a half and finally met her and the other wonderful attorneys at the NPP after my release from prison in 2003.

The March, 2008, issue of *PLN* had an extensive interview with Elizabeth and details her legal career where she has exclusively represented prisoners since 1981. As her article amply illustrates, she brings a compassion and legal acumen to the field that is both noteworthy and admirable. Over the course of almost three decades of prisoner rights litigation Elizabeth has helped ensure better standards of living and decency for literally millions of prisoners. She has also served as a leader, mentor and role model for many lawyers over that same time period who have worked at the NPP, worked with her and otherwise been inspired to represent prisoners in litigation.

It was with shock, outrage and surprise that ACLU executive director Anthony Romero fired Elizabeth from her job as Executive Director of the NPP effective December 2009. Moreso when one considers the excellent results she has obtained for her clients and the sterling leadership and inspiration she has provided to her employees and the legal community over the years. Protests and appeals by a number of prisoner rights advocates that the ACLU reconsider this decision were ignored.

Elizabeth's firing from the NPP is a grave loss to the ACLU, who is a much poorer organization with her departure, and more seriously to the hundreds of thousands of prisoners around who are represented by the NPP. The reality is that the NPP is, outside of a few states, the only organization that represents

prisoners in conditions of confinement class action suits. As we go to print a new executive director has not yet been named for the NPP.

This year marks PLN's 20th anniversary of publishing and this is the first time we have ever commented on another organization's personnel or hiring or firing decisions.

If you have not yet donated to PLN's annual fundraiser please do so now. Next month I will report the total we have raised to date. Our goal has been to close a \$60,000

budget gap as we start the new year.

This year marks PLN's 20th anniversary. We started publishing in May, 1990. In addition to marking that milestone PLN is also seeking an executive director. Ideal candidates should have at least five years of non profit management experience and either live in Seattle or be willing to relocate there. I can be e mailed at pwright@prisonlegalnews.org for the full job description.

Enjoy this issue of PLN and please encourage others to subscribe. ■

\$950,000 Settlement for California Prisoner Rendered Quadriplegic

In February 2008, the California Department of Corrections (DOC) settled a lawsuit by a prisoner who had been allegedly rendered quadriplegic by medical mistreatment after he was knocked unconscious in a fight.

According to the complaint, Kenneth Holcomb, a DOC prisoner, was attacked by other prisoners, severely injured and rendered unconscious. Guards A. Alexander, K. Greeson and Lt. D. Holt responded to the fight. Alexander handcuffed the unconscious Holcomb, then the three guards grabbed Holcomb and tried to force him to stand up. When other prisoners complained, pointing out that they could be exacerbating his injuries, Holt let go of Holcomb, causing his head to violently jerk and bounce off his chest. The other guards then dropped Holcomb onto the floor and called for medical support. Holt cursed the prisoners who had criticized him for the next ten minutes.

A Medical Technical Assistant (MTA) arrived at the fight scene. The MTA, Holt, Alexander and Greeson placed Holcomb on a gurney without the use of a back brace or head restraint. He was taken to the yard clinic where the MTA examined the still unconscious Holcomb and called Registered Nurse Lynda Houghtalin, requesting medical transport to the Central Treatment Center. Houghtalin refused to come transport Holcomb, claiming that there was blood in the Emergency Transport Vehicle (ETV) that had to be cleaned out. There were other means of transporting Holcomb, but none were used.

Two hours after the fight, after

multiple calls from the MTA requesting transport, Houghtalin arrived at the yard clinic with the ETV. However, she was told not to transport Holcomb until M.D. David Stuart Clark examined him. Later, Clark told her that he wanted to continue to observe Holcomb before approving transportation to the CTC, so Houghtalin left the yard clinic without Holcomb.

Clark briefly examined Holcomb, who had regained consciousness and was complaining of excruciating neck and back pain, difficulty breathing and inability to voluntarily move anything below the neck. Without any testing, Clark decided Holcomb was "faking" an injury and released him to his cell. Holcomb was taken to his cell in a wheelchair and "dumped" there. Unable to move, in severe pain and with no control over his bladder and bowels, Holcomb lay in his own excrement for more than a day.

After repeated complaints by prisoners and staff regarding Holcomb's condition and medical treatment, M.D. Daniel Thor visited Holcomb's cell. Without any further examination, Thor concurred with Clark's diagnosis. After more complaints and another request by the MTA for transportation to the CTC, Holcomb was finally taken there the next day. During a videotaped examination by M.D. Issac Grillo, obvious signs of paralysis were ignored. Instead, Grillo lifted Holcomb's hand so that it hit him in the head when Grillo dropped it, hit him in the head and poked him hard with various medical instruments, and injected him with a saline solution which he told

Holcomb was "strong medicine" that would cure him. Grillo also diagnosed that Holcomb was "faking" an injury.

Holcomb continued to plead for help and state that he wasn't faking it. Security staff finally relented and ordered medical staff to transport Holcomb to Salinas Valley Hospital. At the hospital, Holcomb was diagnosed with C4-5 quadriplegia due to a fracture dislocation. Emergency surgery revealed a ruptured C4-5 disk, C4-5 jump facet and acute quadriplegia due to subluxation. Holcomb remains quadriplegic with no chance of recovery.

Holcomb filed a civil right suit pursuant to 42 U.S.C. § 1983 in federal district court, with pendent state claims, claiming that the delay in medical treatment and medical maltreatment caused or worsened his quadriplegia and that some aspects of Gillo's medical examination amounted to assault and battery.

Following a state medical board investigation, an administrative judge stripped Gillo of his medical license in October 2004. The investigation included a medical skills test that revealed Gillo "lacked the knowledge, training and judgment to avoid making potentially serious errors," had an "uncritical and thought-

less approach" in managing test cases and scored in the lowest 10 to 20 percent on medical ethics and communications tests. As a result of medical board disciplinary action, Clark surrendered his medical license in 2003, and Thor was placed on probation by the medical board.

The settlement includes all past and future medical expenses, legal costs and fees and attorney fees. It also provides that Holcomb will be allowed to purchase for use in his cell a 32" flat panel color TV, a digital AM/FM radio and a special remote control to operate them. Holcomb was represented by *PLN* Advertiser Pismo

Beach attorney William L. Schmidt and La Mesa attorney Suzy C. Moore.

Unfortunately, Holcomb's case is not the exception to the rule. The DOC "has been a refuge for doctors who have been unable to provide care in other places," according to San Quentin Prison Law Office staff attorney Alison Hardy. "As a result there have been a lot of prisoners who have been harmed." See: *Holcomb v. Terhune*, U.S.D.C.-N.D. Cal., Case No. C03-02765-RMW. ■

Additional Sources: *Valley Adviser*, www.monterherald.com

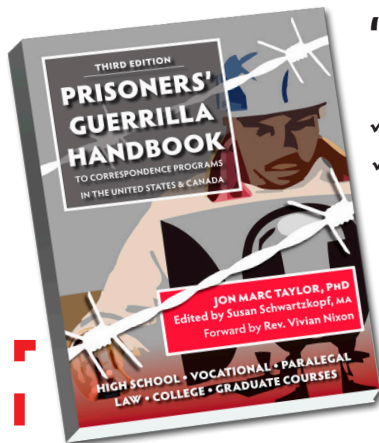


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Hadix Litigation Winding Down

by David M. Reutter

After nearly thirty years, a class-action lawsuit challenging conditions of confinement at the State Prison of Southern Michigan-Center Complex is on the cusp of ending. The end is in sight not because prison officials have fully complied with a court-monitored consent decree, but because they closed the prisons under the court's jurisdiction and scattered the prisoner class members among other facilities. [See: *PLN*, December 2007, p.26].

This class-action suit, known as the *Hadix* litigation, was originally filed in 1980 by twenty-three prisoners who have all since died. The 1985 consent decree included issues related to sanitation, safety, overcrowding and security, which have been resolved and concluded.

What remained under court supervision were provisions concerning medical care. As *PLN* has previously reported, the court re-opened claims regarding mental health care through a preliminary injunction after prisoner Timothy Souders died of dehydration in August 2006; his death was exacerbated by psychotropic medications and an overheated segregation cell.

The district court issued an order that required development of staffing plans to ensure timely routine and emergent psychiatric and psychological care, the provision of daily psychologist and psychiatrist rounds in segregation units, and coordination of mental health and medical staff to prevent indifference to prisoners' care. The court also prohibited the use of punitive mechanical restraints. [See: *PLN*, May 2007, pp.1, 7, 8].

The Michigan Department of Corrections (MDOC) responded to the court's order by appealing to the Sixth Circuit. While the appeal was pending, the MDOC submitted several plans on mental health treatment that were rejected by the district court. The MDOC's next plan was to close major portions of the *Hadix* facilities. The Sixth Circuit remanded the injunction in light of the state's intention to close the affected prisons.

On remand, the district court considered the MDOC's request to end the injunctive relief and dissolve the consent decree. Basically, the court did just that. In a March 31, 2009 order, the court found that the *Hadix* plaintiffs could not prove a systematic failure to comply with the

court's order or show deliberate indifference to the serious mental health needs of the remaining class members.

The evidence showed that the MDOC had banned mechanical restraints as punitive measures, added psychiatric staff, ensured that daily rounds were made by a single psychologist familiar with the needs of prisoners under his supervision, and provided coordination between mental health and medical employees.

As such, there was no need to continue injunctive relief or include mental health care within the 24-year-old consent decree. Since the MDOC had closed the Southern Michigan Correctional Facility in 2007, injunctive relief was terminated as to that prison. In addition, the court terminated such relief as it pertained to the dialysis unit at the Ryan Correctional Facility, stating

that any constitutional violations must be brought in separate litigation because that prison was not covered under the *Hadix* consent decree.

The MDOC argued there was no primary prison left under the consent decree and the class had disappeared, and the district court acknowledged that it was "not entirely clear what, if any, *Hadix* facilities remain, and how many, if any, *Hadix* class members remain." Thus, the court said it would hold a hearing to determine the "future trajectory of this litigation." The plaintiffs have appealed the district court's March 31, 2009 ruling to the Sixth Circuit, where it remains pending.

PLN has reported extensively on the *Hadix* case, beginning in 1995. See: *Hadix v. Caruso*, U.S.D.C. (W.D. Mich.), Case No. 4:92-CV-110; 2009 U.S. Dist. LEXIS 52884. ■

Shortcomings Cited at Virginia's Civil Commitment Facility

by Matt Clarke

The almost two-year-old, \$62-million maximum-security Virginia Center for Behavioral Rehabilitation (VCBR) is still having start-up problems. Located in rural Nottoway County on 28 acres and opened in February 2008, VCBR is unable to retain staff and offers little in the way of rehabilitative treatment. The facility, which was expanded to 300 beds in September 2008, houses sex offenders who have been civilly committed after completing their prison sentences.

The Inspector General for the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services found that VCBR lost around half its staff annually in 2005, 2006, 2007 and 2008. As of February 2009 the facility had 190 employees and 59 staff openings – a 24% vacancy rate.

In a March 2009 report the Inspector General said "active treatment" at VCBR was "much lower than desirable for an effective treatment program," with residents receiving an average of just 6.6 hours of treatment each week. No vocational programs or jobs were available at the facility. The report noted that only two residents had been conditionally released from VCBR since 2004,

when the facility was at a temporary location in Petersburg. A survey found that 64% of staff did not feel safe while working at VCBR.

In an earlier report, one staff member described an "identity issue" in that the residents and some staff viewed the razor-wire surrounded facility as a prison and residents as prisoners rather than civilly-committed patients in need of treatment. Three-quarters of the staff interviewed by the Inspector General in 2007 expressed doubts about any resident ever being released: "Many of the comments made by staff were flatly negative, denying any possibility of eventual successful treatment."

Mental health department spokesman Meghan McGuire said that progress was being made, as the staff turnover rate was down and weekly hours of active treatment doubled from 2007 to 2008. VCBR residents weren't as optimistic.

"We traded a prison for a prison after we did our time," said Mark Hodges, 41, who was civilly committed to VCBR.

"They have me in leisure-skills classes, arts-and-crafts classes ... stuff like that, and I told them I can get stuff like that on my own," said Victor Johnson, 26. "If I'm here, I want to be treated."

The residents have found support in an unlikely advocate. Sex-crime victim Paul Martin Andrews, who organized political support to get the civil commitment program funded, is worried about the lack of treatment.

"The [U.S.] Supreme Court has made it clear that the real reason for these guys to be committed to the center is for treatment," said Andrews. "To think that we could turn these guys around, who have committed these [sex-related] crimes time and time again, and be able to release them safely is kind of ambitious—especially if they're not getting treatment."

W. Lawrence Fitch of the Maryland Department of Mental Health and Mental Hygiene, an expert on civil commitment, disagreed. He said the Supreme Court held that if a civil commitment program doesn't deliver meaningful treatment, the law creating it is not necessarily unconstitutional. Instead, the residents must file suit in an attempt to force the state to provide adequate treatment.

It sounds like the residents are right: VCBR is just another prison—with few if any opportunities to obtain treatment or release, which is generally the whole point of creating civil commitment laws in the first place. Nor is the public getting much in return for its tax dollars; each resident at VCBR costs the state about \$131,000 a year, more than 5 times the price of keeping someone in prison. *PLN* has previously reported on civil commitment centers in Washington state, Florida and California. [See: *PLN*, Oct. 2009, p.18; Sept. 2007, p.20; Dec. 2006, p.20].

Sources: *www.timesdispatch.com*, *Associated Press*, *VA OIG Report #169-08*

BOP Settles FTCA Abuse/Religious Discrimination Suit for \$48,000

by Brandon Sample

On August 12, 2009, the Federal Bureau of Prisons (BOP) agreed to settle a lawsuit by a Muslim former prisoner who alleged that he was tortured and beaten after complaining to investigators about his Qur'an and Kufi being desecrated.

From April 5, 1996, until October 4, 2005, Hakeem Shaheed was incarcerated at United States Penitentiary (USP) Marion, one of a handful of control units operated by the BOP. After the September 11th attacks, Shaheed, like most other Muslim prisoners, faced ridicule, scorn and abuse by guards.

In a lawsuit filed in the U.S. District Court for the Southern District of Illinois, Shaheed's complaint recounts how guards at Marion "intentionally plac[ed] his Holy Qur'an on a floor stained with spit" and "squeezed his Kufi in an obvious attempt to insult [his] religion."

Shaheed reported this conduct to the Justice Department's Office of Inspector General (OIG), who investigated the allegations, making several trips to Marion to speak with Shaheed.

On October 3, 2005, after reporting what happened to the OIG, Shaheed's complaint alleges guards set out to "torture and otherwise physically and mentally abuse" him. According to Shaheed, guards came to his cell "seized him, struck him, handcuffed [his] hands behind his back,

shackled his ankles and took him to the prison hospital."

While at the prison hospital, Shaheed alleged that he was punched and that a baton was ground into his face and spine, shoved into his mouth and rammed into his "rectal area, over his pants." All of this abuse, Shaheed alleged, occurred while medical staff watched and ignored his cries for help. One medical staff member, according to Shaheed, went as far as to give pointers to the guards on where to hit Shaheed in order to cause greater pain.

After further humiliation and torture, Shaheed was transferred to the federal death row unit at USP Terre Haute for his own protection. Shaheed filed suit under the Federal Tort Claims Act (FTCA) after his release.

Shaheed's attorney, John Stainthorp from the People's Law Office in Chicago, said the BOP's decision to settle the case was an obvious "recognition ... that there was abuse of Mr. Shaheed that was unconscionable." The BOP denied any liability in settling the case. The BOP paid \$48,000 to settle the case. The complaint and settlement are available on *PLN*'s website. See: *Shaheed v. United States of America*, USDC SD IL, Case No. 07-CV-679-MJR (2009).

Additional source: *Associated Press*

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U.S. DOJ Calls Houston Jail Unconstitutional, Prisoner Death Rate Alarming

by Gary Hunter

As a follow-up to *PLN's* October 2009 cover story, this article examines in greater detail findings by the U.S. Department of Justice (DOJ) related to conditions at the Harris County jail in Houston, Texas.

From 2001 through June 2009, 142 jail prisoners died in Harris County. The DOJ twice performed on-site inspections of the county's jail system, and concluded in a June 4, 2009 report "that certain conditions at the Jail violate the constitutional rights of detainees." The DOJ went on to say that "the number of inmates' deaths related to inadequate medical care ... is alarming."

Citing its oversight authority under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, DOJ inspectors visited all four jails in Harris County before giving the jail system failing marks in "(1) medical care; (2) mental health care; (3) protection from physical harm; and (4) protection from life safety hazards."

Houston's main jail houses nearly 11,000 prisoners, not including satellite facilities. In 2007, over 130,000 detainees cycled through the county's jail system. The DOJ noted major deficiencies in medical care provided to this revolving population of prisoners—especially those with serious mental health conditions. The two most serious problems involved record-keeping and follow-up treatment at the jail's clinic.

One 74-year-old prisoner who had previously undergone open heart surgery went to the clinic complaining of incontinence. The medical staff sent him back to his unit without examining him or taking his vital signs. The next day he returned with the same symptoms plus high blood pressure. This time he was sent to the hospital; however, he died shortly after his arrival.

Another prisoner with diabetes went to the clinic complaining of leg pain and swelling in her knees. She was given pain medication. Five days later she returned with the same symptoms. Again she received pain pills. When she returned later that day she collapsed in the clinic, but medical staff didn't try to revive her and failed to provide emergency care. She died without receiving any help.

A male prisoner with a history of cirrhosis of the liver visited the jail clinic multiple times over the course of several weeks, complaining of swelling in his leg. He was prescribed blood pressure medication even though his blood pressure was normal. Despite his repeated trips to the hospital, jail staff ignored the hospital's instructions and kept him on his original course of treatment. His condition deteriorated so severely that he died during his last hospital visit.

The level of medical treatment at the jail—or the absence of same—led DOJ inspectors to note that the "discontinuity of care and lack of follow-up by staff are of serious concern...."

The DOJ report cited several other cases in which prisoners with mental health problems were either not treated or were improperly treated for conditions such as self-starvation, self-mutilation, bipolar disorder, alcohol detox and suicide risk. Three of those prisoners suffered physical injuries as a result.

Even more frightening than the jail clinic's lack of adequate care was its tendency to improperly medicate when staff did provide treatment. One prisoner was diagnosed at intake with an acute psychotic state; he was prescribed medication but it was never received. As his mental condition deteriorated, he became less and less cooperative. He was eventually injected with an intramuscular drug that rendered him unconscious. A short time later he died.

Another prisoner had already spent nearly a year in a state hospital before being declared "not competent and not restorable" by the court. Instead of being returned to the hospital he was placed in the jail's general population and allowed to keep his medication on his person. After he suffered a seizure he was sent to the clinic. Medical staff decided that he was merely "sleepy" from his psychotropic medication, and sent him back to his cell. He died soon thereafter.

Beyond inadequate medical and mental health care, federal inspectors expressed "serious concerns" about excessive use of force by Harris County jailers. The DOJ report noted that the jail had no policy or training to instruct staff on pro-

hibited use of force restraints. The jail did not have a policy to distinguish between planned and unplanned use of force, nor did it provide routine videotaping, incident reports or collection of witness statements for use of force events.

Although the DOJ report did not specifically list any deaths in 2009 related to excessive use of force, *PLN* recently reported several examples that occurred in 2008 and 2007. In one of those incidents, prisoner Clarence Freeman was choked to death by jail guard Nathan Hartfield after Hartfield took him to an area where there were no video surveillance cameras. Hartfield and a sergeant were fired following an investigation into Freeman's death, but neither was indicted. [See: *PLN*, Oct. 2009, p.1].

Overcrowding was also identified as a major area of concern by DOJ inspectors. According to their report, "the Jail's crowded conditions currently exacerbate many of the constitutional deficiencies" found at the facility.

The DOJ report cited a 10-month period in which over 3,000 fights and 17 sexual assaults were reported at the jail. Investigators attributed this high rate of violence to overcrowded conditions. The report stated that not only was the jail not equipped to "routinely investigate violent incidents," but jail staff could not "distinguish between disturbances caused by detainees with mental illness and other detainees."

Due to overcrowding, the Houston jail routinely had unsanitary conditions in a variety of areas. Inspectors found there were not enough washers to sanitize linens and clothing, and of the few washers the jail did have, several were not functional. Unsanitary bedding, clothing and mattresses were endemic and caused an immediate danger of spreading infectious diseases.

Barbers at the jail used dirty blades, equipment and supply boxes. Plumbing was deteriorated and in need of maintenance. Some intake cells still used "holes in the floor" as toilets.

The 24-page DOJ report concluded with 20 recommended areas for improvement, and warned that failure to remedy the identified problems at the jail could result in legal action against the county.

Harris County Attorney Vince Ryan responded to the report on August 25, 2009 with a 300-page rebuttal that strongly disagreed with the DOJ's findings, claiming that Houston's "jail system of the past and present meets minimal [constitutional] standards."

Although county officials have acknowledged the overcrowding problem at the jail, they are hard pressed to find solutions. A proposed 2,193-bed expansion of the jail system would cost \$256 million plus about \$9.65 million per year in additional staffing costs. Due to the current economic crisis, the county is preparing for budget cuts in the 2010-2011 fiscal year. The Sheriff's Office is facing cuts of up to 16%.

In December 2009, Harris County Commissioner El Franco Lee proposed putting more jail prisoners to work and increasing the work credits they receive from two days' credit to three per day of incarceration, which would result in earlier releases. "I'm putting it up for

discussion because there has been overcrowding and it is an issue that would bring Harris County in consistency with other parts of the state," said Lee, who chairs the Criminal Justice Coordinating Council. Three-for-one credits are offered in other Texas counties for prisoners who participate in work programs.

Harris County voters rejected a proposed jail expansion in November 2007 that would have been funded with \$195 million in bond financing. Critics have complained that county officials have not implemented other options that would make an expansion of the jail unnecessary – such as issuing citations for some low-level misdemeanors in lieu of arrests, granting more personal bonds for arrestees, and cutting back on probation violations in order to reduce the jail's population. ■

Sources: *Houston Chronicle*; www.dallasnews.com; www.khou.com; U.S. Department of Justice, Civil Rights Division, *Investigation of the Harris County Jail* (June 4, 2009)

\$75,000 Settlement in Heart Attack Death of Missouri Jail Prisoner

On June 3, 2009, Greene County, Missouri agreed to pay half of a \$75,000 settlement in a wrongful death action brought by the family of a prisoner who died while at the Greene County Jail.

In July 2005, Winston Eugene Holt, a federal prisoner being held on charges at the jail, died from a heart attack.

Holt's wife, Donna Holt, filed a 42 U.S.C. § 1983 action against various jail medical staff claiming that they were aware that her husband suffered from different heart related conditions, but "took inadequate action to treat and/or

ameliorate and/or cure" the conditions. In addition, Holt alleged that the jail continued to provide inadequate care to other prisoners.

Greene County denied liability in the case, but after mediation by the parties, reached a \$75,000 settlement in the case. The settlement requires Greene County to pay \$37,500, half of the settlement, with other half being paid by Doctor's Hospital and David Weems, a former doctor at the jail. Holt was represented by Craig Heidemann of Bolivar, Missouri. See: *Holt v. Glenn*, Case No. 07-5106-CV-SW-JCE (W.D. Missouri). ■

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ARTISTS' INQUIRIES WELCOME

Don't Build it Here Revisited (or "There is no Economic Salvation Through Incarceration") - Prisons Do Not Create Jobs

by Clayton Mosher and Gregory Hooks

Despite widespread popular beliefs that prison construction offers substantial economic benefits to local areas, empirical research has suggested otherwise. In an article published in *Social Science Quarterly* in 2004, Hooks et al. collected data on all existing and new prisons constructed in the United States since 1960, and examined the impact of prisons on employment growth in the approximately 3,100 counties in the contiguous United States. Their analyses compared metropolitan with nonmetropolitan counties with respect to income per capita, total earnings, and total employment growth and statistically controlled for other potential influences on employment growth (including population size, economic infrastructure, and the educational level of the workforce, among others). Hooks et al. did not find a significant relationship between the presence of prisons and employment growth in metropolitan counties, suggesting that any impact of prisons is probably drowned out in these larger, diverse urban economies.

Additional analyses compared non-metropolitan counties experiencing slow employment growth during the previous decade with those experiencing more rapid growth. These analyses showed that among the faster-growing counties, there was no evidence that prisons made a substantial contribution to change in total employment. Among the slower-growing counties, prisons actually impeded private sector and total employment growth.

Additional scholarly research has supported Hooks et al.'s findings that prisons do not contribute to economic growth. Using census data for each new prison town and all other towns (incorporated places with fewer than 10,000 residents) Besser and Hanson (2005) found changes in unemployment rates between 1990 and 2000 were approximately equal in prison and non-prison towns, but public sector employment increased more in prison towns. In addition, increases in total non-agricultural employment, retail sales, average household wages, the total number of housing units, and the median value of owner-occupied housing were substantially lower in towns with

prisons compared to non-prison towns. In New York State, a Sentencing Project report by King, Mauer, and Huling (2004) on the impact of 38 new prisons that opened between 1982 and 2000 found no statistically significant impact of prison construction on reducing unemployment, and no positive effects with respect to per capita income. Similarly, a report on the impact of prison construction in the state of Missouri found that, aside from population increases in jurisdictions with prisons (largely as a result of the arrival of prisoners in these jurisdictions), counties with prisons saw no increases in personal income, and actually had larger increases in unemployment, than counties without prisons. Finally, a county-level analysis focusing on the impact of private prisons conducted by Washington State University graduate student Shawn Genter found that in states with private prisons, new prisons impeded economic growth. Genter suggested that prisons impede employment growth due to the "opportunity cost of a misguided investment." In other words, as government funds are allocated to prison construction, other public programs suffer.

In a more recent study to be published in *Social Science Quarterly*, Hooks et al. extended their analysis of the impact of prisons on employment to 2004, separated the analyses into four seven-year periods (1976-1983; 1983-1990; 1990-1997; 1997-2004), and also examined how human capital mediates the influence of other factors affecting employment growth at the county level. Given arguments that large-scale construction projects (such as prison building) provide benefits to local economies that persist after such projects are completed, Hooks et al. also separated private sector employment into construction and non-construction, allowing them to include growth in construction employment to predict changes in non-construction employment over time.

Similar to the findings in their 2004 study, Hooks et al. found no significant relationship between the presence of prisons and employment growth in metropolitan counties, and also that prisons have not played a strong role in economic growth in rural counties over the past few

decades. While new prisons were associated with increases in public employment in the 1976-1983 and 1983-1990 period and established prisons were associated with growth in both public and total employment in the 1983-1990 period, such was not the case for the 1990-1997 and 1997-2004 periods.

In order to examine the impact of human capital factors on employment growth, Hooks et al. compared counties with new and established prisons experiencing high growth in the percentage of individuals holding Bachelors' degrees to counties experiencing low growth in the percentage of individuals holding Bachelors' degrees over the four time periods. Among counties experiencing higher growth in educational attainment, new prisons contributed to growth in public sector employment from 1997-2004. However, for counties experiencing low growth in the percentage of individuals holding Bachelors' degrees, both new and established prisons had a negative impact on total employment growth over the same period.

King, Mauer, and Huling (2004:461) note that "in the case of prison siting, it is incumbent upon those supporting siting to demonstrate not simply marginal economic gain, but rather, to establish that the economic benefits have been worth the investment". Hooks et al.'s more recent study calls into question claims that prison construction is worth the investment for rural communities. Their study is part of a growing literature that examines who does and does not benefit economically from prison construction. While developers prominent in local growth machines and more distant firms may realize profits from construction and service contracts with prisons, there is emerging evidence that prisons do not solve the economic problems of rural areas, but in fact may create several new problems. Among others, these problems would include placing pressure on environmental resources while aggravating class and racial inequalities and leading to increased rates of domestic violence. As Tracy Huling notes, there is "no shortage of anecdotal evidence of increased rates of divorce, alcoholism and substance abuse, suicide, health problems,

family violence, and other crimes associated with multi-generational prison communities.”

In addition, as has been noted by Peter Wagner and others, because the Census Bureau counts people in prison as being residents of the communities where they are incarcerated, there has been a substantial transfer of government funds from urban to rural communities. The urban communities in which most prisoners originally resided also lose political representation and power as a result of this phenomenon.

While the statistical analyses described above do not allow us to determine specifically why the promised economic benefits of prisons do not materialize, we believe that there are several possible explanations.


With respect to prison jobs themselves, in many states, such jobs are subject to union rules regarding seniority and are frequently filled by out-of-county residents, resulting in what King, Mauer, and Huling refer to as an “employment transfer.” Generally, higher paying management and prison guard jobs in prisons have educational and experience requirements which many rural residents do

not possess. In California, for instance, management and security positions in newly-constructed prisons are often given to more senior correctional employees who apply to transfer from other prisons in the state. In Corcoran, California, only 40 percent of jobs at a new prison were filled by residents of the host county. Similarly, in Missouri, more than two-thirds of the prison jobs were filled by individuals living outside the host county. In the eastern Oregon city of Ontario, 62 percent of the approximately 870 employees of the Snake River Correctional facility live in Idaho, where property taxes and home prices are substantially lower. Even the low-wage jobs associated with prisons, such as janitorial positions, are out of reach to local residents because they are commonly filled by the prisoners themselves. Comments by a county commissioner in Minnesota whose jurisdiction was successful in securing a prison summarize this issue most poignantly “At first we thought if we built it they would come, but what we’ve learned is that some of the prison employees come to work here, but not to live here.”

An additional reason that prisons do not contribute to employment gains is

that the economic multipliers associated with these facilities are very limited. Prison workers who move from other locations often don’t reside in the actual prison town, and as such, their consumer behaviors have more of an impact on markets outside the prison community. Big-box retail stores such as Wal-Mart and/or fast food restaurants are among the limited number of businesses that establish themselves in new prison towns and the influx of such businesses frequently leads to the demise of locally-owned establishments. These businesses are also unlikely to create local economic linkages themselves. As an article addressing the economic impact of prisons in Oregon noted that there “is nothing entrepreneurial about a prison economy” - prisons can crowd out other opportunities that might have lead to clusters of related, competing businesses “propelling each other to innovate and expand.”

Another possible reason for the lack of positive economic benefits of prisons is the existence of prison industries, which may serve to displace low-wage workers, especially in economically depressed rural areas. All 50 states and the federal government operate their own prison industries,



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Don't Build It Here (cont.)

and prisoners engage in a wide range of work activities. For example, the federal government's UNICOR program employs more than 22,000 prisoners, operates over 100 "factories" and had more than \$650 million in sales (most products are sold to the United States military) in 2003. It has been noted that some prisoners working for UNICOR are paid as little as 12 cents an hour, and that the company commonly violates federal health and safety standards.

Among the prominent companies that currently use or have used prison labor are IBM, Boeing, Motorola, Microsoft, AT&T, Texas Instruments, Dell, Compaq, Honeywell, Hewlett-Packard, Nortel, Lucent Technologies, Intel, TWA, Nordstrom's, Revlon, Macy's Pierre Cardin, Target Stores, Victoria's Secret, Toys R Us, Starbucks, and the Parke-Davis and Upjohn pharmaceutical companies, among others. While approximately 5,000 prisoners in state penitentiaries are paid the minimum wage for their work on paper, many do not, and in privately-operated prisons, wages are significantly lower.

As we noted in a previous article in *Prison Legal News*, Oregon is the state that perhaps best exemplifies the negative impact of prison labor on employment. Passed in 1994, Ballot Measure 17 in that state required that all prisoners work 40 hours per week. As a result, thousands of previous public sector jobs are now filled by prisoners. In addition, private companies can hire prisoner work crews for as little as \$400 per day which may lead them to lay off or terminate regular employees. Work crews have also been hired by municipalities for public work projects. In Umatilla, Oregon, the city manager, who frequently hired prisoner work crews commented "Yeah, they're jobs that might have been taken away from somebody, but realistically they probably wouldn't have gotten done." There have also been several examples in other states of companies that locate within prisons and subsequently close their outside operations.

Finally, due to the negative stigma that sometimes attaches to "prison towns", prisons can also discourage other types of economic development as businesses may be reluctant to locate in such towns. As the executive director of a group

opposing prison construction in upstate New York commented "Once you have the reputation of a prison town, you won't become a Fortune 500 company town, or an Internet or software company town, or even a diverse tourism and company town." An interesting "case study" of this issue can be seen in the two Oregon counties of Umatilla and Morrow, as documented by Ben Jacklet in *Oregon Business* magazine. When it competed to attract a new prison in 1989, Morrow County had a 16.5% unemployment rate, the highest in the state. Although the county was unsuccessful in securing the prison, from 2000 to 2006, private employment in Morrow County grew by 27%, with clusters of businesses forming in the specialty food and renewable energy sectors. Although it is impossible to determine whether the lack of a prison was responsible for this increase in private employment, Jacklet notes that over the same period, neighboring Umatilla county, which housed two large prisons, lost 1,460 private sector jobs.

The Future

The folly of promoting prisons as economic engines is becoming even more evident in the current economic climate – it turns out that prisons are anything but recession proof. As states face huge budget deficits, they are moving to shut down inefficient prisons. In the fall of 2009, California, which had the second-largest prison system in the United States, floated a proposal to release as many as 40,000 prisoners to save money and comply with a federal court ruling that found the state's prisons were overcrowded. Whether that occurs remains to be seen. Colorado granted earlier parole to nearly 20 percent

of its prisoner population; Oregon temporarily nullified a 2008 ballot initiative that required longer sentences for certain drug and property crimes, and increased the time inmates get off their sentences for good behavior by 10 percent. Michigan planned to close three prisons and five prison camps in 2009, resulting in the loss of more than 1,000 corrections jobs. In the northern Michigan town of Standish, similar to what occurred during the 1990s when communities tried to attract prisons, signs and posters stating "Save our town, Save Standish Max" appeared throughout the community, with prison employees and residents even indicating they would welcome becoming the new home for Guantanamo Bay prisoners.

Although it is unlikely to occur, perhaps we can wish that more prisons realize the fate of the Joliet (Illinois) correctional center (and Alcatraz before it), which was known as one of the toughest prisons in the United States. In 2009, seven years after the facility was closed, Joliet city officials proposed turning the prison into a tourist theme park.

To conclude, the bulk of social scientific empirical research on the issue indicates that prisons provide few benefits to the communities that host them. And as Blankenship and Yanarella poignantly comment "Viewing [prisons] only in terms of economic development ignores the fact that the raw materials being transformed within the prison walls are one's fellow citizens. ... The corrections industry is a component of an economy built on human misery." ■

Clayton Mosher and Gregory Hooks are professors of sociology at Washington State University in Vancouver, Washington.

\$125,000 Settlement in Suicide Death Of New York Jail Prisoner

On April 29, 2009, Onondaga County, New York agreed to settle a lawsuit filed by the family of a prisoner who committed suicide at the Onondaga County Justice Center (OCJC) for \$125,000.

On October 7, 2006, William O'Neil hung himself from a bed sheet tied to his cell door. O'Neil was incarcerated at the OCJC in Syracuse at the time.

O'Neil's family sued Onondaga County following his death alleging jail staff acted with deliberate indifference to

O'Neil's health and safety. According to the plaintiffs, Jail staff failed to properly monitor O'Neil in spite of being aware of his suicidal tendencies. The defendants claimed that they were unaware O'Neil was a suicide risk.

Prior to trial, the parties negotiated a settlement of \$125,000. See: *O'Neill v. Onondaga County*, No. 5:08-cv-00139-GTS-GHL (N.D. NY 2009). The plaintiffs were represented by Sam A. Elbadawi of the Sugarman Law Firm, LLP, Syracuse, New York. ■

Pennsylvania Prisoner Gets \$12,500 in Retaliation Suit After Remittitur

by John E. Dannenberg

A pro se Pennsylvania state prisoner won a jury verdict of \$5,000 in compensatory damages plus \$100,000 in punitive damages against a prison official who openly and repeatedly retaliated against him after he filed grievances and a lawsuit concerning mistreatment by guards. The verdict was later reduced by the court to \$12,500.

In April 2003, Ryan Kerwin was incarcerated in restricted housing at S.C.I. Smithfield, where he agreed to provide an affidavit to fellow prisoner Justin Corliss. Corliss was in the process of filing a lawsuit against Smithfield in regard to guard-elicited assaults on prisoners and the prison's failure to protect him from an assaultive cellmate.

Because Corliss was in a different cellblock, Kerwin tried to sneak his affidavit inside a newspaper he had asked a guard to give to Corliss. The guard spotted and read the affidavit and refused to deliver the paper. The next day Kerwin was transferred to another cell block.

Several months later, Kerwin, who was by then himself suing the prison, passed affidavits for other prisoners to sign to another intermediary prisoner, Jesse Baker. Baker tried to get this done using the field house in the yard. Again, guards intervened and took the papers. Less than a week later Kerwin was transferred to S.C.I. Albion; during the transfer process he was sexually taunted by guards and jeered for his legal work. The guards openly told others that they "were on to him" and were going to cause trouble.

At Albion, the harassment got worse. Kerwin was placed on trash detail. In the chow hall, he was singled out for searches by guards who openly remarked that they would "just make up a reason" for writing him up. Kerwin was literally told by prison counselor Rod Showers, who was friends with staff at Smithfield, that he "better reconsider filing suit" or else "he would regret it." Showers told Kerwin that there were guards at Albion who would have no problem dealing with "troublemakers."

Kerwin grieved these threats to Superintendent William Wolfe. That same day, Albion guards placed two false negative behavior reports in his file. In two weeks, Lt. William McConell interviewed

Kerwin as to his grievances. Three weeks later, after Albion was served with Kerwin's lawsuit, McConell issued Kerwin a misconduct ticket for filing the grievance. McConell accused Kerwin of submitting false affidavits or having them sent in to the court by other prisoners. After being denied witnesses at his disciplinary hearing, Kerwin was given 30 days in the hole.

While he was in segregation, all of the defendants at Albion were served with Kerwin's lawsuit. True to Showers' threat, that same day Kerwin was given another misconduct ticket for having asked to use a stapler and to sign his cash slips. He was again found guilty and given another 30 days. Significantly, both of those misconduct tickets were in his file and were expressly relied upon by the parole board to deny parole at Kerwin's next four hearings.

Kerwin's lawsuit went to a federal jury trial. He sued for compensatory, exemplary and punitive damages from McConell for his persistent and malevolent retaliation. Kerwin also claimed damages for the false misconduct tickets, the 60 days he spent in the hole, the adverse effects on his parole hearings, and for anguish and suffering for willful mistreatment. The jurors found that Kerwin's protected First Amendment activities were the motivating factor behind McConell's misconduct, and awarded \$5,000 in compensatory damages plus \$100,000 in punitive damages.

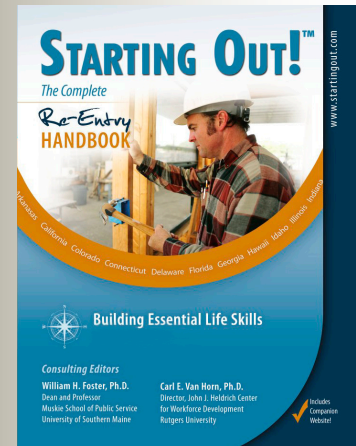
The defendants moved to amend or alter the judgment. In a September 30, 2008 ruling, the district court denied the motion with respect to compensatory damages but granted the motion as to punitive damages, reducing the punitive damages award to \$7,500. Kerwin was given 21 days to decide whether to accept the remittitur (reduced award) or proceed to a new trial on punitive damages only.

Kerwin did not request a new trial, and in October 2008 the district court entered an amended judgment in the amount of \$5,000 in compensatory and \$7,500 in punitive damages. Kerwin represented himself pro se throughout the proceedings. See: *Kerwin v. McConell*, U.S.D.C. (W.D. PA), Case No. 1:05-cv-00093-SJM. ■

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Settlement in Class-Action Suit Against CCA Modified After *PLN* Unseals Court Documents

by Alex Friedmann

Last October, *PLN* reported that Corrections Corporation of America (CCA), the nation's largest private prison firm, had settled a class action lawsuit in U.S. District Court in Kansas that raised claims under the Fair Labor Standards Act (FLSA) on behalf of current and former CCA employees. The settlement agreement, which included a maximum payout of \$7 million, was confidential until *PLN* filed a successful motion to intervene that unsealed the settlement and related court documents. [See: *PLN*, Oct. 2009, p.31].

After the class-action settlement was made public, some CCA employees who had been excluded from the agreement raised complaints. Under the original settlement, potential class members were CCA employees who worked in almost thirty specified job positions from Dec. 9, 2005 through February 12, 2009. Those job positions included correctional officer, correctional counselor, case manager, safety officer and a number of other job titles. Absent from the list was "detention officer," a job category used by CCA primarily at immigration detention facilities, such as the Elizabeth Detention Center in New Jersey.

Current and former CCA detention officers who tried to join the class-action settlement were rejected, even though they performed the same job duties as correctional officers and had been subjected to the same FLSA violations. Other CCA employees with related job titles, including senior detention officer, detention officer part-time and detention counselor, likewise were rejected because those titles were not included in the original settlement.

On December 1, 2009, the U.S. District Court granted the parties' joint motion to modify the settlement agreement to include the various detention officer job positions. A supplemental class notice will be mailed to all potential supplemental class members (current and former CCA detention officers), who will have sixty days to opt-in to the settlement. The Court noted that under the terms of the agreement, class members agree to release CCA from "any and all wage-related claims of any kind," even if such violations are "presently unknown and/or

un-asserted." The Court also instructed the class members and class counsel not to "issue a press release or otherwise notify the media about the terms" of the modified settlement agreement.

The settlement payment per class member was fairly paltry, at just "\$2.4345 per week of employment in a covered position," or about \$126 per year. According to court documents, more than 8,600 current and former CCA employees opted-in under the original settlement agreement, "claiming more than \$2.1 million in settlement benefits." That amount,

though large, was much lower than the \$7 million cap specified in the original settlement agreement.

CCA will now have to pay additional claims filed by the supplemental class members, increasing the company's total payout under the settlement. As with the original settlement agreement, the plaintiffs' attorneys will receive 33% of the total amount awarded to the supplemental class members, in fees and costs. See: *Barnwell v. Corrections Corp. of America*, U.S.D.C. (D. Kan.), Case No. 2:08-cv-02151-JWL-DJW. ■

Colorado Detainee Tasered During Seizure, Paid \$116,731.73 and \$83,268.27 in Fees

A Colorado detainee settled his medical neglect and excessive force suit within four months of filing for \$116,731.73 in damages and \$83,268.27 in attorney's fees.

On July 26, 2006, Michael R. Martin was booked into Colorado's Adams County Detention Facility (ACDF). He was on a high dosage of Xanax for anxiety attacks and, during booking, he warned two nurses that his doctor said that abruptly discontinuing the medication could have serious, negative medical consequences.

ACDF terminated Martin's Xanax, however, and he "predictably began to experience withdrawal symptoms" almost immediately. He reported symptoms of agitation, jitteriness and increased anxiety and nervousness, but ACDF staff did nothing. As his symptoms worsened, "Martin began feeling extremely nauseous, experiencing panic attacks and the inability to eat or drink." Martin repeatedly told ACDF staff that he was suffering severe withdrawal symptoms over the course of several hours.

As Martin's nausea became more acute, he began experiencing vomiting and diarrhea. He "began overheating and his skin turned a very noticeable bright red color." He began hallucinating and lost track of time.

On July 28, 2006, Martin attempted to write a medical kite, but wrote only "gibberish." Seeing Nurse Tammy Beard

nearby, Martin called out, "Help me, help me." He fell and "began uncontrollably shaking and spitting fluid and blood out of his mouth."

Beard knew Martin was actively seizing and several prisoners began yelling "seizure" to get additional staff assistance. Four or five guards responded, and Beard told them Martin was having a seizure.

Martin was seizing so violently that Beard put a blanket between his head and the floor so he wouldn't hurt himself more. Guard David Morrow and others began yelling repeatedly "stop resisting" despite being fully aware that he "was seizing and experiencing a medical emergency." When Martin did not – and could not – respond, guards Joseph McMullen, Gregory Gillett, Daniel Seier, Kevin Trimble and Morrow forcibly restrained Martin.

Morrow continued to yell "stop moving" and forced Martin onto his stomach so he was lying face down, in order to pin him. Seier, Trimble and Gillett held Martin's legs while Morrow and McMullen held his arms.

McMullen attempted to handcuff Martin during the seizure. When he couldn't, Morrow pulled his Taser and administered two electroshocks to Martin's back, between his shoulder blades. Martin was still in the throes of a seizure when he was tased.

Martin lost control of his bowel function and was rendered unconscious. He remained in a coma-like state for approxi-

mately 2-5 hours. When Martin regained consciousness he was disoriented, “experienced an explosive pain emanating from between his shoulder blades, as well as pain in his spine, neck, ribs, hips and knee. He was unable to speak and observed bruising all over his body.” The Taser prongs had to be “surgically removed from his back, leaving several large wounds between his shoulder blades.”

For several weeks, Martin experienced “sharp ringing in his ears, blurred vision, headaches, numbness in his extremities, slurred speech, memory loss, numbness in his face and tongue, nightmares, lack of an ability to concentrate and continued pain in his back, shoulders and spine.” Two years later, Martin still suffered from “severe headaches and such severe back pain that he often has to change his gait

... to reduce the pain.” He still suffers ringing in the ears, impaired sight, “severe and lasting memory loss, an inability to concentrate, speech problems and overall impaired mental processes.” He stutters and has “difficulties with elementary spelling and grammar.” He has become significantly withdrawn, tense, and depressed, and suffers self-esteem problems as a result of the incident.

On December 9, 2008, Martin brought suit in federal court. He filed an amended complaint on February 13, 2009, alleging deficient medical care and excessive force claims. Within two months, Defendants settled the case “solely for the purpose of avoid-

ing the burden and expense of further litigation.” Defendants refused to admit liability but paid Martin \$116,731.73 in damages and \$83,268.27 in attorney’s fees. They also agreed to mandatory training for all corrections staff in: (1) “recognition of and appropriate action to take in response to symptoms of chemical withdrawal, up to and including seizure”; and (2) “appropriate use of Tasers and dangers associated with the use of Tasers.” See: *Martin v. Adams County Bd. Of Commns.*, USDC No. 08-CV-01585-REB-BNB (D. Co. 2009). ■

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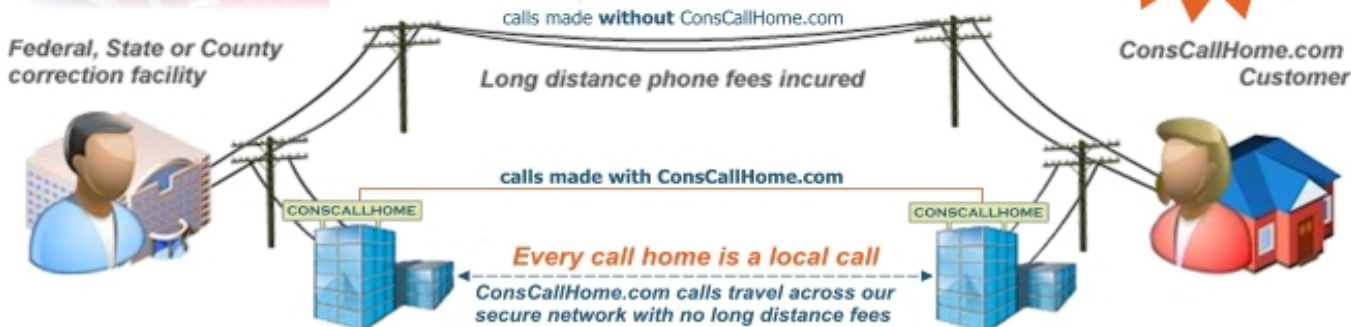
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Prison Video Visitation Expands into For-Profit Market

by David M. Reutter

Businesses seeking to profit from the exponential expansion of our nation's prison population are now turning to visitation. Florida-based JPay is implementing its "video-conference visitation" in Indiana's prison system, while other companies, such as einmate.com, are developing similar prison-based video visitation programs.

The use of technology for prison visits has its benefits. For prisoners, the latest generation of video conferencing puts them right into their family or friends' homes, allowing them to see things they could never view in the sterile, drab atmosphere of a prison visiting room.

"I feel like I'm at home, kind of," said Indiana prisoner Candace McCann. "It's good to see that kind of stuff." Video visitation allows McCann to see her seven-year-old daughter, Kashmir, every Sunday morning. In addition to saving her family a three-hour drive and the costs associated with such lengthy trips, McCann is able to watch her daughter model new clothes and show off her toys through live streaming video.

Prison officials prefer video visitation due to its security features. Video visits allow monitoring in real-time or via recording while eliminating the possibility of contraband entering the facility. The video visitation service being developed by einmate.com, for example, "seeks to limit physical visitation," which "increases security and cuts costs." Expanded video visits may have a positive effect on prisoners, too. "When they have contact with the outside family they actually behave better here at the facility," said Richard Brown, assistant superintendent at Indiana's Rockville Correctional Facility (RCF).

To participate in a video-conference visit, a prisoner logs into a JPay kiosk. At RCF there is one kiosk for every 75 prisoners. The kiosk has a video camera, a screen that allows prisoners to view streaming video, and a phone that lets them talk with their "visitor." Video visitors must have a webcam to participate, and must be pre-approved by prison officials. A secure video conference connection is established between the prison kiosk and the visitor's webcam at their home.

This approach differs from the type of video visitation typically offered at prisons and jails, which usually requires visitors to travel to a central location such as a

church or the facility itself to participate in video visits. The First Refuge Baptist Church in Camden, New Jersey, for instance, has been offering video visitation with prisoners at the Camden County jail since 2005.

JPay covers the expense of installing the kiosks at no cost to the prison system. However, the company has established rates for video visitation similar to the exorbitant cost of collect-only prisoner phone calls, which is approximately \$15 for 30 minutes at RCF. The price of a 30-minute video-conference visit through JPay is \$12.50. The company also provides email services at prisons in seven states. [See: *PLN*, Dec. 2009, p.24].

Currently only RCF has installed JPay's video visitation kiosks, but all 28,000 Indiana prisoners are expected to have access to video-conference visits within four years. The program is expected to expand to the Kansas prison system in 2010. A number of jails are switching to video visitation, too, though such visits are usually held onsite at the facility and simply replace in-person visitation. Jails in Washburn County, Wisconsin; Yakima County, Washington; and Collin County, Texas have replaced in-person visits with video visits. "This was the most efficient and feasible way for us to maintain our daily operations," said Collin County jail Capt. Jim Moody.

The Pinellas County jail in Florida is going one step further, by equipping a bus with five laptops to use as a mobile video conferencing center for prisoners' family members and friends. "This will give us some relief [from visits at the jail] and at the same time provide a service to the community to those who can't afford to drive all the way out here or don't have transportation," stated Pinellas County Sheriff Jim Coats.

Prison video visitation is not actually new, though the increased interest in creating for-profit video services for prisoners represents a novel twist on the concept. The Pennsylvania Family Virtual Visitation program, which was created in 2001 through a partnership between the Prison Society and the Pennsylvania Dept. of Corrections, allowed prisoners to visit with their families via video-conferencing. Florida's prison system implemented a program called "Reading and Family

Ties – Face to Face" in February 2000, which let women prisoners read books to their children through teleconferencing over the Internet.

Former Virginia prisoner Carolyn LeCroy, who saw a need for video visits for incarcerated parents, founded her own program after she was released. "When I was in prison, and I would get visits, I would come back to the floor, and I would see the women who never got visits," she said. "And they were always depressed and unhappy."

LeCroy started The Messages Project in December 1999, to record videotaped messages from prisoners at the Fluvanna Correctional Center for Women; the videos were then shared with their families and children at Christmas. The project has since expanded to six prisons, with videos being recorded three times a year.

"For many of the inmates, these videos are the first time they have taken responsibility and apologized to their kids, and the first step to establishing a bond that was lost when they went to jail," said LeCroy. She received the Governor's Volunteerism and Community Service Award from Virginia Governor Tim Kaine on April 15, 2009, and was a top-ten finalist for CNN's Hero of the Year award in 2008. LeCroy works for the Virginia Department of Corrections and operates The Messages Project on a volunteer basis.

Of course, not all video visitation services have such laudable (and non-profit) motives as programs like The Messages Project. Companies such as JPay and einmate.com are simply trying to make money. And in October 2009, it was reported that the Sheriff's Office in Charlotte County, Florida planned to sell advertising on video visitation screens at the county jail. The paid ads will have a captive audience.

PLN recognizes that video visits may be appropriate in some cases, such as when prisoners are transferred to other states where in-person visitation is impractical, or when family members are unable to visit due to cost or medical reasons. However, *PLN* believes it is inappropriate for video visitation to be used in lieu of in-person visits for the convenience of prison staff, to reduce institutional expenses, to generate profit, or to redress purported security concerns. Moreso when prison

and government officials have made the decisions to build prisons in impoverished rural areas far from the urban areas that provide most of the prisoners and where most prisoners' families reside.

In the latter regard, while prison

officials routinely claim that most contraband is introduced through visitation, numerous cases of contraband smuggling by prison employees indicate that such incidents are more a staff problem than a problem involving visitors. ■

Sources: *CBS News*, *CNN*, <http://hamp-tonroads.com>, www.mysuncoast.com, *Associated Press*, *Yakima Herald-Republic*, *Dallas Morning News*, www2.tbo.com, www.themessageproject.org, www.wfla.com

Sex with Former Jail Employee Lands Texas Sex Offender Back in Prison

On February 27, 2009, three days after his release from prison, Wydell J. Vaughn, 28, found himself back behind bars for having a romantic relationship with a former jail employee.

Vaughn was convicted in 2002 on two second-degree felony sex charges for having sex with underage girls. While incarcerated at the Sheboygan County Detention Center in 2007, he struck up a relationship with Tammy Green, 37, a kitchen worker employed by Aramark, the jail's food service provider.

The two immediately got together after Vaughn was released from jail in August 2007. Their relationship was discovered when Vaughn called Green's supervisor at the jail complaining that her marriage was interfering with their romance.

Green was fired and Vaughn was returned to prison in November 2007 because the relationship violated the terms of his probation, plus he had had unapproved contact with minors.

On February 24, 2009, he was released to a halfway house and repeatedly warned not to have any contact with Green. According to the terms of Vaughn's probation, because he was a sex offender all of his relationships had to be approved by his probation officer.

Heedless of those conditions, Green visited Vaughn at the halfway house the day he was released. On February 26 the two had sex when Vaughn went to buy clothes for court the next day.

Court records indicated that Vaughn called his probation officer from Green's

cell phone, and his GPS tracking device showed that at one point the two even left the city together. When Green accompanied Vaughn to court on February 27 they were observed kissing in the hallway of the courthouse. He was arrested later that day. Yet even after Vaughn's arrest, Green called his probation officer and identified herself as his girlfriend.

Vaughn was sentenced in June 2009 and returned to prison. He has served over five years on his original sentence; approximately two of those years were due to his relationship with Green, which violated the terms of his probation.

Apparently love, like justice and stupidity, is sometimes blind. ■

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California Communities Made Less Safe as Sex Offender Housing Restrictions More Strictly Enforced

by Michael Brodheim

A December 2008 report by the California Sex Offender Management Board (CASOMB) has found that increased enforcement of laws adopted to protect communities from registered sex offenders has had the unintended effect of making those communities less safe from those offenders.

Created in 2006, CASOMB was charged with providing state legislators and other policy makers with an assessment of sex offender management practices, and making recommendations consistent with its vision of decreasing sexual victimization and increasing community safety. In its report, *Homelessness among Registered Sex Offenders in California: The Numbers, The Risks and The Response*, CASOMB examines the practical effect of the voter-approved passage of Prop. 83 (in November 2006) and subsequently enacted local ordinances restricting the residency of sex offenders. It found that implementation of those residency restrictions had led to a significant increase in the number of sex offenders registering as transient -- most dramatically among Parolees, the only population of sex offenders where the residency restrictions of Prop. 83 have been consistently enforced.

CASOMB's report observes, moreover, that the rise in homelessness among sex offenders may be attributed to causes other than the various residency restrictions imposed by state and local laws. Specifically, it notes that California's registration and community notification laws -- which make it possible for citizens to pinpoint the location of sex offenders -- have enabled neighborhoods to mobilize to oust sex offenders from their midsts. As a consequence, sex offenders have even fewer housing options available to them.

CASOMB report begins by asking, pointedly, why should we care whether sex offenders are homeless? Its answer: "The rise in homelessness among sex offenders needs attention because it is so closely associated with an increased level of threat to community safety." That answer derives, in CASOMB's view, from common sense as well as from empirical evidence. As to

the latter, CASOMB makes the case that, although "there is no known study that empirically examines the risk of homelessness on sexual re-offense," nonetheless "many researchers and policy makers are of the strong opinion that lack of housing in a sex offender population will lead to higher levels of risk and will decrease public safety." It cites to studies showing, on the one hand, that unstable housing has been linked with a lack of social support and with difficulty finding employment -- both of which are dynamic risk factors for sexual re-offense -- and, conversely, that stable housing leads to stable employment and social support, factors that reduce the risk of re-offending.

The CASOMB report goes on to note some of the innovative housing methods employed by other states in an effort to reduce homelessness among sex offenders. Of those, Colorado's shared living arrangements -- where two or three sex offenders live together in a home which they rent or own, and where a treatment provider and supervising of-

ficer conduct frequent site checks -- have proven to be an effective containment modality for high-risk sex offenders. Significantly, a study of these shared living arrangements has shown that, contrary to conventional wisdom, proximity of sex offender residency to areas where children regularly congregate has no impact on recidivism. If this Colorado-based finding extends to California, the basic premise of Prop. 83, i.e., that community safety is enhanced by restricting sex offenders from living within a 2,000-foot zone of schools or parks where children regularly gather, is cast into considerable doubt.

CASOMB concludes by underscoring the need for the development of an effective, state-wide housing policy which makes stable, affordable and appropriate housing available to sex offenders. Among its recommendations is the use of incentives to local governments and private entities to develop long-term and short-term housing for sex offenders. The report is available on PLN's website. ■

Soft Porn, Bribery and Jailed Millionaire Make for a Dangerous Mix

by Brandon Sample

In April 2007, Joe Francis, 36, the multi-millionaire founder of the popular soft porn *Girls Gone Wild* videos -- which consist of young women exposing themselves at parties, clubs and spring break -- was charged with federal tax evasion for claiming about \$20 million in fraudulent deductions on his income tax returns and for keeping money in offshore accounts.

In an unrelated prosecution, Francis was indicted in Panama City, Florida on more than 70 counts of prostitution, conspiracy, drug offenses, racketeering and using minors in a sexual performance (the latter charges resulted when *Girls Gone Wild* filmed several 17-year-olds who reportedly lied about their age). Almost all of the Florida charges were eventually dismissed. Francis claimed he was prosecuted in retaliation for a successful First Amendment suit he had filed against city

officials after they tried to stop him from filming a *Girls Gone Wild* video during spring break in 2003.

While held at the Bay County jail in Panama City after being incarcerated on a federal criminal contempt charge in a lawsuit brought by underage girls who had appeared in *Girls Gone Wild* footage, Francis was accused of receiving contraband from a visitor, Scott Barbour, the CEO of Mantra Films, Inc. Mantra Films produces the *Girls Gone Wild* videos.

Both Barbour and Francis were charged with smuggling contraband, which included cash and anti-anxiety medication. Francis denied the charges, claiming he had brought the items into the jail himself when he was booked without being searched. "I didn't do anything," he said at a court hearing. He was also accused of offering a jail guard \$500 for a bottled water. The charges against

Barbour were dropped after Francis later pleaded no contest to two contraband-related misdemeanors.

Francis alleged he was mistreated at the Bay County jail; he said guards didn't give him toilet paper or meals, and he was forced to wear ankle restraints that were too tight. "They treated me like I was a terrorist," he stated. "They'd put my food just out of reach and laugh with each other, 'Oh, I guess Joe wasn't hungry today.'" He described Bay County jail officials as "scary people."

Francis was moved to the Grady County Law Enforcement Center in Oklahoma in May 2008, and remained there for 17 days before being transferred to a facility in Reno, Nevada, where his tax evasion case was being prosecuted. While at the Grady County jail, Francis claimed that guards denied him food and a blanket, and threatened to strip him naked and put him in a restraint chair. Jail officials denied the allegations. "Mr. Francis was treated like every inmate that comes through the Grady County Law Enforcement Center," said jail administrator Shane Wyatt.

Francis was held in the special needs unit at the Washoe County jail in Reno after being moved from Oklahoma. Between July and August 2009, federal prosecutors filed bribery charges against *Girls Gone Wild* marketing executive Aaron Weinstein and three Washoe County jail employees, related to Francis' stay at the facility.

According to the indictment, Weinstein provided \$3,200 and four Oakland Raiders tickets to Ralph Hawkins, a former sheriff's deputy, to bring sushi, barbecued chicken and other types of food to Francis. Weinstein allegedly gave a new television, a home entertainment system and an airline ticket to Mary

Boxx, a former classification specialist, for providing Francis with magazines in violation of jail rules.

Weinstein also was accused of giving a \$4,500 Cartier watch and a \$5,000 Saks Fifth Avenue gift card to Sergeant Michon Mills, a former jail supervisor, in exchange for protecting Francis from disciplinary charges and allowing him "almost unrestrained access to telephones."

Further, bribery charges were filed against Francis for trying to obtain preferential treatment at the jail. The cases against Boxx and Mills are still pending; Hawkins pleaded guilty and received three years probation and a \$4,000 fine. On December 8, 2009, Weinstein entered a guilty plea to a misdemeanor charge of providing contraband. He is scheduled to be sentenced on March 8, 2010. See: *United States v. Weinstein*, U.S.D.C. (D. Nev.), Case No. 3:09-cr-00066.

Francis was released from the Washoe County jail on \$1.5 million bond in March 2008 after serving a total of 11 months in Florida, Oklahoma and Nevada. He returned to Florida and on March 12, 2008 pleaded no contest to three felony child abuse charges and two misdemeanor prostitution charges stemming from the original 70-plus count Panama City indictment. Francis also pleaded no contest to the contraband charges involving the Bay County jail.

He was sentenced to 339 days with time served, plus over \$60,000 in fines, court costs and restitution. Additionally, he agreed not to film *Girls Gone Wild* videos in several Florida counties for three years. "I have never committed any crime. I pleaded guilty just to get out of jail," he said in his defense.

Francis' tax evasion case was transferred from Nevada to California, and he pleaded guilty in September 2009 to two

misdemeanor counts of tax evasion and one felony bribery charge involving the Washoe County jail. He was sentenced on November 6, 2009 to time served plus one year on supervised release, \$249,705 in restitution and a \$10,000 fine. The IRS has since filed a \$33.8 million tax lien against him for unreported income. See: *United States v. Francis*, U.S.D.C. (C.D. Cal.), Case No. 2:08-cr-00494-SJO.

For a multi-millionaire like Joe Francis, his criminal prosecution and 11-month incarceration must have been troubling, perhaps even traumatic. However, the "justice gone wild" nature of our nation's criminal justice system is an everyday occurrence for the 2.3 million men and women held in U.S. prisons and jails on any given day. Most of those prisoners can't afford high-priced attorneys or \$1.5 million bonds, and lack the privileged status and financial resources to bribe guards for preferential treatment. ■

Sources: *Associated Press*, *USA Today*, *www.newsherald.com*, *Nevada U.S. Attorney press release*, *www.la.metbogs.com*, *www.eonline.com*

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Former High-Ranking CIA Official Imprisoned for Corruption

by Matt Clarke

When the CIA wanted to build secret prisons outside the United States where terrorism suspects could be tortured with impunity, it turned to Kyle “Dusty” Foggo, who ran the agency’s main European supply base in Frankfurt, Germany. That was in March 2003, and Foggo already had earned a reputation as the “go-to” guy when supplies were needed for the CIA’s rapidly-growing operations in Iraq and Afghanistan.

Foggo immediately agreed to handle the project. He supervised the construction of three prisons, which were identical in design to disorient detainees as to their location and included such torture-friendly features as plywood-covered walls to cushion the impact when prisoners were slammed against them. The six-bed facilities were built at a remote Moroccan location; in Bucharest, Romania; and near an undisclosed former East bloc city. “It was too sensitive to be handled by [CIA] headquarters,” said Foggo. “I was proud to help my nation.”

Foggo also was apparently proud to help his lifelong friend, San Diego military contractor Brent R. Wilkes, make a profit off the deal. Wilkes’ business received a CIA logistics contract to supply the prisons with items such as plumbing, stereos, night vision goggles, bedding, toilets, video games, earplugs, bottled water and wrap-around sunglasses. Often these products were simply purchased at stores such as Wal-Mart and flown overseas. Torture devices, such as waterboards, were made from materials procured locally.

The CIA was so pleased with Foggo that it promoted him to its third-highest office, executive director, the administrator over day-to-day operations. The promotion – equated by some to putting a sergeant in charge of a regiment – ruffled the feathers of other CIA officials who had been in line for the position. They initiated an investigation of Foggo that uncovered evidence of corruption.

Technically, Foggo was not accused of wrongdoing in regard to the construction of the secret prisons. Rather, he was charged with fraud for steering a \$1.7 million CIA supply contract to Wilkes-connected Archer Logistics, which overbilled the agency. In exchange for the contract Wilkes took Foggo on a \$30,000 luxury vacation to Hawaii, bought him

dinner at expensive restaurants and promised him a high-paying job when he retired. Prosecutors also claimed that Foggo had tried to get his mistress hired by the CIA even though she was unqualified.

Foggo and Wilkes were indicted in February 2007; additional charges were included in a superseding indictment three months later. Foggo, 55, pleaded guilty to fraud in September 2008. He was sentenced to 37 months in prison on February 26, 2009 and is presently housed at a federal facility in Kentucky. As part of the plea agreement, Foggo admitted that he steered contracts to Wilkes “through direct and indirect means.” See: *United States v. Foggo*, U.S.D.C. (S.D. Cal.), Case No. 3:07-cr-00329.

From prison, Foggo has claimed that he was unfairly prosecuted and that he pleaded guilty only to prevent national

security secrets from being exposed at trial. The CIA refused to let Foggo’s attorney review the agency’s files related to the secret overseas prisons, citing national security concerns.

Wilkes was convicted of 13 felonies for bribing former California Congressman Randall “Duke” Cunningham in exchange for Department of Defense contracts, and received a 12-year sentence. He has maintained his innocence of the CIA-related fraud charge and was released on bond pending an appeal. Rep. Cunningham had previously pleaded guilty to corruption charges, including accepting \$2.4 million in bribes from Wilkes and other military contractors, and is serving a 100-month federal prison sentence. ■

Sources: *New York Times*, *Washington Post*, *Associated Press*, *USA Today*

Texas Supreme Court Rules in Favor of Ex-Prisoner’s Religious Halfway House

by Matt Clarke

On June 19, 2009, the Texas Supreme Court held that a city zoning ordinance which effectively banned a religious halfway house in the City of Sinton violated the Texas Religious Freedom Restoration Act (TRFRA), § 110.003(a)-(b), Texas Civil Practice and Remedies Code.

Pastor Richard Wayne Barr, a former prisoner, owned two houses across the street from the Grace Christian Fellowship Church. In 1998, with the church’s support, he founded and directed Philemon Restoration Homes – a non-profit organization that operated the houses as faith-based halfway houses for around fifteen newly-released prisoners who had not been convicted of violent or sex offenses. Residents were required to sign a statement of their faith in the tenets of Christianity, and to abide by strict house rules. The Texas Board of Pardons and Paroles (BPP) approved the halfway houses for parolees even though they received no state funding.

In 1999, the City of Sinton passed zoning ordinance 1999-02, which was aimed specifically at “correctional or rehabilitation” facilities. Under the guise

of restricting halfway houses from being located within 1,000 feet of a park, school, church or residential area, the ordinance effectively banned them from the entire city. Although Barr continued to operate the halfway houses, he was never cited or fined for violating the ordinance. However, Sinton’s police chief informed the BPP that the halfway houses were in violation of a city ordinance; as a result, the BPP refused to approve parole placements at Philemon Restoration Homes.

Barr filed suit in state court in 2001, alleging that the ordinance interfered with his religious practices in violation of the TRFRA. The trial court refused to grant a temporary injunction and later held that ordinance 1999-02 did not violate the TRFRA because it was “in furtherance of a compelling governmental interest.” Barr appealed. The Court of Appeals affirmed the trial court’s judgment in 2005, and Barr then petitioned the Texas Supreme Court for review.

The Supreme Court held that contrary to the findings of the Court of Appeals, zoning ordinances were subject to TRFRA review under the strict scrutiny standard. The fact that some halfway houses were secular did not preclude

the application of TRFRA to religious halfway houses. The Court discussed the legal similarities among TRFRA, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), and distinguished cases cited by the city in defense of the zoning ordinance.

The Supreme Court found the ordinance substantially burdened Barr's religious exercise rights, and the city's failure to enforce the ordinance undermined its claim that it involved a compelling government interest. "An interest that need not be enforced against the very thing it is adopted to prevent can hardly be considered compelling," the Court noted. Additionally, the fact that the halfway house residents were non-violent offenders who had never caused a disturbance or other problem undercut the city's claim that the ordinance was necessary to address public safety concerns.

The city made no attempt, as required by TRFRA, to show that the ordinance was the least-restrictive means of furthering the claimed governmental interest. Therefore, the ordinance violated Barr's religious rights under TRFRA. The judgment of the Court of Appeals was reversed and the case returned to the trial court for a ruling on appropriate injunctive relief, damages and attorney fees.

Although Barr won his suit against the City of Sinton, he no longer works for the Grace Christian Fellowship Church and has since moved out of the city. Thus, while he prevailed in court after an 8-year legal battle, city officials were successful in preventing him from operating his religious

halfway houses during that time period.

Barr was represented by attorneys from the Liberty Legal Institute and the Rutherford Institute. The Texas Supreme Court received amicus briefs from the American Civil Liberties Union Foundation of Texas, Prison Fellowship, the

American Center for Law and Justice, and two Texas state legislators. See: *Barr v. City of Sinton*, 52 Tex.Supp.J. 871, 2009 Tex. LEXIS 396 (Tex. 2009). ■

Additional source: *Corpus Christi Caller-Times*

\$2.4 Million Settlement in Children's Death Caused by California Jail Guard's Driving

A \$2.4 million settlement has been reached in a lawsuit involving three children being killed in an automobile accident caused by a California jail guard on the way to work.

As Tulare County guard Joseph D. Armstrong was on the way to work at the county's jail, he ran a stop sign while driving at "highway speeds." He hit the vehicle of Tanya L. Rader, who was traveling at highway speeds. The collision killed Rader's three children, aged 5, 3, and 1. Rader suffered orthopedic injuries and bereavement.

Rader sued Tulare County, several property owners, and Armstrong. Tulare County was sued under the "going and coming rule," contending that on a few occasions Armstrong had been required to use his personal vehicle to drive from the jail to the hospital to attend a prisoner. He was not paid mileage.

The second claim against the county contended a dangerous and defective condition on public property. That claim alleged the stop and sign ahead signs were partially obscured. It also claimed the road was recently repaved and the

stenciling on the roadway had not been replaced. The county paid \$1.36 million to settle the claims against it.

The property owners settled claims related to the signs on their property being obscured, paying \$990,000 total, with Armstrong paying \$60,000 to settle claims against him.

The matter was settled on March 12, 2009. Rader was represented by Fresno attorney Richard C. Waters. See: *Rader v. County of Tulare*, Tulare County, CA. Superior Court, Case No: 0-225967. ■

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\$1.95 Million Awarded to New Hampshire Guards Falsely Accused of Assaulting Prisoner

by David Reutter

A New Hampshire jury awarded two former prison guards nearly \$2 million upon finding that two of their co-workers had lied about a confrontation with a prisoner, which resulted in their firing.

After guards Shawn Stone and Todd Conner accused fellow prison guards Timothy Hallam and Joseph Laramie of participating in or failing to report an assault on prisoner Michael Kelly in April 2005, Hallam and Laramie were fired. Kelly claimed that he had been punched in the side and back while he was handcuffed.

A hearing in 2006 by the New Hampshire Personnel Appeals Board determined that the prison's investigation was contradictory and questionable. The Board found no wrongdoing by Hallam and Laramie, and ordered them to be reinstated to their job positions. Prison officials did not appeal the Board's decision.

Hallam and Laramie then filed suit in state court against the New Hampshire Department of Corrections (NHDOC), Commissioner William Wren, and Stone and Conner. The court dismissed NHDOC and Wren as defendants but the case proceeded to trial against Conner and Stone.

It turned out that the prisoner had accused Stone and Conner of punching him, not Hallam or Laramie. "The inmate had actually accused both of the defendants of assaulting him, and their claim was in turn for self-preservation," said Kevin Leonard, the attorney who represented Laramie and Hallam.

The jury's May 19, 2008 verdict found Stone and Conner had "intentionally and improperly interfered" with Hallam and Laramie's employment. The jury awarded Hallam \$1.3 million in compensatory damages; Laramie was awarded \$650,000. The disparity in the amounts was due to Hallam being "medically unable" to return to work, while Laramie had been reinstated as a prison guard. Both Stone and Conner are still employed by the NHDOC.

"First, they prevail at the Personnel Appeals Board, and now to have a jury of 14 Merrimack County residents agree with them – they're both ecstatic," said

Leonard. New Hampshire taxpayers are the real losers, as they are on the hook to pay the verdict.

The state attempted to reduce the jury award in a post-trial motion, claiming that a statutory cap on liability for damages should apply pursuant to RSA 541-B:14. The defendants also argued that Leonard had made inappropriate remarks in his closing statement, including references to abuse at the Abu Ghraib prison in Iraq.

The court rejected those arguments in

a September 30, 2008 ruling, finding the statutory cap did not apply and Leonard's remarks were not improper. The \$1.95 million total jury award was affirmed. The state has appealed to the New Hampshire Supreme Court, with oral argument scheduled for January 13, 2010. See: *Laramie v. Cattell* and *Hallam v. Cattell*, Merrimack County Superior Court, Case Nos. 06-C-224 and 06-C-225. ■

Additional source: www.boston.com

Guantanamo's Youngest Prisoner Can't Be Tried, Won't be Released

by Matt Clarke

By July 2002, Omar Khadr, a skinny 15-year-old boy born in Toronto, Canada, had become a radical Muslim militant. He received his first training in an Al-Qaeda camp at the tender age of twelve. To Khadr, a kid who loves *Die Hard* movies, Nintendo computer games and junk food, he was just following in the footsteps of his older brother Amed, who had been injured by a land mine in 1992 while fighting the Soviets in Afghanistan on behalf of the CIA.

Khadr and several other fighters became involved in a July 2002 firefight with U.S. forces in Afghanistan. His companions died in the battle. In the last moments of the firefight a hand grenade exploded, killing U.S. Army medic Christopher James Speer and wounding Layne Morris, a U.S. soldier.

The severely-wounded Khadr, who was accused of tossing the grenade, was captured, taken to Bagram Air Force Base north of Kabul and eventually transferred to the U.S. military prison at Guantanamo Bay, Cuba. Khadr has had the dubious distinction of being Gitmo's youngest prisoner since arriving at the facility in October 2002. He was formally charged with Speer's death in April 2007.

Khadr's arrival at Guantanamo coincided with the introduction of torture, including sensory deprivation, degrading humiliation and water-boarding. He has claimed that he was tortured into confessing that he threw the hand grenade

that wounded Morris and killed Speer. A U.S. military tribunal judge agreed in July 2009, ruling that Khadr's confession had been coerced and was therefore inadmissible.

The ruling put the military's case against Khadr in jeopardy. The Army's own account acknowledges that another Muslim fighter lived long enough to have thrown the grenade. Khadr did not have any weapons when he was captured and, perhaps most importantly, the house that he and the others fighters were in had collapsed following a bombing run by a U.S. jet fighter, leaving Khadr buried in the rubble and presumably incapable of combat. However, U.S. military officials have maintained that all of that is irrelevant. Khadr was the only survivor; thus, he is the only one who can be, and should be, held responsible for the grenade attack.

This illustrates the difficulty of waging a war against guerilla fighters who wear no uniforms and represent no nation. It also illustrates the axiom that "terrorist is what the big army calls the little army." When an armed soldier is killed in combat on a battlefield it is unusual to charge the other soldier with murder. It also explains the greatest frustration of Guantanamo prisoners – a lack of explanation as to the legal basis for their imprisonment.

"They're not saying, 'I'm innocent' or 'I'm guilty.' They're saying, 'Define me. Define me. What are they going to do – keep me in jail another 10 years?'" said a

U.S. translator assigned to Guantanamo, identified only as Zak.

On April 23, 2009, a Canadian court ordered that country's government to demand Khadr's return from the U.S., since he is a Canadian citizen. Canada's Prime Minister appealed the decision; the government has been reluctant to pressure the U.S. to repatriate Khadr and has spent about \$1.3 million in legal proceedings to prevent his return to Canada for trial. The Federal Court of Appeal upheld the lower court's order on August 14, 2009. See: *Prime Minister v. Khadr*, Federal Court of Appeal of Canada, 2009 FCA 246. Canada's Supreme Court was scheduled to hear the government's appeal of that ruling on November 13, 2009; separately, U.S. officials will decide by November 16 if Khadr and other detainees will be tried in a civilian court in the United States.

Khadr's future is thus uncertain. The Army says it has footage of him planting a roadside bomb, something he was not charged with. Khadr admits to being an Al-Qaeda fighter and his family hasn't exactly helped his cause. In a TV interview his mother said she would be happy for him to die a martyr, and his sister shrugged off questions about allegations that he had killed Speer, saying, "big deal." All of which makes it likely that Guantanamo's youngest prisoner will get considerably older in U.S. custody whether or not Guantanamo is closed as President Obama has promised. [See: *PLN*, Oct. 2009, p.14].

Sources: www.villagevoice.com, *KPFT-FM Pacifica Radio Station*, www.ctv.ca

Education for Persons in Detention —A Human Right

by Jimmy Franks

The positive correlation between increased education and lowered recidivism rates is a long-established fact. Even so, governments worldwide are not always willing or even able to insure that the men, women and children housed in various detention facilities are given access to sufficient educational and vocational opportunities. Many factors can contribute to this problem, not all of which will be solved with increased funding. In some instances, the primary obstacles faced are environmental, institutional, cultural or individual.

In a recently submitted report prepared by the Special Rapporteur to the United Nations' Human Rights Council, the issue of the right to education of persons in detention was examined in depth for the purpose of identifying and initiating possible remedies for solving the shortcomings that currently exist in the area of education. The Special Rapporteur observed that a basic problem faced in many detention facilities worldwide is that education is often viewed as a privilege and not as an imperative in its own right. The huge positive impact an education can have on a person's ability to become self-sufficient upon release is oftentimes marginalized or minimized in an environment "inherently hostile to its liberating potential." And the problems are often compounded for women and

children in cultures where their worth and potential are considered beneath that of men. Another group of individuals frequently overlooked are those with mental, physical, or emotional difficulties that inhibit their learning abilities.

However, the report lists a number of recommendations to address the various problems. Chief among them is the premise that education for persons in detention should be "guaranteed and entrenched in Constitutional and/or other legislative instruments." The adoption of this recommendation alone, backed by adequate public funding and enforced compliance standards, would go far in raising public awareness of the issue, possibly opening the door for new ideas and initiatives from that sector.

In total, this report offers a clear, concise evaluation of a complex problem with far-reaching results. With the resources and technology available in the world today, no person, regardless of specific living arrangements, should have to suffer the indignities that a lack of proper education gives rise to. Furthermore, if the world community were to confront this issue with the gravity and dedication it deserves, illiteracy and crime would be significantly reduced accordingly.

Source: *Report of the Special Rapporteur on the right to education*, Vernor Munoz, pub. 2 April 09, United Nations' Human Rights Council.



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Four Pennsylvania Jail Guards Fired, Two Resign Over Prisoner Beating

by David M. Reutter

Four Pennsylvania guards have been fired for beating a prisoner at the Westmoreland County Prison (WCP). The June 8, 2009 incident revealed a cover-up orchestrated by prison guards and their union leader.

When WCP prisoner James Edwards, 27, and other prisoners in his cellblock were ordered to return to their cells because some were smoking, Edwards complained to part-time guard Christopher Pickard that he should not be punished. Pickard notified a sergeant, who went to Edwards' cell with two other officers.

They took Edwards, who was in jail on a parole violation, to a nearby counselor's office out of the view of video cameras. A guard then grabbed Edwards by the neck, slammed him into a filing cabinet, pushed his head against the wall and said, "I'll kill you right now."

As Edwards slid to the floor, the guard struck him in the mid-section with his knee and punched him in the head. Upon trying to stand, the guard punched him again.

After the incident, Edwards was taken to be examined by a nurse. He "complained of injuries he stated he received from a beating," according to medical notes. A subsequent report said Edwards had "multiple injuries to the neck and head area, also ribs and back." Additionally, he had a quarter-sized contusion near his eye.

Other guards told Pickard "to go along with the story told by everyone else, that nothing happened, nothing occurred. The inmate was never struck, you can't crack. You have to stick to the story."

When Pickard was advised that he was under investigation, Casey Mullooly, who represents WCP guards as president of Local 522 of the United Mine Workers of America, told Pickard what to say to prison investigators. "Mullooly said to me when questioned to stick with the story everyone else was going with," Pickard stated.

That is not, however, what Pickard did. Instead he told the truth to investigators and resigned from WCP on June 14, 2009. Another guard, Craig Petrus, also

resigned. As a result of the information provided by Pickard, WCP guard Steven Greenawalt and sergeants Jonathan Billheimer, Marc Hutchinson and Randy Miller were fired by the prison board at a July 6, 2009 meeting. Greenawalt was reportedly the one who assaulted Edwards. Hutchison denied any wrongdoing, stating he had "no idea" why he was fired. Mullooly was suspended.

"Some of the individuals who had their appointments revoked weren't there that day, but they were involved in what we'll call a cover-up – an effort to create a story that wasn't the truth," said County Commissioner Tom Balya. A state Unemployment Compensation Board of Review later cleared Billheimer, finding he did not engage in willful misconduct. He is now

seeking reinstatement at the prison.

As previously reported by *PLN*, abuses have existed at WCP for some time. In July 2007, a guard was fired for making prisoners sing nursery rhymes, recite the alphabet and get on their knees and bark like dogs. [See: *PLN*, Dec. 2007, p.1]. That guard, Scott A. Rogers, was sentenced to nine months probation on February 23, 2009. Another WCP guard was fired for engaging in sexual misconduct with a female prisoner, and last year a prisoner filed a federal lawsuit claiming he was beaten and choked by guards until he passed out. ■

Sources: *Pittsburgh Tribune*, www.thepittsburghchannel.com, www.pittsburghlive.com

BOP Guard Found Guilty in Prisoner's Death, Sentenced to Life

by Brandon Sample

On July 30, 2009, a federal jury found a former prison guard at the Federal Correctional Complex (FCC) in Coleman, Florida guilty of civil rights violations in connection with a prisoner's death. She later received a life sentence.

Richard Delano had been in and out of prison since his early twenties. At 39, he found himself in the Special Housing Unit (SHU), a "prison within a prison," at FCC Coleman. He had been transferred to Coleman from FCC Beaumont and was being kept in the SHU for his own protection.

Delano had developed a reputation for snitching – he liked to tell on guards who broke the rules. Naturally, most prison employees disliked him. Coleman guard Erin Sharma was no exception.

Sharma and her husband, Rajesh Sharma, had worked for the Bureau of Prisons (BOP) since 2000, and transferred to FCC Coleman in 2001. Sharma was assigned to the SHU, which she didn't mind. She did mind Delano, though.

In February 2005, Delano grabbed Sharma's arm through a food port in his cell door, bruising her arm. She already didn't like Delano because he was a snitch.

The cell door incident just made things worse.

Rather than reporting what Delano had done, Sharma decided to take matters into her own hands. She was on good terms with John McCullah, another prisoner in the SHU. McCullah showed Sharma "respect," so she would do favors for him from time to time, like passing notes between cells or giving him extra ketchup packets from the kitchen so he could make "hooch," homemade alcohol.

McCullah wasn't known as a nice guy. He had developed a reputation in prison, earning the nickname "Animal" for the violence he exacted on other prisoners. He had assaulted every one of his previous cellmates.

After Delano bruised Sharma's arm, she showed McCullah the bruise and asked if he would break Delano's leg. McCullah was happy to oblige; besides, he was a potential recruit for the Aryan Brotherhood and needed to show them what he could do. Sharma just had to get Delano into McCullah's cell.

Because all cell moves had to be approved by Sharma's supervisor, Lt. Jeffrey

James, Sharma concocted a story and claimed Delano wanted to move in with McCullah. James, believing this to be true, approved the transfer.

On March 4, 2005, McCullah made good on his promise to Sharma; in fact, he gave her more than she asked for, beating Delano beyond recognition. Delano lapsed into a coma and died 13 days later from his extensive injuries.

It was Sharma's "cruel acts," federal prosecutor Douglas Kern told the jury in her subsequent criminal trial, that caused Delano's brutal death – a "death he didn't deserve." The defense countered that jurors shouldn't believe the SHU prisoners who had testified as witnesses, calling them the "worst of the worst" and saying they had plenty to gain by implicating Sharma. However, Kern noted that the prisoners had not been offered sentence reductions for their testimony, nor even a "Big Mac and Slurpee."

"They put their safety and comfort on the line to testify in this case," said Kern. "Justice. That's all these inmates hope to gain." This was somewhat ironic, because when government officials defend prison guards accused of abusing prison-

ers in civil cases, they frequently portray the prisoners as criminals and liars. But as one defense attorney has noted, the only time criminals can be trusted is when they testify for the government. Sharma was emotionless when the jury returned a guilty verdict. She might have showed some emotion when she was sentenced, though. On October 26, 2009, Sharma received a life sentence followed by three years on supervised release, plus 75 hours of community service and a special assessment of \$200. She did not make a statement at her sentencing hearing. See: *United States v. Sharma*, U.S.D.C. (M.D. Fla.), Case No. 6:09-cr-00001-PCF-GRJ.

A second FCC Coleman guard, Michael Kennedy, was indicted on conspiracy charges in connection with Delano's death on October 29, 2009. According to the federal indictment, Kennedy and Sharma had "discussed and agreed to retaliate" against Delano. Kennedy was released after posting \$50,000 bond. See: *United States v. Kennedy*, U.S.D.C. (M.D. Fla.), Case No. 6:09-cr-00217-ACC-DAB. ■

Sources: *Orlando Sentinel*, www.ocala.com



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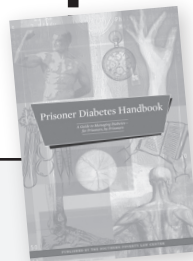
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South Dakota: Prisoner May Enforce Third-Party Kosher Meal Obligation

The South Dakota Supreme Court has ruled that a state prisoner can bring a third-party beneficiary claim to enforce a settlement agreement between the South Dakota Department of Corrections (DOC) and another prisoner.

Charles E. Sisney, a DOC prisoner, filed a pro se complaint in state circuit court seeking to enforce a settlement agreement between the DOC and another prisoner, Philip Heftel. Heftel had filed a civil rights suit against the DOC in 1998, alleging that he was deprived of his First Amendment right to free exercise of his Jewish religion because the DOC refused to provide him with kosher meals. Heftel and the DOC settled, with the DOC agreeing “to provide a kosher diet to all Jewish inmates who request it,” consisting of “prepackaged meals which are certified kosher for noon and evening meals.”

In February 2007, the prison’s food service provider stopped serving prepackaged kosher meals and began serving a new kosher diet that included beans and rice prepared in the prison kitchen. Meals not prepared in a kosher kitchen are not considered kosher regardless of the food used for the meal. Sisney filed a grievance alleging that the new kosher diet violated both his religious beliefs and the *Heftel* settlement. DOC officials responded that Sisney was not a party to the settlement. He then filed suit.

The circuit court granted the defendants’ motion to dismiss on the basis of statutory immunity and insufficient proof that the defendants – the Director of Prison Operations and Secretary of Corrections – were responsible for enforcing the settlement agreement. Sisney appealed.

On appeal, the DOC argued that Sisney could not enforce the settlement as a third-party beneficiary. The state Supreme Court held that the agreement was for the DOC to provide the specified kosher diet to any Jewish prisoner who requested one, not just to Heftel. Sisney was Jewish and had requested kosher meals. Therefore, he was a member of a group of prisoners intended to be third-party beneficiaries to the agreement and had standing to enforce the settlement.

The Supreme Court also found that the Secretary of Corrections was the successor in office to the party that entered

into the Heftel agreement. This created a legal inference that he was the superseding party responsible for carrying out the settlement. Similarly, the Director of Prison Operations was a position that created a legal inference of responsibility for enforcing the agreement at the prison where Sisney was housed.

The Court further held that, whereas state officials are generally immune from suit in their official capacities under SDCL 3-21-8 and 3-21-9, and the state is immune from suit under Article III, Section 27 of the South Dakota Constitution, such immunity “is waived to the extent the State entered into a contract and a party or third-party beneficiary sues to enforce that contract.”

Furthermore, Sisney sought only declaratory relief, and “SDCL 3-21-8 and 3-21-9 only provide immunity from suits seeking to impose liability.” Therefore, the defendants were not entitled to statutory immunity. The dismissal of Sisney’s law-

suit was reversed and the case returned to the circuit court for further proceedings. See: *Sisney v. Reisch*, 754 N.W.2d 813 (S.D. 2008).

In separate opinions, the Supreme Court concluded that Sisney could not raise a third-party beneficiary claim under the DOC’s food service contract with Best Inc. and CBM Inc., companies that provided kosher food, because the contract “did not expressly indicate that it was intended for Sisney’s direct benefit or enforcement.” Rather, it indicated “that it was made for the express benefit of the State, and the collective benefit that inmates may have received was only incidental to that of the State.”

The Court also dismissed Sisney’s claims under 42 U.S.C. §§ 1983 and 1985, but remanded a state law claim of deceit to the lower court for further proceedings. See: *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008) and *Sisney v. State*, 754 N.W.2d 639 (S.D. 2008). ■

Federal Jury Awards \$5 Million for Wrongful Conviction Involving Houston Crime Lab

by Matt Clarke

A Texas federal jury awarded \$5 million to a former prisoner who was wrongly convicted of kidnapping and sexual assault based in part on falsified evidence generated by the Houston Police Department’s Crime Lab. In rendering its verdict, the jurors found the City of Houston “had an official policy or custom of inadequate supervision or training of its Crime Lab personnel” and that the city’s policymakers were deliberately indifferent to those deficiencies, which were the moving force behind the wrongful conviction.

On October 26, 1987, George Rodriguez was convicted of kidnapping and aggravated sexual assault of a child. DNA testing later proved he was innocent of those offenses. Nonetheless, there was daunting evidence against him, some of which was provided by Houston’s Crime Lab. The problem was that the Crime Lab evidence had been falsified.

On February 24, 1987, a 14-year-old girl was snatched off the street by two men driving a green and white 1978 Chrysler

Cordoba. She was blindfolded and driven to a house where she was raped before being taken to another location and released. Remarkably, the girl memorized all of the turns made by the car, allowing police to identify the house.

The girl said one of the men was skinny and the other was fat; both were Hispanic. Manuel Beltran was found at the house and quickly confessed to being the skinny suspect. He identified the fat one as Isidro Yanez. Beltran’s brother had been present at the house when the girl was there, and he also identified the other suspect as Yanez. Furthermore, the Cordoba was Yanez’s car. Regardless, based upon the fact that another person, George Rodriguez, looked a lot like Yanez (who was an occasional police informant), and an officer’s belief that Rodriguez and Beltran hung out together, the police began to build a case against Rodriguez.

Yanez was later turned in to the police by his mother for raping her pregnant, live-in housekeeper. His mother told po-

lice she “wants charges filed against her son because he, on several occasions, had assaulted women and nothing has ever been done to him.” This did not deter Rodriguez’s prosecution for raping the 14-year-old girl.

Allegedly, through careful manipulation of lineups and witness coaching, the police were able to get the girl to identify Rodriguez as her assailant. Rodriguez had been at work that day, and his boss told the police about his alibi and testified to it in court. Nonetheless, Rodriguez was convicted and sentenced to 60 years in prison.

Especially damaging to Rodriguez’s claim that Yanez was the real perpetrator was testimony by Crime Lab criminologists James R. Bolding and Christy Y. Kim. Bolding and Kim testified that a hair found in the girl’s underwear was microscopically consistent with Rodriguez’s, and that, using Lewis ABO typing, semen recovered from the victim excluded Yanez as a suspect but did not exclude Rodriguez.

The Crime Lab evidence was fabricated. Later investigation and DNA testing proved that the hair and semen were not Rodriguez’s but could belong to Yanez. It also was revealed that Kim had fabricated and postdated her bench notes, and Bolding and Kim’s blood and saliva tests didn’t even have the correct typing listed for Yanez.

Rodriguez filed a motion for DNA testing in 2001. On May 10, 2004, testing by an independent lab excluded Rodriguez as a contributor of the hair. He was then released from prison on a personal recognizance bond. On August 31, 2005, the Texas Court of Criminal Appeals reversed his case for retrial. In September 2005, eighteen years after he was convicted, the charges against him were dropped. During his incarceration his father had died and his daughters were abused by men who lived with their mother.

Rodriguez filed a civil rights action pursuant to 42 U.S.C. § 1983 in U.S. District Court, alleging that the City of Houston had a policy, custom and practice of operating a substandard crime lab that fabricated evidence and failed to report exculpatory evidence to prosecutors, despite knowing that this could lead to wrongful convictions. Other publicized errors at the Crime Lab had led to an independent investigation, which resulted in reports that were highly critical of the Lab’s operations and culminated in a final

report released on June 13, 2007.

The report detailed the Serology Section’s defective procedures and failure to provide adequate training and supervision of its serologists. Both the report and communications from Crime Lab administrators who complained of severe understaffing, which caused inadequate training, supervising and reliability, were introduced as evidence in Rodriguez’s lawsuit.

After the district court denied the city’s attempt to have the report declared inadmissible hearsay, and rejected its efforts to use Rodriguez’s ineffective assistance of counsel claim from his habeas petition to deflect blame and its other summary judgment defenses, the case proceeded to trial.

On June 25, 2009, the jury awarded Rodriguez \$3 million for past pain and suffering, \$1.5 million for future pain and suffering, \$350,000 for past lost earnings and \$150,000 for future lost earnings, totaling \$5 million. The monetary award, however, didn’t fully compensate Rodriguez. “Ain’t no amount of money is going to even my scale,” he said. “I lost my dad and my girls have been through hell. I am grateful, but no money could replace what I lost.”

Rodriguez was represented by Barry Scheck and other attorneys with the firm of Cochran Neufeld and Scheck, and by the Houston law firm of Susman Godfrey LLP. Rodriguez’s attorneys are seeking fees and costs in the amount of \$4.69 million. See: *Rodriguez v. City of Houston*, U.S.D.C. (S.D. Tex.), Case No. 4:06-cv-02650. ■

Additional sources: *Houston Chronicle*, *Crime Lab report by Office of the Independent Investigator* (available at www.hplabinvestigation.org)

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Seventh Circuit Upholds \$9,063,000 Award to Illinois Ex-Prisoner Exonerated by DNA

by *Brandon Sample*

On December 30, 2008, the U.S. Court of Appeals for the Seventh Circuit upheld a \$9,063,000 jury award to a former prisoner, later exonerated by DNA evidence, whose criminal trial was rendered unfair by a police detective who investigated his case.

In September 1989, Alejandro Dominguez, then fifteen years old, was arrested and charged with rape and home invasion based on the allegations of Lisa Kraus, 18, who lived in the same building.

Dominguez was found guilty at trial and spent four years in prison before being paroled. In 2002, he was finally able to prove his innocence after DNA tests confirmed that semen taken from Kraus' underwear did not match his DNA. Dominguez's conviction was vacated and in August 2005 he received a full pardon from then-Governor Rod Blagojevich (who is presently facing unrelated federal corruption charges).

In April 2004, Dominguez sued the City of Waukegan and Paul Hendley, a police lieutenant who had investigated his case. Dominguez claimed that Hendley caused his criminal trial to be unfair because he did not provide truthful information to prosecutors and even misled them at times. Further, Dominguez alleged that Hendley withheld exculpatory evidence by getting the victim to falsely identify him.

On October 17, 2006, following a ten-day trial, the jury returned a verdict in favor of Dominguez and awarded \$9,063,000 in damages. The district court later granted him attorney fees of \$517,532. Because the City had agreed to indemnify Hendley, it was on the hook for the damage award and fees. Naturally, the City and Hendley appealed.

On appeal, Hendley presented a grab bag of claims; he argued, among other things, that he was entitled to qualified immunity. For example, Hendley asserted that he was entitled to qualified immunity because "numerous circuits have held that police officers who provide truthful information to subsequent decision-makers in the criminal justice system cannot be held liable under § 1983 for allegedly wrongful convictions."

The problem with Hendley's argument, the Seventh Circuit explained, was that the jury had determined he did *not* provide truthful information to decision-makers. The cases Hendley relied on were thus inapposite.

Finding no merit in the plethora of other claims that Hendley presented, the Seventh Circuit affirmed the judgment of the district court. On May 19, 2009,

the day after the U.S. Supreme Court denied the defendants' certiorari petition, Dominguez filed a motion seeking to access a letter of credit that had been posted by the City in lieu of a judgment bond to cover the jury award and interest, in the amount of \$10,047,195.39. The district court granted his motion four days later. See: *Dominguez v. Hendley*, 545 F.3d 585 (7th Cir. 2008), *cert denied*. ■

Iowa Supreme Court: Retroactive Good Conduct Time Denial is Unconstitutional, Depending on Date of Conviction

by *Matt Clarke*

On January 23, 2009, the Iowa Supreme Court held that state law amendments enacted in 2001 and 2005, which required that certain prisoners must participate in rehabilitative programs to be awarded good conduct time credits, violated the ex post facto clauses of the U.S. and Iowa Constitutions when applied to prisoners whose crimes occurred prior to the enactment of those amendments. In a separate ruling, the Court determined that prisoners who committed crimes after the 2001 amendment but before the 2005 amendment could not show an ex post facto violation.

Denny Propp, then an Iowa state prisoner, brought a petition for post-conviction relief in state district court alleging that the application of Iowa Code § 903A.2, as amended in 2001 and 2005, was an unconstitutional ex post facto violation. He claimed that the amended statute extended his term of imprisonment by causing him to lose sentence-reducing good time credits he would have been eligible to receive under the statute in effect at the time his crime was committed.

Propp was convicted of a sex offense. At the time he committed his crime, § 903A.2 provided that he and other prisoners with category "A" sentences were eligible for one day of sentence reduction via good conduct time for each day of good behavior, plus an additional five days per month for participation in an employment, treat-

ment or educational program.

Effective January 1, 2001, § 903A.2 was amended to require category "A" prisoners to both participate in programs and display good conduct to receive up to one and two-tenths days of good conduct time per day of imprisonment. As of July 1, 2005, § 903A.2 was further amended to require sex offenders to participate in and complete a sex offender treatment program (SOTP) to be eligible for any good conduct time credits.

Propp was informed that he had to participate in an SOTP to get good conduct time. He started the program, but was removed for misconduct. The Iowa Department of Corrections (IDOC) stopped giving Propp good conduct time. He was later reinstated in the SOTP, but by then had lost enough good conduct time credits to move his tentative discharge date back by four months. He sought post-conviction relief that challenged the loss of his good conduct time.

The district court agreed with Propp's arguments and ordered the IDOC to reinstate his original tentative discharge date. The IDOC filed a petition for a writ of certiorari with the Iowa Supreme Court.

The Supreme Court held that the question was controlled by *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960 (1981), in which the U.S. Supreme Court decided that a law violates the ex post facto clause if it is retrospective and has a

disadvantageous effect. More recent cases have clarified that the disadvantage must amount to an increase in punishment, which includes lengthening the amount of time spent in prison. In this case, the amendments to § 903A.2 were clearly retrospective because were being applied to prisoners whose crimes occurred before the amendments were enacted. The amended statute also clearly increased punishment by extending the amount of time those prisoners spent in prison due to their inability to earn good conduct time credits.

Propp could not have known of the future additional requirements to earn good conduct time when he committed his offense. He could have earned one day of credit merely for displaying good conduct under the old law. According to the new law, he must participate in SOTP programming to earn any good time credits. The Court held that this violated the ex post facto clauses of both the state and U.S. constitutions; therefore, the state's writ of certiorari was annulled. See: *State v. Iowa District Court for Henry County*, 759 N.W.2d 793 (Iowa 2009).

The Court's decision related specifically to prisoners convicted prior to the

2001 amendment to the statute. By January 30, 2009, Iowa had released all 15 sex offenders convicted before 2001 who had challenged the amendments to § 903A.2, based upon the Supreme Court's ruling.

However, in a June 19, 2009 decision, the Court addressed a more narrow question in a case involving a related issue. That case involved Jordan Holm, an Iowa prisoner who filed a certiorari action challenging the district court's denial of post-conviction relief when he had been convicted after 2001 and was challenging the application of the 2005 amendment to § 903A.2. The Court held that for prisoners who committed crimes after the 2001 amendment to the good conduct time statute but before the 2005 amendment, the latter amendment did not violate ex post facto provisions.

Holm had refused to participate in an SOTP because he maintained his innocence of the crime for which he was convicted (third-degree sexual assault). A note in his file stated that he was "denying guilt to his crime and will not be provided SOTP due to this." Regardless, and although § 903A.2 as amended in 2005 was applied retroactively to Holm, the Supreme Court found that the "2005

amendment was merely a clarification of the 2001 amendment and did not create any new obligations or duties," and therefore did not constitute punishment.

Thus, as applied to Holm, the 2005 amendment to § 903A.2 was not an ex post facto violation. The Court also found that he had received "sufficient due process," as he was afforded hearings when he refused to participate in the SOTP program. See: *Holm v. Iowa District Court*, 767 N.W.2d 409 (Iowa 2009). ■

Additional source: *Associated Press*

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New York Politicians Want to Re-Evaluate Civil Confinement Release Law

by Matt Clarke

Two years ago New York enacted the Sex Offender Management and Treatment Act, which lets a jury release a civilly-committed sex offender from confinement if the state fails to provide sufficient evidence of a mental abnormality. Sex offenders who are released by a jury are placed under “civil management,” which requires “strict and intensive supervision.” Since the law took effect, 65 offenders have been placed under civil management. Of those, 29 have violated the conditions of their release; 10 were charged with sex-related offenses or violations, 5 of which involved no physical contact (e.g., possession of pornography).

Recent incidents involving two sex offenders under civil management have resulted in calls to re-evaluate the provision of the law that allows a jury to release offenders from civil confinement. The first sex offender released by a jury, Douglas Junco, was arrested in 2008 and charged with kidnapping and raping a woman in Georgia. Another offender, Ken-Tweal Catts, was released from civil confinement by a jury in September 2008. He was arrested for rape on May 27, 2009, but snatched a pistol from a Dutchess County detective, shot the detective in the head and then fatally shot himself following a three-hour standoff. The detective was only grazed by the bullet and survived.

These incidents caused New York politicians to question whether a jury should have the ability to decide whether to release an offender from civil confinement. “The question is: what does the jury really know?” said Assemblyman Joel Miller. “Judges normally do that and it’s only when we play this game and people claim mental illness that we fool the jury. This isn’t supposed to be a game. People with competence should make the decisions, not turn it over to lay people.”

What Miller’s confusing statement appears to say is that it is just fine for juries to listen to expert testimony in criminal cases and then make decisions about a defendant’s guilt or innocence, which can result in up to a life sentence. It’s also OK for a jury to hear evidence to determine whether sex offenders should be civilly committed in the first place. But when a

jury verdict could lead to the release of a civilly-confined sex offender, then only “experts” should make that decision. This is intellectually dishonest at best and deliberately undermines the basic right to a jury trial at worst.

Other lawmakers have been more honest about their goals: they don’t want civilly committed sex offenders released. Ever. Period. “There is no hole dark or deep enough for these sick and twisted predators,” said Assemblyman Greg Ball, who wants the most serious offenders confined for the rest of their lives.

“The reason we passed the civil confinement law is because there are some people you need to keep in confinement,” observed state Senator Dale Volker.

Consider that the reason we have a jury system in the United States is to prevent the historically-common abuse of the government’s power to incarcerate its citizens. If the government alone decides when it will impose civil confinement, and government experts determine when a civilly committed offender can be released, then where are the checks and balances in that system? Clearly, the role of a jury in release decisions is a necessary component of a fair and balanced civil commitment process.

It is doubtful, however, that New York politicians will see it that way. ■

Sources: *Associated Press*, www.newsday.com

Seventh Circuit Reverses Dismissal of 8th Amendment and FTCA Medical Claims; Case Settles on Remand for \$20,000

The U.S. Court of Appeals for the Seventh Circuit has reversed, for the second time, a grant of summary judgment to two Bureau of Prisons (BOP) medical employees and the United States in a *Bivens* and Federal Tort Claims Act (FTCA) suit.

Diego Gil, a prisoner at the Federal Correctional Institution (FCI) in Oxford, Wisconsin, filed suit against Dr. James Reed, the Clinical Director at FCI Oxford, James Penaflor, a nurse, and the United States after he was denied treatment and medication for a rectal prolapse – an unpleasant condition in which the rectal wall slides out of place and protrudes from the anus, usually during bowel movements.

Gil first underwent surgery for the prolapse in March 1998. After the surgery, Gil’s incisions became infected and resulted in a “golf-ball-sized bulge” that had to be drained and lanced. In addition, Gil was prescribed antibiotics. However, when he attempted to obtain the antibiotics from nurse Penaflor during “pill line,” Penaflor angrily refused. The next day another medical staff member provided the antibiotics to Gil, and he felt better after taking them.

Nonetheless, Gil’s condition contin-

ued to deteriorate. His rectum prolapsed again and medical staff denied his requests to see a colorectal surgeon for a year and a half. He finally saw Dr. Michael Kim, a specialist, who performed another rectal prolapse surgery. Following surgery, Dr. Kim prescribed Milk of Magnesia, Colace, Metamucil for constipation, and Vicodin for pain. Dr. Kim specifically told Gil that he should not take any Tylenol III because it caused constipation and would worsen his condition.

Gil was given everything Dr. Kim ordered except for the Vicodin. Vicodin is not on the BOP’s national formulary, and Tylenol III was substituted instead.

The following day Gil saw Dr. James Reed. Gil told Reed that Dr. Kim had warned him not to take Tylenol III. Dr. Reed prescribed Tylenol III anyway and cancelled Gil’s prescriptions for Metamucil and Milk of Magnesia, even though he knew Gil was constipated. Gil saw Dr. Reed three days later complaining, unsurprisingly, that he was constipated and had not had a bowel movement since the surgery five days earlier. Reed agreed to reinstate Gil’s prescription for Milk of Magnesia, but once again prescribed Tylenol III in spite of Dr. Kim’s warning.

In May 2000, Gil saw Dr. Kim again. Dr. Kim was angry with Reed for not following his instructions. Dr. Kim rewrote his prescriptions – including one for Vicodin – and included a note requesting that prison staff follow his instructions. Reed did not listen and prescribed Tylenol III for a third time.

Gil then sued Reed, Penaflor and the United States, alleging violations of his Eighth Amendment rights and the FTCA. The district court, however, granted summary judgment to the defendants. The court held that (1) Gil could not succeed on his FTCA claims because he failed to obtain an expert witness as required by Wisconsin law; (2) Gil was not harmed by Penaflor's failure to give him antibiotics; and (3) Dr. Reed's decision not to follow Dr. Kim's instructions was merely a difference of opinion. Gil appealed.

The Seventh Circuit reversed. The appellate court held that Gil could rely on evidence from his treating physicians, in lieu of an expert witness, to show that the standard of care was violated. The Court of Appeals also concluded that Penaflor's angry refusal to provide the antibiotics to Gil created a genuine issue of material fact as to his state of mind, and that genuine

issues of material fact remained in dispute regarding whether Dr. Reed's actions were proper. See: *Gil v. Reed*, 381 F.3d 649 (7th Cir. 2004) [*PLN*, Nov. 2005, p.40].

On remand from the Seventh Circuit, the district court again entered summary judgment for the defendants. With the record now supplemented with declarations from Reed and Penaflor, and deposition testimony from Dr. Kim and Dr. Bruce Harms, a colorectal surgeon, the district court reiterated its original conclusion that Gil was not harmed by Penaflor's failure to provide him with antibiotics and that Reed's failure to follow Dr. Kim's instructions was nothing more than a difference of opinion. Gil again appealed and the Seventh Circuit once again reversed the lower court.

Turning first to Penaflor's refusal to give Gil his antibiotics, the Seventh Circuit restated what it had mentioned in its earlier ruling in this case: "We need not check our common sense at the door" in analyzing Gil's injury, and a "delay in providing antibiotics will necessarily delay the curing of an infection or possibly lead to its spread." Further, the Court of Appeals noted, the testimony of the defendants' expert, Dr. Harms, actually supported Gil's

claim that an antibiotic was necessary for his post-surgical recovery.

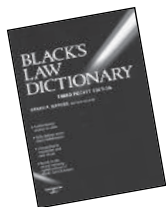
As for the district court's conclusion that Reed's actions had amounted to no more than a difference of opinion with Dr. Kim, the appellate court again found genuine issues of material fact in dispute. Accordingly, the Seventh Circuit vacated the district court's grant of summary judgment in favor of the defendants and remanded the case for trial on all of Gil's claims. See: *Gil v. Reed*, 535 F.3d 551 (7th Cir. 2008).

Gil was released from prison after the case was returned to the district court and deported to Columbia because he was a foreign national – which posed difficulties in terms of having him return to the U.S. for trial. The parties agreed to settle the case in May 2009 for \$20,000. Gil was represented by Kendall W. Harrison with the firm of Godfrey & Kahn S.C., who was appointed by the court. ■

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New Hampshire City Ordinance Restricting Sex Offender Residency Found Unconstitutional

On July 30, 2009, a New Hampshire state district court held that a city ordinance restricting where sex offenders could live violated the Equal Protection Clause of the New Hampshire Constitution.

Richard Jennings, a resident of Dover, was charged with violating city ordinance 131-20, which prohibited a person who was required to register for life as a sex offender from living within 2,500 feet of the property line of a school or day care center. Violators were subject to a fine up to \$1,000.

In Dover District Court, Jennings argued that the ordinance violated his equal protection rights under the New Hampshire Constitution. He presented an expert witness, Carolyn Lucet, who treated both sex offenders and children who were victims of sex crimes. Lucet testified that numerous studies of ordinances which limit where sex offenders can live have shown that such restrictions are not effective in preventing sex offenders from re-offending. In fact, they may actually increase the likelihood of recidivism by cutting sex offenders off from friends and relatives who are willing to support them. Lucet also noted that 93-95% of sexual assaults against children are committed by someone the child knows, not a stranger. Thus, "the ordinance did not address the 93-95% of situations involving sexual assaults against children," the Court observed.

City Councilman Matthew Mayberry testified that he came up with the idea of an ordinance to ban sex offenders from living in Dover to prevent them from sexually abusing children. When Mayberry discovered that such an approach would be unconstitutional, he, the city's attorney and the city's police chief researched ordinances that courts had upheld in the face of due process challenges, intending to enact an ordinance as restrictive as legally possible. They did not consult any experts as to the potential effectiveness of the ordinance.

Mayberry "explained to the Court that he did not need an expert because no one could tell him that a sex offender was ever rehabilitated as he felt that once someone was a sex offender they would always continue to be a sex offender." Mayberry said he considered this to be a

matter of common sense.

The city council passed the ordinance unanimously, having heard only testimony from the police chief. The council members believed the ordinance was constitutional because areas remained within the city where sex offenders could still live, including a trailer park, various apartment complexes and several hundred homes valued at less than \$200,000.

Applying the intermediate scrutiny test for an equal protection challenge to an ordinance that affects the right to use and enjoy property, the district court held that the City of Dover failed to show that the ordinance was substantially related

to an important governmental objective. "There is no question but that the State's interest in protecting minors is 'compelling.' However, the State has not produced any evidence showing a causal connection between the [sex offender] residency restrictions and the protection of minors," the Court wrote. Unexamined "common sense" was simply insufficient.

Therefore, ordinance 131-20 violated Jennings' equal protection rights, and the charges against him were dismissed. See: *State v. Jennings*, County of Strafford, Dover District Court, Docket No. 7679. The ruling is available on *PLN's* website. ▀

PLN Sues Texas Dept. of Criminal Justice Over Censorship; Court Upholds Rights of Book Distributors

by Alex Friedmann

On November 4, 2009, *Prison Legal News* filed suit in U.S. District Court for the Southern District of Texas against Brad Livingston, Executive Director of the Texas Dept. of Criminal Justice (TDCJ), and other TDCJ officials.

According to *PLN's* complaint, the TDCJ has unlawfully censored books sent to Texas state prisoners. One of those books was *Women Behind Bars: The Crisis of Women in the U.S. Prison System*, by Silja J.A. Talvi. Ms. Talvi is an accomplished journalist and award-winning author, and has served as a *PLN* board member. Her book on incarcerated women has been described by one reviewer as a "comprehensive and passionately argued indictment of the inhumane treatment of female prisoners ... the sort of shocking expose too seldom seen in these media days of so much celebrity fluff." Two other Texas prisoners also were not allowed to receive *Women Behind Bars* after placing book orders with *PLN*.

PLN contends that the censorship of *Women Behind Bars*, which was upheld by senior prison officials, was improper. Further, the TDCJ did not notify *PLN* of the censorship, which would have provided *PLN* an opportunity to respond and contest that decision.

TDCJ staff also censored another

book ordered from *PLN* – *The Perpetual Prisoner Machine: How America Profits from Crime*, by Joel Dyer – on the basis that the book mentions "rape." In fact, as *PLN* explained in its federal complaint, *Perpetual Prisoner Machine* "quotes from a 1968 Philadelphia District Attorney's Office investigation into sexual assault in prison, and describes crimes committed against prisoners." Again, the TDCJ did not provide notice of this censorship decision, in violation of *PLN's* due process rights.

"It's a sad commentary when government officials censor books sent to prisoners – particularly books that deal with prisoners' rights and conditions in our nation's prisons," stated *PLN* editor Paul Wright. "Apparently, the TDCJ prefers that prisoners remain uninformed about issues that directly affect them. We believe this is a poor rationale for censorship."

"For decades, Texas prisoners have had the right to read most books while they are incarcerated," added Scott Medlock, Director of the Texas Civil Rights Project's Prisoners' Rights Program. "If there is anything everyone should be able to agree on, it's that encouraging prisoners to read is a good thing."

The TDCJ filed motions to change venue and to dismiss, claiming qualified immunity, expiration of the statute of

limitations, and arguing that *PLN* lacked standing to bring the suit because it only distributed – not published – the censored books at issue. On December 17, 2009, the district court issued a detailed order denying the motion to change venue, finding that the defendants had not met their burden of demonstrating why public or private factors favored moving the case to a “more convenient” forum.

The court also denied the TDCJ’s motion to dismiss. As to the statute of limitations, while *Perpetual Prisoner Machine* had been added to the TDCJ’s banned book list as early as 2000, *PLN* did not receive notice of such censorship or suffer injury until a *PLN* book order was rejected by the TDCJ in March 2009. Thus, the statute of limitations defense was inapplicable.

Significantly, the court further found that the First Amendment and due process rights afforded to publishers extend to book distributors such as *PLN*. “The Supreme Court has repeatedly recognized the First Amendment rights of book distributors in a variety of circumstances, which exist independently of the rights of publishers or readers,” the court wrote. “Although no case has directly addressed the First Amendment rights of distributors who seek to send books or other publications to prisoners, the cases discussed above firmly establish that First Amendment protections apply not only to readers and publishers, but to book distributors as well, and may be invoked when a distributor seeks to challenge a governmental action that interferes with its constitutional rights.” The court therefore rejected the TDCJ’s motion to dismiss based on standing.

The district court reserved judgment on the issue of qualified immunity, and requested additional briefing. *PLN* is ably

represented by Scott Medlock with the Texas Civil Rights Project and by HRDC general counsel Daniel E. Manville. See:

Prison Legal News v. Livingston, U.S. District Court (S.D. Texas, Corpus Christi Division), Case No. 2:09-cv-00296. ■


Oneida County, NY Jail Suicide Litigation Settled for \$225,000

In May 2008 the County of Oneida agreed to pay \$100,000, and CNY Services agreed to pay \$125,000, in settlement of a wrongful death claim brought by the parents of a 17-year-old detainee who committed suicide in the Oneida County Jail one month after his detention.

Cail Williamson, a resident of Boonville, father of two and student at Adirondack High School, was jailed on August 10, 2003 on larceny and felony burglary charges. He had other pending felony charges in Lewis County. In Septem-

ber 2003, he hung himself in his jail cell. Ronald Williamson sued on behalf of Cail and his family, claiming negligence on the part of both the jail (Oneida County) and its contractor, CNY Services, which provides psychological assessments of newly admitted prisoners. The matter had been scheduled for trial on May 12, 2008. See: *Estate of Cail Williamson v. Oneida County* and *Ronald Williamson v. County of Oneida*, Oneida County Superior Court. ■

Other source: *Rome Sentinel*.



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Los Angeles County Jail Agrees To Pay \$900,000 to Settle Lawsuit over Inadequate Medical Care

Los Angeles County has agreed to pay \$900,000 to a prisoner who lost his foot after staff at the Los Angeles County Sheriff's Department (LASD) in California delayed processing a culture test that later showed the prisoner had a serious infection.

Franklin Silva was arrested on March 7, 2005, by the LASD. On March 18, 2005, LASD staff took a culture of Silva's right foot. The test results showed Silva had ne-

crotizing fasciitis. However, the test results did not come in until March 20, 2005, two days after they were taken.

Silva was subsequently taken to the hospital and received care for his infection. However the treatments proved ineffective, and the infection spread through Silva's body, injuring his right foot and right arm. The injuries were so severe, Silva's right foot had to be amputated.

Silva sued LA County alleging negli-

gence and violations of his civil rights. Silva argued that LASD staff took too long in processing the results from his culture.

LA County agreed to settle the case for \$900,000. In addition, as a result of the settlement, LA County instituted a policy requiring timely testing and review of all test results. The Plaintiff was represented by Neil J. Fraser, Esq. See: *Silva v. County of Los Angeles*, Los Angeles Superior Court, Case No. BC 349175. ■

DHS Ordered to Respond to Petition Seeking National Standards at Immigration Detention Facilities

by Brandon Sample

Immigration rights advocates won a short-lived victory in June 2009, when a U.S. District Court in New York ordered the Department of Homeland Security (DHS) to respond to a petition for rulemaking that requested the adoption of uniform national standards for conditions at immigration detention facilities.

The petition, drafted by Families for Freedom and the National Immigration Project, a component of the National Lawyer's Guild, was filed in 2007 after the treatment of immigration detainees by a hodgepodge of state and local agencies and private contractors "had led to inconsistent conditions of confinement, substandard and abusive detention conditions, and widespread detainee mistreatment." Families for Freedom and the National Immigration Project filed suit in 2008 after DHS failed to respond to their petition for rulemaking.

DHS has long known that there are serious problems with its detention system. In 1998, the Immigration and Naturalization Service, predecessor to the Immigration and Customs Enforcement agency (ICE), adopted national detention standards after reports of detainee mistreatment. However, the standards proved ineffective because they did not apply to state and local facilities – where most of the problems were occurring. In 2000, the standards were extended to state and local jails, but that also proved ineffectual as facilities which held detainees 72 hours or less were exempt.

In 2003, ICE adopted non-binding guidelines for all of its detention centers. Once again, however, this did not remedy

the problems. In fact, the deficiencies at immigration detention facilities only got worse. Without binding national standards that included an enforcement mechanism, state and local agencies and private contractors simply could not be trusted to treat immigrant detainees appropriately or humanely.

A 2006 report by the DHS Office of the Inspector General confirmed many of the existing problems. According to the report, officials at a number of detention facilities did not respond to non-emergency requests for medical care within DHS's guidelines. Other detainees with serious injuries were left unattended, while some died as a result of indifference to their medical needs.

Thus, Families for Freedom and the National Immigration Project filed a petition for rulemaking to establish national standards, and then filed suit after DHS ignored their request. On June 25, 2009, after DHS failed to respond to the petition for over two-and-a-half years, U.S. District Court Judge Denny Chin denied DHS's motion to dismiss the lawsuit and ordered a response to the petition, finding the agency's failure to provide an answer "unreasonable." DHS responded within thirty days of Judge Chin's order, but not with the answer that the plaintiffs wanted. DHS denied their petition for rulemaking to create national standards for immigration detention facilities.

Following the election of Barack Obama, immigration advocates felt they had an ally in the White House. The denial of the petition by DHS left many wondering about the priorities of

the new administration. DHS's decision "disregards the plight of thousands of immigration detainees," observed Paromita Shah, associate director of the National Immigration Project. "The department has demonstrated a disturbing commitment to policies that have cost dozens of lives."

In its decision rejecting the plaintiffs' petition, DHS contended "that rule-making would be laborious, time-consuming and less flexible," wrote Jane Holl Lute, the agency's deputy secretary. Further, DHS argued that its switch to "performance-based standards" monitored by private contractors would "provide adequately for both quality control and accountability."

Advocates disputed the effectiveness of "performance based standards," noting that "the groups that ICE commonly contracts with are staffed by former ICE employees and former corrections officers who have a vested interest in pleasing ICE," said Chuck Roth, director of litigation for the Heartland Alliance's Immigration Justice Center. "We haven't seen them take the useful watchdog role," he said.

In July 2009, the National Immigration Law Center issued a comprehensive report on policy violations at detention facilities, based on information obtained through the Freedom of Information Act. Earlier, the U.S. Government Accounting Office had found problems with telephone access, food service, medical care and use of force at detention centers in a July 2007 report. [See: *PLN*, Oct. 2007, p.28]. Beyond such deficiencies, ICE itself has been less than forthcoming about problems in

immigration detention facilities, including detainee deaths. [See: *PLN*, Nov. 2009, p.26; Feb. 2009, p.10].

"This whole detention system that has been created is a human rights nightmare," stated Mary Meg McCarthy, executive director of the National Immigrant Justice Center. "The past administration created this, and now we need to dismantle it."

The battle for improved conditions and enforceable standards at immigration detention facilities continues. Families for Freedom and the National Immigration Project were represented in their lawsuit by Michael Wishnie, Anand Balakrishnan, Jeffrey Kahn and Lindsay Kahn of the Jerome N. Frank Legal Services Organization.

Following the district court's order directing DHS to respond to the plaintiffs' petition, the parties agreed to settle the issue of attorney fees. On October 1, 2009, DHS agreed to pay \$46,000 in fees to the Jerome N. Frank Legal Services Organization of Yale Law School. See: *Families for Freedom v. Napolitano*, 628 F.Supp.2d 535 (S.D.N.Y. 2009). ■

Additional sources: www.nationalimmigrationproject.org, *New York Times*

\$1.31 Million Awarded to California Man Wrongly Jailed on Murder Charge

On February 25, 2009, a California federal jury awarded \$1,310,000 to a man who spent eight months in jail facing a murder charge that was eventually dismissed.

Shortly after Christopher Shahnazari was shot in Glendale, California on November 1, 2005, he examined a photographic lineup and said Edmond Ovasapyan, 28, looked like his assailant. Based on that identification, Glendale police detective Arthur Frank and Lt. Ian Grimes arrested Ovasapyan and booked him into the Los Angeles County Jail. When Shahnazari died, Ovasapyan was charged with murder.

Eight months after his arrest, the charges against Ovasapyan were dropped and he was released. He then filed a civil rights action claiming malicious prosecution, alleging that Frank and Grimes had ignored exculpatory evidence—specifically his alibi witness. Ovasapyan's attorney obtained his cell phone records, which indicated he was not in the area at the time Shahnazari was shot.

The case went to trial and the jury found for Ovasapyan, awarding him compensatory damages of \$1 million for past pain and suffering and \$160,000 in economic damages related to attorney fees, investigatory fees and costs in the underlying criminal case. The jury also assessed punitive damages of \$75,000 each against Frank and Grimes.

On May 5, 2009, the district court entered an amended judgment awarding Ovasapyan \$271,495.57 in attorney fees and \$5,543.85 in costs. The city has since appealed the jury verdict. Ovasapyan was represented by Los Angeles attorneys Pat Harris and Shelley L. Kaufman. See: *Ovasapyan v. City of Glendale*, U.S.D.C. (C.D. Cal.), Case No. 2:08-cv-00194-CAS-JWJ. ■

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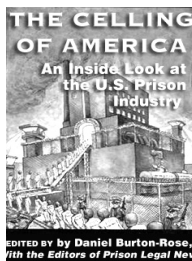
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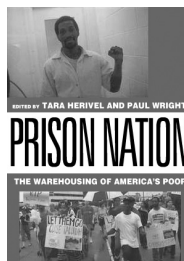
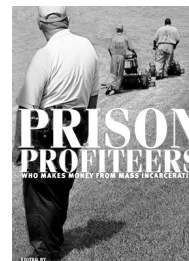
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China Taking Steps to Reduce Number of Executions

In July, 2009, Zhang Jun, vice president of China's Supreme People's Court, said that China was taking steps to reduce the number of executions.

Despite the televising of many executions as a form of public intimidation, the absolute number of executions in China remains a state secret. Nonetheless, international human rights groups estimate that between 1,700 and 5,000 Chinese prisoners were executed in 2008. Death penalty crimes include corruption, espionage and drug trafficking.

Possibly in response to the international outcry over the large number of executions, two years ago the Supreme Court was given the right to review death penalty cases. It overturned about 10% of them in 2008.

According to Zhang, new legislation will soon be enacted to cap the number of death penalty sentences and further restrict the use of capital punishment. This will include an increase in the use of the "death penalty with reprieve" sentences which allows initial commutation to life in prison and possible later commutation to 20 years or even less in consideration of good behavior. According to the government, the death penalty will now only be used for heinous crimes with "grave social consequences."

"Judicial departments should use the least number of death sentences as possible, and death penalties should not be given to those having a reason not to be executed," said Zhang.

Some prisoners had already had their

death sentences reduced if they expressed remorse or agreed to pay victims restitution.

Critics call the new policy a step in the right direction, but decry it as too ambiguous. They have adopted a "wait and see" attitude on whether it will result in actual reductions in executions.

"It is a small incremental step, but a step in the right direction," said China National Association of International Studies director Victor Gao. "While other countries have abolished the death penalty because they think it is cruel and unusual punishment, China has decided it wants to keep the death penalty."

The same could be said of the United States. ■

Source: www.cnn.com

Discovery Disputes in Suit Over Pennsylvania Jail MRSA Deaths

by Matt Clarke

A Pennsylvania federal court has ordered medical personnel to answer deposition questions in a case involving the deaths of two prisoners due to MRSA at the Allegheny County jail. The court also appointed a special master and ordered the parties to pay the master's fees as a result of protracted discovery disputes.

Ella Mae Howard, administratrix of the estate of her daughter, Valeria Whetsall, filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986, plus wrongful death and negligence claims, after Whetsall and Amy Lynnn Sartori, who were incarcerated at the Allegheny County jail, died due to Methicillin-resistant *Staphylococcus aureus* (MRSA) infections. Howard also represents the interests of Sartori's heirs, Edward and Dianne Sartori.

The plaintiffs sought to depose Bruce Dixon, chairman of Allegheny Correctional Health Services (ACHS); ACHS supervisor Michael Patterson, Sr.; and Lucille Aiken, the physician who treated Sartori at the jail. Defense counsel objected to many of the deposition questions and the plaintiffs filed a motion to compel responses.

At his deposition, Dixon was asked whether, prior to Whetsall and Sartori's deaths, he had asked the Allegheny County legal department if he could release information about infectious diseases

to guards and/or prisoners at the jail according to the requirements of the Health Insurance Portability and Accountability Act (HIPAA). The defendants objected, claiming attorney-client privilege.

The district court held that attorney-client privilege covers the content of communications between a lawyer and client, not the fact that such communications were made. The court ordered Dixon to re-appear for a deposition and answer the question. The court ruled that Dixon was not required to answer a hypothetical question as to whether it would be a violation of policy for ACHS staff to make decisions regarding prisoners' medical care, since he was a fact witness and not an expert witness.

Plaintiff's counsel also deposed Patterson, asking whether standing water in the jail could lead to MRSA infections, and posing various questions about what certain entries on Sartori's medical chart meant and whether he, as an ACHS supervisor, had investigated the medical care that Sartori received. Defense counsel objected. The district court held that the questions about standing water and medical chart entries called for an expert opinion and Patterson had only been offered as a fact witness. Therefore, he did not have to answer those questions. However, the inquiry about whether he had investigated Sartori's medical care was factual, and Patterson was ordered

to re-appear at a deposition to supply an answer.

When the plaintiffs deposed Aiken, she was asked whether she thought there was sufficient medical staff at the jail to assist her in her duties, and whether a lack of entries in Sartori's medical chart for two hours while she was dying was unexpected. Defense counsel again objected. The court ruled that these were fact-based questions and ordered Aiken to re-appear for a deposition to provide answers. The court did not require Aiken to respond to other questions regarding Sartori's medical treatment because, like Dixon and Patterson, she was only presented as a fact witness and not an expert witness, thus was not required to answer hypothetical or expert questions.

The court denied the plaintiffs' request for costs for compelling discovery, and ordered the new depositions to be scheduled and concluded within 30 days. However, the plaintiffs continued to file motions to compel due to the defendants' continued failure to respond to discovery requests, including requests for production of documents. As a result, on Sept. 26, 2008, the district court appointed Arthur H. Stroyd as special master to advise the parties in regard to disputed discovery issues related to objections over attorney-client privilege and work product doctrine.

Following the entry of Stroyd's

report and recommendation, the court ordered the parties to pay his fees. The court assessed most of the costs against the defendants, as they “failed to provide this Court with a reason why they should not bear costs that were the direct result of their failure to provide Mr. Stroyd with the information necessary to complete his services.” On May 19, 2009, the plaintiffs were ordered to pay \$2,818.65 and the

defendants were ordered to pay \$6,718.65 in fees.

The defendants failed to make their payment to Stroyd in a timely manner, and were ordered by the court on Sept. 15, 2009 to appear and “show good cause why they should not be held in contempt of Court.” At a hearing on Sept. 21, Stanley A. Winikof, counsel for the defendants, said the bill had been sent to a claims

adjuster and should be paid “by early next week.”

This case remains pending, following resolution of the discovery disputes. See: *Howard v. Rustin*, U.S.D.C. (W.D. Penn.), Case No. 2:06-cv-00200-NBF; 2008 U.S. Dist. LEXIS 36101. *PLN* recently reported on lawsuits against other Pennsylvania correctional facilities involving MRSA infections. [See: *PLN*, Nov. 2009, p.1].

Federal Court Awards \$1.47 Million in Attorney Fees and Costs against Sheriff Arpaio

Last May, *PLN* reported that a U.S. District Court in Arizona had found that jails in Maricopa County, managed by Sheriff Joe Arpaio, continued to violate the civil rights of pretrial detainees. That ruling came in a long-standing class-action lawsuit that alleged inadequate medical, mental health and dental care, plus inhumane and dangerous conditions of confinement. [See: *PLN*, May 2009, p.28].

On July 1, 2009, the district court awarded a total of \$1,464,713.47 in attorney fees and costs to the plaintiffs in the class-action suit.

The court had previously granted the plaintiffs’ motion for \$1,239,491.63 in attorney fees and \$123,221.77 in non-taxable costs for work performed prior to October 22, 2008. However, when the plaintiffs filed for additional fees of \$97,029.55 and costs of \$4,970.52 for work completed between December 5, 2008 and April 30, 2009, the defendants raised objections over the hourly rate and other issues.

The district court held that the hourly rate was governed by the PLRA cap of 150% of the rate established under 18 U.S.C. § 3006A. The plaintiffs showed that the § 3006A rate was \$113 prior to January 1, 2009 and \$118 effective January 1, 2009. Thus, the capped attorney fee rate was \$169.50 for work performed before January 1, 2009 and \$177 for work performed on or after that date.

The court found that the plaintiffs’ billed hours and reasons for the billing were reasonable. Except for two minor errors that were corrected after the defendants filed objections, the district court granted all of the requested attorney fees and costs plus interest for work performed prior to October 22, 2008 until the fees and costs were paid. The total award was \$1,464,713.47. The plaintiffs were represented by the ACLU of Arizona, the ACLU National Prison Project and the law firm of Osborn Maledon P.A. See: *Graves v. Arpaio*, 633 F.Supp.2d 834 (D. Ariz. 2009).

On July 30, 2009, the court entered a corrected judgment totaling \$1,472,318.00 in attorney fees and costs, which included work performed up to July 1. The parties later entered into a settlement agreement in which the defendants voluntarily dismissed several appeals pending before the Ninth Circuit related to the fees and costs award; in exchange, they agreed to pay a reduced amount of \$1,221,020.00. The plaintiffs filed a satisfaction of judgment on October 20, 2009, acknowledging payment by the defendants.

As noted previously in *PLN*, Sheriff Arpaio is one of the nation’s most expensive sheriffs, having paid millions in jury awards, settlements and attorney fees in a number of lawsuits. [See: *PLN*, Oct. 2009, p.32; Aug. 2009, p.38; March 2009, p.34].

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Starting Out: The Complete Reentry Book, **by William Foster and Carl Horn, 446 pp, \$22.95**

by Matt Clarke

Ideally, our schools and parents teach us all of the things we need to know to function as healthy and productive adults. Obviously, this is not always the case. Schools may focus more on academics than practical knowledge for living; or they may be distracted from their educational mission by social, political or financial problems. Parents may not realize what exactly they need to pass on to their kids, may not know all of the information themselves or might be incapable of educating their children due to drug and/or alcohol addictions. Furthermore, the person needing the information may have skipped classes or dropped out of school and might be estranged from parents and possibly incarcerated from a young age. Prisoners incarcerated for a long time may have known how to deal with the responsibilities of being a free citizen before their incarceration, but might have forgotten some of them or had their coping skills rendered quaint by changes in the way society functions. All of those possibilities and more are what make *Starting Out! The Complete Re-Entry Handbook* a very useful resource for prisoners re-entering free world society.

The 446-page book addresses a huge number of issues and life decisions facing anyone being released from prison. The topics range from obtaining identification documents and finding housing through landing a job; restoring family relationships; finding a doctor; determining what health, life, homeowners or renters insurance you need; all the way to budgeting money; understanding payroll deductions; opening a checking or savings account and investing money. Included in the discussion of these topics are issues specifically addressing the needs of former prisoners such as “Should I reveal my criminal history to a prospective employer on a job application and, if so, how should I present it.”

The book goes beyond the rudimentary need to survive in the free world, seeking to instill a healthy lifestyle in the former prisoners. It does this by addressing topics such as proper nutrition and health, exercise, finding a mentor, shopping, proper use of credit, consumerism, home and workplace safety and environmental conservation.

The book’s stated objective is: “building life management skills alongside academic and occupational skills, then applying those skills to many practical issues, from educational choices to occupational possibilities, from health to nutrition to housing and volunteering.” To accomplish this goal, it “catalogued more than 80 different life decision areas into 20 topics, beginning with education and training, followed by such areas as employment, insurance, investing, taxes, housing, and emergency preparedness.” Most impressive is the book’s marshalling of additional resources for each topic discussed. At the end of each topic is a section called “Dig-

ging Deeper” which lists websites run by the government or other institutions containing extensive information and advice on the topic. For instance, on the topic of resume writing, the section refers the reader to a website run by Northeastern University, another by the College Board and a third by a CareerOneStop. Additionally, the book has a supporting website, www.startingout.com, containing specific information for each of the states, including a list of employers willing to hire former prisoners. Each book contains a user code allowing free access to that resource. *Starting Out* is available from the PLN Book Store for \$22.95. ■

Massachusetts Court of Appeals Reinstates Prisoner’s Dental Negligence Suit

Andrew W. Kilburn, a Massachusetts state prisoner, filed suit in state superior court alleging negligence and violation of the Eighth Amendment by Department of Correction (DOC) officials and medical personnel employed by Correctional Medical Services (CMS) and University of Massachusetts Correctional Health (UMCH). Kilburn claimed that the defendants had failed to properly treat a small cavity for over three years until the tooth had to be pulled. He also challenged a DOC policy that required him to use “the world’s smallest toothbrush,” which would not reach his back teeth. A series of three judges issued orders which ultimately resulted in a summary judgment ruling in favor of the defendants. Kilburn appealed.

The Court of Appeals held that the toothbrush issue was moot because the DOC had since changed its policy to allow the purchase of one larger toothbrush every 90 days. The appellate court also held that a medical malpractice tribunal’s finding of insufficient proof of liability against CMS dentist Anthony Orlatunji required that he be dismissed as a defendant. However, the court’s findings did not extend to former CMS dentist Steven Black, who had failed to answer Kilburn’s complaint, or to CMS as a company.

The DOC claimed immunity from liability because it had delegated its dental

responsibilities to CMS. However, this issue was not sufficiently developed to justify summary judgment, since neither the amount of control the DOC had over CMS and UMCH nor the degree of independent judgment allowed the contract dentists had been shown. Noting that the DOC had argued in other cases that a prisoner could not sue as a third-party beneficiary of the contract between the DOC and CMS, the Court of Appeals observed “that the DOC should not be able to have it both ways: immunity from liability based on an inmate’s lack of standing to sue as an intended beneficiary of a contract, and also, at the same time, immunity from liability by delegating its dental responsibilities to an independent medical provider.”

Therefore, the Court of Appeals vacated the portion of the judgment that dismissed Kilburn’s Eighth Amendment claims against Black and any other defendant who could be held liable as Black’s supervisor. The appellate court also vacated the judgment to the extent that it dismissed negligence claims against the DOC defendants, Black and the UMCH and CMS defendants – except for Orlatunji, whose dismissal was affirmed. The case was remanded to the Superior Court for further proceedings. See: *Kilburn v. Department of Correction*, 72 Mass.App. Ct. 1105 (2008). ■

BOP Fails To Meet Drug Treatment Goals; Lack of Funding Blamed

According to the Bureau of Prisons' (BOP) annual report to Congress on substance abuse treatment programs, the BOP will once again fail to provide residential drug treatment services to 100 percent of eligible prisoners.

With the BOP's population swelling beyond 205,000, the demand for drug treatment by federal prisoners only continues to increase. This is especially so given the potential for prisoners to receive up to one year off their sentence if they successfully complete treatment.

Since 2003, though, the BOP has not received a funding increase dedicated to expanding the availability of residential drug treatment. In fiscal year 2007, this resulted in only 80 percent of eligible prisoners receiving residential treatment. In 2008, this figure jumped to 93 percent, but it is expected that number will decline again to around 80 percent, as the 2008 jump in participation was the result of an "unanticipated early release of a number of treatment-eligible" prisoners in the wake of the United States Sentencing Commission's decision to apply its "crack cocaine" amendment to the federal sentencing guidelines retroactive.

Today, an average of 7,600 prisoners are waiting for residential treatment. In fiscal year 2008, 17,523 prisoners successfully completed residential treatment, 4,800 of which received a sentence reduction. And while the BOP is authorized to reduce sentences up to one year for those who successfully complete treatment, the average reduction was only 7.8 months in fiscal year 2008.

According to the BOP's report to

Congress, prisoners are receiving less than 12 months because they "are not being admitted to the program with sufficient time left on their sentence to allow for completion of all components of the program and to have 12 months remaining" due to the "growing RDAP waiting list."

"Without additional funding," the BOP wrote, "the agency will [be] unable to meet [Congress's goal] of treating 100 percent of eligible" prisoners.

See: *The Federal Bureau of Prisons Annual Report on Substance Abuse Treatment Programs Fiscal Year 2008*. A copy of the full report is available on PLN's website. ■

Georgia Prisoners Must Use Court Promulgated Form to Initiate a Court Action

The Georgia Supreme Court has held that a trial court should have dismissed a mandamus petition filed by a prisoner against prison officials because the prisoner failed to use a form promulgated by the Administrative Office of the Courts (AOC).

Georgia state prisoner Rashad D. Price filed a pro se mandamus petition against his prison's warden, who moved to dismiss for failure to comply with OCGA § 9-10-14(b). That statute provides that a clerk of court shall not "accept for filing any action by an inmate of a state or local penal or correctional institution ... against any ... officer of state or local government unless the complaint or other initial pleading is on a form or forms promulgated by the [AOC]."

The Supreme Court held that the

language of the statute was unambiguous and provided no exceptions. Thus, as the trial court had stated, the clerk "should not have docketed this complaint absent the proper form," and Price's mandamus petition should not have been considered a viable pleading.

Accordingly, the Supreme Court reversed the trial court's grant of mandamus relief in favor of Price, finding that the court had "erred in failing to dismiss the action without prejudice." See: *Donald v. Price*, 283 Ga. 311, 659 S.E.2d 569 (Ga. 2008). ■

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District Court May Order *Martinez* Report, Ninth Circuit Holds

A federal district court has the discretion to order the preparation of a *Martinez* report, the U.S. Court of Appeals for the Ninth Circuit decide.

Robert Tuzon, an Arizona prisoner, sued various state prison officials alleging that (1) staff had failed to protect him from assault; (2) his legal materials were taken by library staff; (3) his money was confiscated in July 2003; and (4) he received inadequate medical care.

The district court screened Tuzon's complaint and dismissed all of his claims except those related to deliberate indifference to his safety and denial of access to the courts. Thereafter, the district court entered a scheduling order and directed the defendants to file an answer. Included in the scheduling order was a requirement that the defendants prepare a *Martinez* report.

A *Martinez* report, based on *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978), typically requires prison officials to (1) thoroughly explain the allegations in a prisoner's complaint; (2) provide the results, if any, of their investigation into the allegations; (3) submit affidavits supporting any facts in the report; and (4) provide copies of all grievances and other documents related to the administrative record.

The purpose of a *Martinez* report "is to give the court the benefit of detailed factual information that may be helpful in identifying a case involving a constitutional challenge to an important, complicated correctional practice, particularly one that may affect more than one inmate who has filed the 1983 action." *Lewis v. Fong*, 1986 U.S. Dist. LEXIS 17837 at *5 (E.D. Pa. Nov. 12, 1986).

After partial denial of the defendants' motion to dismiss, the defendants sought a writ of prohibition in the Ninth Circuit arguing that the district court had abused its discretion in ordering the preparation of a *Martinez* report. According to the defendants, the court's order (1) violated Fed.R.Civ.P. 26; (2) impermissibly granted Tuzon "excessive injunctive relief"; (3) allowed Tuzon to circumvent exhaustion of administrative remedies; (4) violated their due process rights and denied them the benefit of qualified immunity; and (5) presented an "ethical quandary" for defendants' counsel.

The Ninth Circuit disagreed. The ordering of a *Martinez* report is within a

district court's "broad discretion," the appellate court wrote, and is not inconsistent with the Federal Rules of Civil Procedure. The order to produce the report did not impermissibly grant "relief" as contemplated by 18 U.S.C. § 3626 of the Prison Litigation Reform Act, the Court of Appeals held, as its creation was ordered sua sponte by the district court and was not requested by Tuzon in his complaint.

Furthermore, the *Martinez* report

had no effect on the defendants' qualified immunity defense as the defendants remained "free to raise the immunity issue at any time." The defendants' remaining claims of error were either moot or not ripe, the Ninth Circuit determined.

Accordingly, the defendants' petition for a writ of prohibition was denied. See: *Goddard v. United States District Court (In re: Arizona)*, 528 F.3d 652 (9th Cir. 2008), cert. denied. ■

Washington Supreme Court Upholds Denial of Parole for Sex Offender Who Refuses to Admit Guilt

In a 5-4 decision, the Supreme Court of Washington state, sitting en banc, upheld the denial of parole for an untreated sex offender.

Richard J. Dyer was convicted of abducting and repeatedly raping two women in 1980. Maintaining his innocence, Dyer is ineligible for the Department of Corrections sex offender treatment program.

Washington's Indeterminate Sentence Review Board (ISRB) denied Dyer parole on several occasions. Dyer petitioned for review following a denial in 2002, resulting in a ruling by the state Supreme Court that the ISRB had abused its discretion by relying on "speculation and conjecture." See: *In re PRP of Dyer*, 157 Wn.2d 358, 139 P.3d 320 (Wash. 2006) [*PLN*, July 2007, p.37].

In October 2006, after another hearing, the ISRB "found Dyer unparolable because he is an untreated sex offender." The ISRB held that "without an exploration and understanding of the behaviors that directly resulted in his incarceration, he remains at risk to repeat those behaviors in the community."

Dyer filed a Personal Restraint Petition, arguing that the ISRB's decision was an abuse of discretion and violated his constitutional rights. Upon consideration by the Washington Supreme Court, the majority noted that RCW 9.95.100 requires the ISRB to "deny parole if the inmate is unrehabilitated or otherwise unfit for release." Additionally, the Court "adopted the position that 'the first step toward rehabilitation is 'the offender's recognition that he was at fault,'" citing *In re PRP of Ecklund*, 139 Wn.2d

166, 985 P.2d 342 (1999), which quoted *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969).

The Court found that "the ISRB may base its decision to deny parole, in part, upon the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior." Because Dyer had "not taken responsibility for his crimes which prevents him from obtaining the treatment the ISRB deems necessary for his full rehabilitation," the Court ruled that "the ISRB acted within its discretion" to deny him parole. The Supreme Court rejected Dyer's claims that the ISRB decision violated the ex post facto, due process and equal protection clauses, or that it amounted to cruel and unusual punishment.

In a strongly worded dissent, Judge Richard B. Sanders argued that "to require Dyer to admit guilt as a precondition to parole violates equal protection, substantive due process, and the doctrine of unconstitutional conditions."

Citing *Ecklund*, Judge Sanders observed that "a refusal to admit guilt may be relevant to the question of rehabilitation; however, it cannot be the sole basis to deny parole.... Nor can the ISRB lawfully withhold parole because Dyer has not confessed Yet that is exactly what the ISRB and the majority require of Dyer. The only way for Dyer to be eligible for sex offender treatment, and therefore parole, is to confess."

Sanders argued that "Dyer's rehabilitation is proved," despite his refusal to admit guilt. "The ISRB's decision is contrary to the evidence presented and an abuse of discretion," he said. Sanders also

accused the ISRB of relying upon older psychological reports that were “predictive of high recidivism” when more recent reports had found Dyer posed a low recidivism risk.

“The ISRB’s reasoning presents a catch-22: a factually innocent person must admit to being a criminal in order to reenter free society; yet admitting to the crime forecloses any opportunity the factually innocent prisoner may have to clear his name,” Sanders wrote. “This shocks the judicial conscience.” Dyer remains incarcerated. See: *In re PRP of Dyer*, 164 Wn.2d 274 (Wash. 2008). ■

Washington Pretrial Release UAs Invalidated

In three consolidated criminal cases, the Court of Appeals for Washington state held that a standard pretrial release condition requiring weekly urinalysis (UA) tests was inappropriate.

Washington residents Amber Dee Rose, Danielle Wilson and Kevin Wentz were charged with criminal offenses. The state recommended pretrial release for all three defendants, but requested that each be required to submit to weekly UAs at their own expense.

The defendants contended that the UA requirements were prohibited by *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006) and *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007) [PLN, Dec. 2008, p.49]. The trial court rejected their arguments and ordered each to provide weekly UAs. Rose, Wilson and Wentz appealed.

The Court of Appeals reversed, finding that the trial court had erred in imposing weekly UAs for Rose and Wilson because no evidence justified that condition. The Court found evidence supporting the UA condition for Wentz, but then assessed whether the condition was constitutional.

Following “the *Scott* court’s reasoning,” the appellate court concluded “that the State failed to establish a special needs exception to the warrantless, suspicionless searches.” The Court held that “without a showing that drug use leads to a higher likelihood of absconding or an individual determination by the trial court that Wentz’s drug use would increase the likelihood of him failing to appear, the special needs warrant exception does not apply here. Thus, the trial court should not have required weekly UAs in Wentz’s case.”

The Court of Appeals also held that a UA which had tested positive for marijuana could not be used as evidence of Wentz’s violation of pretrial release. Since the weekly UAs constituted an illegal search, the Court concluded that such evidence must be excluded under the exclusionary rule and fruit of the poisonous tree doctrine. See: *Washington v. Rose*, 146 Wn. App. 439 (Wash. Ct. App. 2008). ■

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Second Circuit Establishes Anonymous Pleading Standards

by Mark Wilson

In a case of first impression, the Second Circuit Court of Appeals established standards governing the use of pseudonyms in civil litigation. The Court endorsed the Ninth Circuit's test of balancing a plaintiff's interest in anonymity against the public's interest in disclosure and any prejudice to the defendants.

On October 5, 2005, a pro se New York woman sued state and city officials for claims involving physical and sexual assault. Proceeding under a "Jane Doe" pseudonym, she moved for "a preliminary injunction and an order granting discovery for the purpose of identifying certain 'John Doe' defendants." On October 24, 2005, the district court denied the plaintiff's motions and ordered her to file an amended complaint using her real name rather than a "Jane Doe" pseudonym. The court also ordered her to correct some other "pleading errors," including identifying several "John Doe" defendants.

Two weeks later the plaintiff sought the district court's assistance in identifying the Doe defendants. The court denied the motion. The plaintiff filed two other motions, but they were "rejected and returned" by the court. In doing so, the district court gave the plaintiff 45 days to file an amended complaint that comported with its October 24, 2005 order.

The plaintiff did not file an amended complaint, and on March 9, 2006 the court dismissed the lawsuit for "failure to comply with the prior orders of this Court and for her failure to file a viable pleading in this action." Jane Doe appealed.

The Second Circuit reversed, noting that the case raised issues of first impression. "Drawing on both the rules adopted by other Circuits and the experience of the district courts of" the Second Circuit, the Court of Appeals "set forth the standards governing the use of pseudonyms in civil litigation."

The appellate court noted that other courts employed "a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure." Agreeing that "the interests of both the public and the opposing party should be considered when determining whether to grant an application to proceed under a pseudonym," the Court of Appeals endorsed the Ninth Circuit's approach, which weighs the plaintiff's

interest in anonymity against the public interest in disclosure and any prejudice to the defendant. The Court then noted with approval ten non-exhaustive factors that courts should consider, and vacated the district court's decision with instructions to analyze those factors.

The Second Circuit also found that the lower court had erred in holding the "plaintiff to a pleading standard inconsistent with that applicable to pro se litigants." The appellate court wrote that the trial court should have liberally construed the pleadings, finding that "in light of the nature of plaintiff's claims – including physical and sexual assault – the District Court should have afforded

plaintiff wider latitude in pressing her claims."

Finally, the Court of Appeals encouraged the district court "to consider whether the appointment of pro bono counsel pursuant to 28 U.S.C. § 1915(e)(1)" was warranted, given "the serious nature of the claims pressed in this action." See: *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185 (2d Cir. 2008).

PLN was unsuccessful in trying to locate this case on the district court's docket following remand to determine the outcome, as the case is not only sealed but has been removed entirely from the publicly-accessible online electronic court docket. ■

Fifth Circuit Reinstates Texas Prisoner's Failure-to-Protect Suit

by Matt Clarke

The Fifth Circuit Court of Appeals reversed in part a district court's dismissal of a prisoner's failure-to-protect suit, though the case lost at trial after remand.

Ernesto R. Hinojosa, Sr., a Texas state prisoner, was housed in an open dormitory at the Wynne Unit when he was attacked without provocation by fellow prisoner Joseph Brown. No guards or video or audio surveillance was in the dormitory when the assault occurred. Brown broke a toilet brush while hitting Hinojosa on the head multiple times, then tried to stab him with the broken brush handle, causing serious injuries.

Hinojosa filed a pro se 42 U.S.C. § 1983 civil rights action against both Wynne and state-level prison officials for failing to protect him. He alleged that Wynne officials knew the dormitory was understaffed and insufficiently supervised, and that Brown was mentally unstable and had a history of violence – including using weapons to attack other prisoners – and thus should not have been housed in an open dorm with unrestricted access to potential weapons such as cleaning tools.

Claiming qualified immunity, the defendants moved for summary judgment and a protective order against discovery. Hinojosa opposed both motions and

filed a F.R.C.P. Rule 56(f) motion for a continuance to conduct discovery before the summary judgment motion was considered by the court. The district court denied Hinojosa's motion, granted the protective order, and then granted summary judgment to the defendants. Hinojosa appealed.

The Fifth Circuit noted that Hinojosa's summary judgment evidence included unsworn declarations from prisoners stating that prison officials had been made aware of Brown's increasingly delusional behavior ten days before the attack, and that one of the defendants who was investigating the attack was overheard saying Brown was known to be violent and should not have been housed in the open dorm. The appellate court held that unsworn prisoner declarations made under penalty of perjury were competent evidence for summary judgment purposes.

Hinojosa's evidence also showed that Brown had disciplinary infractions for fighting with a weapon in 1976 and 1977, possession of a weapon in 1978, and fighting without a weapon in 1979 and twice in 1982. Hinojosa was unable to obtain further information about Brown's institutional records without discovery.

The Fifth Circuit found that such evidence was sufficient to justify further

discovery limited to “those facts necessary to rule on the immunity defense,” citing *Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1989). Thus, the district court had abused its discretion in preventing limited discovery prior to ruling on the defendants’ summary judgment motion.

Hinojosa was not required to show the defendants knew of a specific threat to his safety, as the district court had ruled. However, he failed to present any evidence that the state-level officials had affirmatively participated in unconstitutional acts

or implemented a policy of understaffing. Therefore, summary judgment in those defendants’ favor was upheld. Hinojosa also was not required to name each defendant in his grievances in order to exhaust administrative remedies, the purpose of which “is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued.” The district court was instructed to determine whether Hinojosa’s grievances gave prison officials a fair opportunity to address the issues that formed the basis of his suit.

The district court’s orders were reversed, and summary judgment was upheld for the state-level defendants and vacated as to the Wynne prison officials. See: *Hinojosa v. Johnson*, 277 Fed.Appx. 370 (5th Cir. 2008); 2008 LEXIS U.S. App. 9542.

On remand, the district court denied the defendants’ second motion for summary judgment and appointed counsel to represent Hinojosa. The case proceeded to a jury trial in late September 2009, resulting in a verdict in favor of the defendants. ■

Reversal of Summary Judgment to BOP Doctor Accused of Deliberate Indifference

by *Brandon Sample*

The U.S. Court of Appeals for the Seventh Circuit has reversed a grant of summary judgment to a Bureau of Prisons (BOP) doctor accused of denying a death row prisoner needed eye surgery.

Arboleda Ortiz, a federal prisoner currently on death row at the U.S. Penitentiary in Terre Haute, Indiana, was first diagnosed with pterygia, abnormal masses of thickened membrane that extend over the cornea of the eye, in 2001. The ophthalmologist who examined Ortiz noted that the pterygia were “visually significant” and recommended surgery.

For the next five years, Ortiz’s vision worsened and specialists continued to recommend that his pterygia be surgically removed. Nevertheless, Dr. Thomas Webster, the Clinical Director at Terre Haute, refused to approve Ortiz for surgery. One of Webster’s denials included a handwritten note stating, “NO TOWN TRIP.”

Ortiz filed suit against Webster alleging that he was denied surgery for his pterygia in part due to a policy prohibiting death row prisoners from leaving prison for medical treatment. Webster responded to Ortiz’s allegations by asserting, for the first time, that he had denied Ortiz’s surgery for pterygia because none of the doctors who examined him indicated that the condition was affecting his vision. The district court granted summary judgment for Webster, and Ortiz appealed.

The Seventh Circuit reversed. Ortiz had presented sufficient evidence to create a genuine issue of material fact about whether “Webster was deliberately indifferent to [Ortiz’s] medical needs,” the appellate court wrote. Webster’s claim that

none of the doctors who had examined Ortiz found that the pterygia affected his vision did “not square with the record.”

Furthermore, although BOP officials denied having a policy that precludes death row prisoners from receiving outside medical treatment, the unexplained “NO TOWN TRIP” notation suggested that Ortiz “was denied surgery because it would have required a town trip,” the Court of Appeals held.

Accordingly, the judgment of the district court in favor of Webster was reversed and the case was remanded for further proceedings. See: *Ortiz v. Bezy*, 281 Fed.Appx. 594 (7th Cir. 2008); 2008

U.S. Appl. LEXIS 12885.

On remand, the court appointed counsel to represent Ortiz on May 27, 2009. The defendants have since filed another motion for summary judgment, which remains pending. ■

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News in Brief:

California: On June 29, 2009, Richard Henry Kase, 41, was sentenced to 90 years to life for the first-degree murder of his cellmate, 28-year-old Randy James Rabelos, at the Deuel Vocational Institution in Tracy. Kase repeatedly told Rabelos, a convicted child molester, to be quiet one night in December 2007 before punching him in the throat, shoving a towel in his mouth, pinching his nose shut and saying, "Goodbye, Randy." The next morning he informed the guards that Rabelos was dead. Kase was serving an 11-year sentence for illegal weapon possession at the time. Ironically, that conviction was overturned and dismissed just seven months after he killed Rabelos.

California: Working on a tip, Fresno County Sheriff's deputies staked out the Claremont Correctional Center on October 17, 2009. They arrested 27-year-old parolee Antoine Enoch and 31-year-old Janae Mason after observing the pair throw a soccer ball over the prison yard fence. The ball was stuffed with drugs, cell phones and other contraband. The pair was booked into jail on various drug-related charges.

Florida: In November 2009, Vincent Lee, 42, was charged with killing Willie Smith, 28, on October 16. Both men were prisoners at the South Bay Correctional Institute, operated by GEO Group. Lee killed Smith by stabbing him in the head with a foot-and-a-half long "shiv," apparently because Smith had insulted his favorite football team, the Miami Dolphins.

Idaho: Bill Lloyd, 32, formerly a guard at the Women's Correctional Center in Pocatello, was sentenced to six years of probation and 180 days in jail for having sex with a prisoner. Judge David Nye said the dilemma he faced in sentencing Lloyd was how to deter others from committing similar crimes, which he described as "an abuse of power situation." Apparently, the judge believed a six-month jail sentence was sufficient despite having the authority to impose up to six years in state prison. As frequently reported in *PLN*, guards typically receive short sentences for similar "abuses of power" that involve sexual assaults on prisoners.

Illinois: In early November 2009, Tyrone McDowell, Jr., who worked in the trust account department of the Cook County Jail, was charged with stealing \$1,260 from ten prisoners. Officials uncovered the thefts when prisoners complained that money was missing from their trust

accounts upon release. An internal audit revealed McDowell was the only employee working in the department when the incidents took place. He was jailed on \$50,000 bond.

Indiana: On November 18, 2009, Matthew Patterson, 38, and Jim Heffernan, 39, were arrested by the state police for official misconduct and ghost employment. An investigation revealed that the two were "playing golf, going to an exercise gym, gambling, moving furniture, attending sporting events or visiting friends" while they were on the clock as guards at the Henry County Corrections Center. Community Corrections Director Doug Sheets, 57, was charged with knowingly approving false time cards for Patterson and Heffernan. The scam occurred between March 2007 and July 2009.

Kentucky: On November 18, 2009, 50-year-old Albert Preston Long, an employee of Court Services, Inc., a private firm that transports prisoners, was charged in federal court with traveling in interstate commerce to have sex with a prisoner. Long allegedly transported one female and three male prisoners from Tennessee to Kentucky, where he booked the men into the Christian County Jail. However, he took the woman to a local motel and forced her to have sex. Prosecutors say Long was also charged with civil rights violations and firearm offenses because he was armed when he committed the rape.

Maryland: Former guard Jason Weaver was sentenced on November 20, 2009 to three months in jail for conspiracy to commit assault. Weaver is among 22 guards from the North Branch and Roxbury state prisons who were fired following an investigation into guard brutality. Fifteen of the guards were charged with various felonies for beating prisoners in March 2008. Four of the North Branch guards, including Weaver, were convicted at trial and two from Roxbury pleaded guilty to assault charges. The rest were either acquitted, went to trials that ended in hung juries, or had the charges dropped. [See: *PLN*, August 2009, p.20].

Massachusetts: James "Jim" Burke, 41, a clerk at the Chelsea District Court, was indicted by a federal grand jury in April 2009 on civil rights and extortion charges. The charges stem from Burke using his clerk's position to extort sex from two women charged with prostitution. He promised to have their cases dismissed

in exchange for sexual favors; when one woman refused, he threatened to have her arrested. Burke faces up to 20 years in federal prison if convicted.

Mexico: In November 2009, Mexican police apprehended Marco Antonio Ibarra, formerly the chief guard at Tijuana's La Mesa State Penitentiary, in his home town of Culiacan where he had been hiding for a year. Ibarra was wanted for ordering guards to take 10 prisoners into a storage room and beat them. A 19-year-old prisoner died during the assault, which sparked two uprisings that resulted in at least 23 prisoner deaths in September 2008. Ibarra ordered the beatings to find out who owned drugs, cell phones and other contraband found at the prison. He will stand trial on charges of homicide and torture.

Michigan: Kent County Sheriff's deputies simply forgot to unload three prisoners from a transport van on the evening of November 10, 2009. The guards picked up six prisoners from the local courthouse, loaded them in a van and transported them back to jail. However, only three were unloaded; the others were left shackled in the van, which was returned to the courthouse and parked in a garage. The jail realized the oversight during head count and quickly retrieved the three forgotten prisoners. Officials are investigating the incident.

Michigan: The Department of Corrections announced that it is in the process of overturning a controversial policy barring HIV-positive prisoners from working in food service positions. DOC Director Patricia Caruso has authorized the policy revision and ordered the amended version to be circulated among wardens and other department heads for comment. If there are no objections, the new policy could become effective as early as December 2009. HIV cannot be transmitted by casual contact, including through food preparation.

Minnesota: In June 2009, John St. Marie, a former Hennepin County prosecutor, was accused of soliciting clients for prostitutes over the Internet and then arranging paid sex sessions for the men, who referred to themselves as "The Minnesota Nice Guys." St. Marie was not paid for his services but received free sex from the prostitutes he helped pimp. A search warrant was served on his residence, and he is expected to be charged in federal court with transporting women across

state lines for prostitution.

Nebraska: On October 20, 2009, former Gage County jail guard Eugene Fiester, 37, was sentenced to 3 to 5 years in prison for raping a female prisoner. He claimed the sex was consensual, but the woman alleged that Fiester entered her cell while she was sleeping and sexually assaulted her. Fiester had worked as a guard at the Tecumseh State Prison for six years before transferring to the jail.

New Mexico: In November 2009, former Camino Nuevo Correctional Center guard Anthony Townes was sentenced to 18 years in prison for raping four female prisoners between January and August 2007. Camino Nuevo is owned and operated by CCA. *PLN* has reported extensively on sexual abuse by CCA guards around the country, including a recent sex scandal in Kentucky that involved at least six CCA employees over a multi-year period, including a chaplain. [See: *PLN*, Oct. 2009, p.40].

New Mexico: Joey Montoya, 21, was on duty at the Española Police Department's jail on November 15, 2009, when he left with a 20-year-old woman who was at the facility for alcohol detox following a domestic dispute. He drove her to a secluded area behind a local high school and the two had sex. Montoya admitted to the sex, but claimed it was consensual. The woman said she had been raped. Montoya was charged with criminal sexual penetration and freed on bond pending trial. Another unnamed jailer was placed on leave for failing to report that Montoya had left with the woman.

New York: Ronald Tackman was arrested on October 1, 2009 as a fugitive from justice. He had been released from court the day before when a jailer mistook him for an attorney. Tackman, who was wearing a business suit, had been transported to court from Rikers Island for a hearing on a string of robbery charges.

Oklahoma: On November 6, 2009, a warrant was issued for former guard Michelle Kalinich. Kalinich, 29, who worked at the CCA-owned and operated Davis Correctional Facility, is accused of having sex with 21-year-old prisoner James Black. She is also accused of smuggling seven ounces of marijuana, 30 Ecstasy pills and 36 pouches of tobacco to Black. She reportedly received \$2,000 for the contraband.

Oklahoma: Richard Lynn Dopp, 47, was arrested in the early morning hours of November 6, 2009 after tricking officials at the GEO Group-run Lawton Correctional Facility into releasing him. Dopp had been set free on October 5 when prison officials received a fraudulent order modifying his life sentence to 10 years. The false order caught the attention of Ottawa County District Attorney Eddie Wyant when prison officials notified him of Dopp's release. The fraudulent docu-

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News In Brief (cont.)

ment indicated that Wyant had attended a hearing on July 27 during which Dopp's sentence was reduced. No such hearing took place. Dopp was apprehended without incident at his mother's house.

Texas: On November 6, 2009, prisoners working in the mess hall at the Segovia Unit found 25 pounds of marijuana in a crate of fruit. The fruit had been donated by the Edinburg Police Department after it was seized from a produce truck carrying more than a half-ton of the drug. The police department routinely donates seized items to other government agencies. The fruit had been searched by drug dogs before being delivered to the prison, but apparently the contraband was missed. The prisoner who found the drug stash immediately reported it to guards; all pris-

oner workers were strip-searched but no marijuana was found outside the crate.

Texas: Standric Choice, 36, formerly a sheriff's deputy in Dallas, was sentenced on November 13, 2009 to 15 years in federal prison on drug and weapons charges. The charges stem from Choice and two co-defendants, Terry Kemone Anderson, 29, and Charlie Lee Hill, 31, planning to rob a local drug dealer by staging a fake arrest. The drug dealer was actually an undercover police officer.

Virginia: On June 4, 2009, Steven Lederman, formerly a state assistant attorney general, pleaded guilty to misdemeanor marijuana possession. He had originally been charged with felony counts after police learned from an informant that he had purchased a quantity of marijuana for resale. Lederman was sentenced as a first time offender and received probation. He lost his job following his arrest.

Washington: In November 2009, King County Jail prisoner Michael Brown, 42, was charged with assault for spitting pepper spray into a guard's mouth. Brown became irate during booking on September 7; after kicking a jail guard, he was forcibly moved to a padded cell where he began tearing out the padding and urinating under the cell door. Guards doused him with pepper spray and put him in a restraint chair. Undeterred, Brown spit saliva and pepper spray at the guards, hitting one in the face.

Wisconsin: On November 6, 2009, a Waukesha County Sheriff's deputy shot and wounded Steven P. Lettenberger, 43, who was in the deputy's custody at an area hospital for treatment of unspecified injuries. Lettenberger, who was shot when he tried to attack the deputy, was listed in critical condition. The deputy was not injured. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

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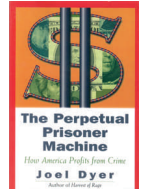
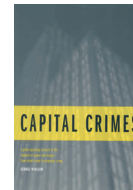
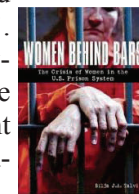
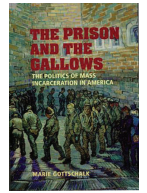
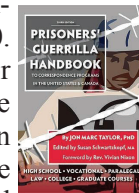
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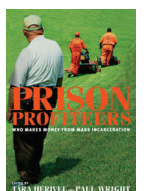
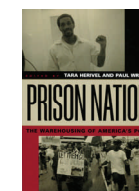
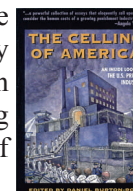
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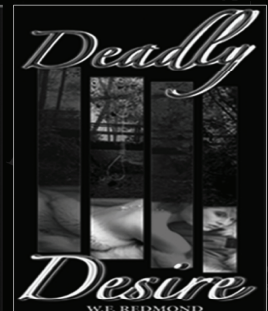
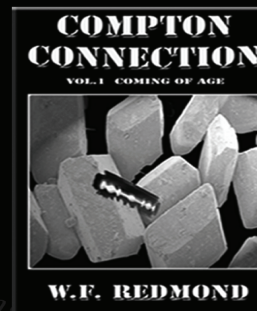


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February 2010

Swine Flu Widespread in Prisons and Jails, but Deaths are Few

by David M. Reutter

For hundreds of years the cramped, overcrowded and often filthy confines of dungeons, prisons, jails and other places of imprisonment have served as incubators for infectious diseases, which have killed more prisoners than any other single factor. Thus, the recent outbreak of H1N1 virus, commonly known as “swine flu,” had government officials very, very worried.

Their concerns were heightened on June 11, 2009, the day when the World Health Organization declared that a global pandemic of swine flu was underway. While the mainstream media has focused on the threat that H1N1 poses to the general public, health officials are also concerned about the risk of a major

outbreak in prisons. Last May, the Centers for Disease Control (CDC) created interim guidelines to address the problem of swine flu in correctional settings.

Although prisons and jails by their nature are isolated and contained, infectious diseases spread quickly once they enter the prisoner population. “It’s a perfect breeding ground,” said Sheriff James DiPaola of Middlesex, Massachusetts.

As noted by the CDC, “correctional institutions pose special risks and considerations due to the nature of their unique environment. Inmates are in mandatory custody and options are limited for isolation and removal of ill persons from the environment.”

What worries officials is that most prisons and jails have three shift changes a day, during which dozens of people move in and out of the facility. Employees can transmit diseases to prisoners or can carry infections from the prison and expose their family members. Prison officials hope to prevent such cross-contamination with swine flu. “We don’t want to be bringing this home to our kids, which is what happened with MRSA [staph infection],” said Steve Kenneway, president of the Massachusetts Correction Officers Federated Union.

Thus far, cases of swine flu in U.S. prisons and jails have been widespread but there have been few deaths. The low fatality rate is attributed to the characteristics of the virus and the type of people who are most susceptible to infection.

Swine Flu 101

H1N1 first appeared in Mexico in April 2009; it became known as swine flu after laboratory tests indicated that

some of the virus’ genes were similar to influenza strains that normally occur in pigs. Further research revealed that H1N1 is very different from viruses in North American swine. In what scientists call a “quadruple reassortant” virus, H1N1 has two genes that normally circulate in pigs in Europe and Asia, as well as bird (avian) genes and human genes.

With a 42% infection rate after contact with someone who has swine flu, the virus is easily transmitted person-to-person through coughing or sneezing. According to the CDC, those who are “infected with seasonal and 2009 H1N1 flu shed virus and may be able to infect others from 1 day before getting sick to 5 to 7 days after.”

Swine flu can be spread by touching a surface or other object where the virus is present and then touching your mouth or nose. “Studies have shown that influenza virus can survive on environmental surfaces and can infect a person for 2 to 8 hours after being deposited on the surface,” the CDC warns. H1N1 cannot be transmitted by eating pork or pork products.

Unlike seasonal flu which occurs annually, persons age 65 and older are the least likely to be infected with swine flu. Those at higher risk of contracting H1N1 include people who are pregnant, younger than 25, or who have medical complications such as asthma, diabetes, suppressed immune systems, heart disease, kidney disease and neuromuscular disorders. Once a person is infected with swine flu and recovers, their body builds resistance to that strain of the virus, which should prevent re-infection.

Prisoners come into contact with the

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Swine Flu (cont.)

same surfaces, fixtures and objects that are touched by hundreds of other prisoners on a daily basis – such as door handles or salt shakers in the dining hall. That situation, and close proximity to other people who may cough or sneeze, can result in swine flu outbreaks.

A few simple steps can be taken to protect oneself. Ask prison medical staff to provide face masks if they do not do so already. Wash your hands for at least 20 seconds with soap and water often, especially after contact with common surfaces.

Try not to touch your eyes, nose or mouth; germs are easily spread that way. Avoid close contact with people who are sick or who exhibit flu-like symptoms. Do not share cups, dishes or eating utensils until they have been washed. If you become infected with H1N1, the CDC recommends that you avoid contact with others for at least 24 hours after your fever is gone. Cover your mouth when you cough or sneeze.

Newton E. Kendig, the medical director for the U.S. Bureau of Prisons, described a creative way to curb the spread of swine flu. “Realizing that nearly all the inmates touch a single door knob when they enter the dining hall,” he said, “one warden paid an inmate to hold the door open.”

The signs and symptoms of H1N1 include fever, a non-productive cough, severe body aches, a stuffy or runny nose, headache, chills, chest discomfort and fatigue. Some people may experience vomiting or diarrhea. The simple hygiene precautions described above should be followed to reduce the risk of infection.

As Goes California ...

As of late December 2009, forty-nine states reported some level of swine flu activity, mostly sporadic or local outbreaks. That was a major improvement over the previous two months, when H1N1 infections and fatalities peaked and forty-eight states reported “widespread” cases of the virus.

Nationwide, during the worst period of the outbreak from October to November, there were 3,280 to 4,985 hospitalizations and more than 170 deaths per week over a 4-week period. According to the CDC, an estimated 34 to 67 million cases of H1N1 occurred in the

U.S. between April and November 14, 2009, and there were an estimated 7,070 to 13,930 swine flu-related deaths during that period. Those figures are much higher than confirmed cases though.

“Our best estimate right now is that the fatality [rate for H1N1] is likely a little bit higher than seasonal influenza, but not necessarily substantially higher,” said Dr. Anne Schuchat, director of the CDC’s National Center for Immunization and Respiratory Diseases.

Swine flu outbreaks have been reported in prisons and jails across the country. California, with the nation’s largest state prison system, is not surprisingly the leader in confirmed cases among prisoners. Statewide, as of November 2009 there were 767 cases of H1N1 and three swine flu-related deaths in California prisons.

Last May, state officials canceled visitation and banned non-essential workers at all 33 adult prisons and six juvenile facilities in California after a prisoner at Centinela State Prison was diagnosed with swine flu. Although visits were suspended for about 10 days, prison staff continued to go in and out of the facilities and return to their homes in the community, largely defeating the purpose of the no-visit restriction.

Thirty-five prisoners exhibited swine flu symptoms at San Quentin in early July 2009 and the prison was quarantined. The facility stopped accepting incoming transfers, and about 2,100 prisoners were restricted to their cells.

Over 1,240 prisoners at the Men’s Central Jail in Orange County were placed on lockdown in July after five cases of H1N1 were reported. While prisoners were confined to their cells during the quarantine, the jail continued to accept new arrivals who were then subject to the lockdown.

That same month there were 20 confirmed cases of swine flu at the Los Angeles County jail; consequently, 190 prisoners were isolated to prevent spreading the infection. Another 20 prisoners were treated for probable H1N1 at the jail in San Joaquin County, and the Sacramento County jail reported one confirmed case of swine flu.

More than 1,000 prisoners were quarantined in San Diego County’s jail system in July. Fifty-six prisoners and 11 employees exhibited flu-like symptoms; the employees were sent home while the prisoners were transferred to Donovan State Prison.

Swine Flu (cont.)

A precautionary quarantine of jail prisoners had defense attorneys crying foul in Riverside County, California. Although constitutional law requires an arraignment within 48 hours of arrest, pretrial detainees were not being taken to court due to the quarantine.

"It's not that clear cut that just because somebody is ill you can't provide a courtroom that accommodates that," said assistant public defender Bryant A. Villagran. "They may have an obligation to protect the people from that risk [of swine flu], but that doesn't necessarily mean they have the right to stop somebody's due process."

... So Goes the Nation

At least one defense attorney in Washington state's Spokane County had no problem with postponing hearings for prisoners who might be infected. The unidentified lawyer requested a one-day delay and refused to sit next to his client, who appeared in court wearing a surgical face mask. The mask was required by jail officials because he shared a cell with other sick prisoners.

While that defense attorney may have overreacted, the threat posed by swine flu is real. Kenneth Lane Beckett, 27, a Harris County, Texas jail prisoner, died on September 25, 2009 after contracting H1N1. He was awaiting trial on murder charges.

As with most deaths resulting from swine flu, Beckett had other health problems. "He had underlying serious medical conditions along with the H1N1," said Deputy Thomas Gilliland, a spokesman for the Harris County Sheriff's Office. Separately, three cases of H1N1 were reported at the El Paso County jail.

There were no confirmed swine flu outbreaks in Texas prisons, the nation's second largest state corrections system, as of May 2009. "We're testing people who may be symptomatic, but we have no confirmed cases of swine flu," said Texas Department of Criminal Justice spokesman Jason Clark. "It's something we're monitoring and something we'll continue to look at."

As a precaution, weekend visitation at all 112 Texas prisons was suspended in May and newly-arrived prisoners were quarantined for 72 hours. By October 2009 there were 23 confirmed cases of

H1N1 among Texas state prisoners, most at the Estes Unit.

The state with the third most populous prison system, Florida, experienced an outbreak of swine flu in July at the Lancaster Correctional Institution, which houses about 500 male offenders between the ages of 19 and 24.

"I don't know the actual number who got sick," said Dr. Pamela Santelices, a local physician, who advised that all prisoners with symptoms were isolated and treated after a cluster of three cases was reported.

There were six confirmed and 17 suspected cases of swine flu at the Homestead Correctional Institution in Dade County, Florida, which houses 668 women. Visits at the facility were suspended and 252 prisoners were quarantined in their units.

Once a cluster of confirmed cases is found, no more testing is done. "According to the guidelines of the Centers for Disease Control, further testing of additional cases in the facility is not necessary because of the similarity of symptoms and proximity of the victims," said Gretl Plessinger, spokeswoman for the Florida Department of Corrections.

Three county jails in Florida had confirmed outbreaks of swine flu. Pasco County reported one case, there were three confirmed and four suspected cases in Collier County, and Pinellas County had seven confirmed and 25 suspected cases. Three immigration detainees at the Krome Detention Center in Miami tested positive for H1N1.

Swine flu also has been reported in prisons and jails in Kentucky, Idaho, Nevada, Pennsylvania, New York, Maine, South Carolina, Tennessee, Arizona, Illinois and Massachusetts, often resulting in quarantines or visitation restrictions.

The U.S. Bureau of Prisons implemented a four-part response plan that included screening all incoming prisoners for flu-like symptoms. Several federal facilities canceled or suspended visits, and there were confirmed cases of H1N1 at FCI Tucson in Arizona, USP McCreary in Kentucky, and FCI Memphis in Tennessee.

In May 2009, the Cook County Jail in Chicago, Illinois arbitrarily limited visits to immediate family members over age 18; similar restrictions were imposed in December following 26 confirmed cases of H1N1 at the facility.

That exaggerated response – as though family members were somehow

less susceptible to swine flu – was typical of such knee-jerk reactions. If officials were serious about containing H1N1 there would be no movement in or out of quarantined prisons and jails, including by staff members, until the threat of infection had passed.

"Jails and prisons are part of communities," said Ed Harrison, president of the National Commission on Correctional Health Care. "If they think that disease won't spread from there – when you have visitors, workers and delivery people there every day – they're mistaken."

One court has recognized the futility of restricting visitation due to swine flu-related fears. On December 23, 2009, Montana's Supreme Court struck down a Missoula County jail policy that suspended contact visits based on concerns about spreading the H1N1 virus. The Court held that the jail's policy infringed on prisoners' right of access to the courts by limiting them to non-contact attorney visits, but said officials could "impose reasonable public health precautions such as masking and hand sanitizing to reduce the risk of infection."

The policy, which had been implemented on October 27 for the "duration of the flu season," was challenged by the state public defender's office. Jail officials were ordered to immediately change the policy to allow private, in-person attorney visits. See: *Office of the State Public Defender v. McMeekin*, 2009 MT 439 (Mont. 2009); 2009 Mont. LEXIS 678.

There is no question that officials should act promptly and appropriately when confronted with outbreaks of H1N1, however. The Middlesex County Jail in Cambridge, Massachusetts, which holds about 400 prisoners, was faced with a near-riot situation after a confirmed case of swine flu was quickly followed by ten prisoners and two guards who exhibited flu-like symptoms.

The prisoners – who were packed into an overcrowded jail that was designed to hold 160 – were legitimately concerned about a heightened risk of the virus spreading due to cramped conditions. In addition to the cell blocks, they were being housed in the jail's chapel, indoor gym, visitation room and hallways. On July 5, 2009, nine prisoners created a disturbance and broke the sprinkler heads of the fire suppression system at the facility, causing extensive damage.

"The flooding went down from the 18th floor all the way through the building

into the lobby and it was cascading down the elevator shaft,” said Sheriff James DiPaola. Electricity to the jail had to be cut off and approximately 200 prisoners were moved to other nearby facilities. Four Middlesex County prisoners face charges as a result of the incident.

At the Berks County Prison in Pennsylvania, 90 female prisoners were locked down in October 2009 after six developed flu-like symptoms. The quarantine resulted in the delay of a murder trial because a witness was being held at the facility. “It caused some slight disruption in the court system,” said District Attorney John T. Adams. “I firmly believe that with the dangers of the flu we have to take precautions.”

The November 2009 death of an unidentified female Pennsylvania prisoner at SCI Cambridge was blamed on H1N1. She had chronic obstructive pulmonary disease, which increased her susceptibility to swine flu. Another Pennsylvania state prisoner, Howard “Duck” Kelley, 25, who was serving a life sentence, died at SCI Dallas on November 14 after being exposed to the virus.

In June 2009 the Rikers Island jail complex in New York City reported 64 cases of swine flu among prisoners, plus five involving jail employees. Confirmed cases of H1N1 were also reported at jails in Syracuse, New York and Cumberland County, Maine.

Swine flu has been found in detention centers outside the U.S., too. Up to 70

prisoners displayed flu-like symptoms at Australia’s Queensland prison; a subsequent quarantine required court approval for prisoners to leave the facility. Three confirmed cases of H1N1 occurred at the Rimutaka Prison in New Zealand, and on December 27, 2009, forty-five new cases of swine flu were reported at the Butimba Prison in Tanzania. Five suspected cases of H1N1 were found at the Kigali central prison in Rwanda in early January 2010; as a result, visitors were required to undergo medical screening and wear face masks.

While there were few media reports of swine flu among prisoners in the United Kingdom (one case was confirmed at Sudbury Open Prison in July), there were reports of prisoners drinking alcohol-based hand gel sanitizer in an attempt to get drunk. The hand gel had been distributed in an effort to prevent the spread of H1N1.

“It was subsequently reported by some association members ... that the inmates had been incorrectly using [the sanitizer], for want of a better phrase,” said Andy Fear, a member of the Verne Prison Officers Association.

Prisoners in Ontario, Canada were scheduled to receive the swine flu vaccine on November 1, 2009, while vaccinations for guards were canceled due to poor turnout among staff for flu shots in previous years. An officer at the Toronto West Detention Centre called the decision to inoculate prisoners but not prison guards “insulting.” The Toronto West facility

was placed on lockdown for three hours on November 2 after guards protested by initiating a “work refusal.”


Vaccination Controversies

The institutional response to treating and stopping the spread of swine flu has included quarantining people infected with the virus; prescribing Tamiflu, an antiviral medication; and, most recently, H1N1 vaccinations. The CDC “recommends influenza vaccination as the first and most important step in protecting against the flu.” Vulnerable populations were slated to receive the vaccine first, including pregnant women, children and young adults, and adults with certain chronic health conditions.

Prisoners who fall within those high-risk categories are also priority cases for vaccinations, but not all prisoners are considered high-risk based solely on the fact of their incarceration. “Whether to offer it [the vaccine] to prisoners is up to state public health officials,” said CDC spokesman Tom Skinner.

The H1N1 vaccine was approved for use in the United States on September 15, 2009, and distribution began in October. Although there were initial shortages there is now a surplus of swine flu vaccine.

Despite a public outcry, Massachusetts officials, recognizing the danger of a potential outbreak in the close confines of the state’s prison system, decided to vaccinate thousands of prisoners before providing the vaccine to other citizens.



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Swine Flu (cont.)

The Hawaii DOC announced in November 2009 that prisoners at high risk of catching swine flu would receive vaccinations before the general public. "The sooner we can vaccinate, the sooner we'll be more comfortable," said Dr. Marc Rosen, medical director for the Hawaii Department of Public Safety.

A December 10, 2009 news report indicated that 40,000 doses of vaccine were headed to California prisons, which house about 168,000 prisoners. The Metropolitan Correctional Center, a federal prison in San Diego, received 20 doses of vaccine while 400 doses were going to jails in San Diego County.

Maryland officials said 1,900 vaccinations would be provided to state prisoners and prison staff, and the Florida DOC ordered swine flu vaccine for distribution to high-risk prisoners. However, Oklahoma health officials denied the state prison system's request for 15,000 doses of vaccine, saying high-risk cases in the general population would be given priority.

In Virginia, prisoners at the Hampton Roads jail will be vaccinated but not those at the jail in Portsmouth. "When you've got law abiding citizens and tax payers out there that have to wait in line behind inmates, I think the law abiding citizens have the right to the serum first," said Portsmouth Sheriff Bill Watson. He was told by the Virginia Department of Health that prisoners will receive swine flu vaccine only when it is distributed to the general public.

Likewise, prisoners at the Gaston County jail in North Carolina will not get H1N1 vaccinations before they are made available to members of the public. Officials cited the transient, short-term nature of jail stays as one reason why prisoners were not considered a priority for vaccinations.

A mere 300 doses of H1N1 vaccine were distributed to the Nevada DOC and of those only 10 went to prisoners. "There are people who will say, 'They're just prisoners. Who cares?'" said Allen Lichtenstein, general counsel for the Nevada ACLU. "But this isn't just a problem for inmates. If this epidemic spreads among thousands in there – and it easily could in the overcrowded conditions that are present – the state is going to be faced with how to deal with this." There have been eight confirmed cases of H1N1 in Nevada prisons.

In October 2009, the Wisconsin DOC responded to criticism that some prisoners would receive swine flu vaccinations before the general public. Wisconsin's prison system, which houses 22,000 prisoners, received 900 doses of vaccine. Forty-five went to prisoners, including pregnant women at the Taycheedah Correctional Institution. "No one wants to be inhumane," complained state Rep. Brett Davis, "but there are pregnant women who have been law-abiding citizens who are having trouble getting the vaccine."

Christopher Ahmuty, director of the ACLU of Wisconsin, disagreed. "In overcrowded jails and prisons ... the risk of H1N1 contagion spreading among prisoners and correctional officers and then to the officers' families and communities must be addressed vigorously," he said. "Prisoners are serving their debt to society, but being subjected to disease and death is not part of a just sentence in any civilized society."

Although healthcare officials in Texas initially declared that high-risk prisoners would receive vaccinations, they reversed that decision on October 28, 2009 following extensive criticism. "Texas has not allocated any swine flu vaccine to prisons at this time," the Department of State Health Services announced. "Prisoners are not a priority group to receive the vaccine and will not be vaccinated ahead of the general public." Some high-risk prisoners were still slated for vaccinations, though, including those who were pregnant "to help protect their unborn children."

"Not allocating any swine flu vaccine to prisons at this time doesn't seem like a good answer," said Texas state Rep. Jim McReynolds, who chairs the House Corrections Committee and sits on the House Public Health Committee. "Like it or not, we have a large number of people incarcerated in Texas – in [the Texas Department of Criminal Justice], in [the Texas Youth Commission], in various mental health facilities. We have a responsibility to take care of the people there, the ones who are vulnerable to this illness, the ones who are medically fragile."

The U.S. military said it planned to offer vaccine shots to 200 political detainees at the Guantanamo Bay prison in Cuba. This led to criticism from U.S. Rep. Bart Stupak (D-MI), who slammed the government for putting incarcerated guerrilla suspects before U.S. citizens – even though all but one of the Guantanamo detainees have not been convicted of any crime. Pentagon spokesman Bryan Whit-

man later said the detainees would receive the vaccine only after active duty military troops and other Dept. of Defense personnel were vaccinated.

Beyond H1N1

There has been a great deal of media attention focused on swine flu due to the global pandemic. However, consider that H1N1 is much less of a threat than other maladies that commonly affect prisoners, such as HIV/AIDS, hepatitis C (which has reached epidemic levels in some prison systems), MRSA and tuberculosis. [See: *PLN*, Nov. 2007, p.1].

While prison and jail officials have taken steps to prevent the spread of swine flu, including temporary quarantines in some cases, historically they have been less inclined to provide comprehensive medical care for prisoners who suffer from HIV/AIDS or hep C – which result in far more fatalities.

According to a study released by the Bureau of Justice Statistics in December 2009, for example, over 22,100 cases of HIV were reported among state and federal prisoners at yearend 2008, including 5,113 that had progressed to AIDS. In 2007, the most recent year that death-in-custody statistics are available, 130 prisoners died from AIDS-related causes alone. Other prisoners have been denied routine medications such as antibiotics and insulin, resulting in needless deaths.

Once the focus on swine flu subsides, prisoners will continue to die from treatable and preventable medical conditions due largely to the apathy of prison officials, despite a constitutional obligation to provide prisoners with adequate healthcare. ■

Sources: *Centers for Disease Control*, *St. Petersburg Times*, *Miami Herald*, *Associated Press*, *Gainesville Sun*, *Idaho Spokesman*, *News-Sentinel*, *Desert News*, *Orange County Register*, *USA Today*, *Augusta Chronicle*, *Sun Journal*, *Mercury News*, news.smh.com, www.monstersandcritics.com, *Houston Chronicle*, *Los Angeles Times*, *San Francisco Chronicle*, *Boston Globe*, www.corspecops.com, <http://cbs5.com>, <http://lbjs.ojp.usdoj.gov>, www.starbulletin.com, www.cbsnews.com, <http://lwjz.com>, www.statesman.com, www.canada.com, *Las Vegas Review-Journal*, www.madison.com, www.readingeagle.com, *Wilkes Barre Times-Leader*, www.afriquejet.com, www.torontosun.com

Ineffective Attempts to Protect Texas Prisoner Were Sufficient

The Fifth Circuit Court of Appeals reversed a district court's denial of summary judgment to prison officials who had failed to safeguard a Texas state prisoner, saying their ineffective attempts to protect him were sufficient.

Gregory Moore was incarcerated at the Beto Unit for sex offenses when a guard used the state's sex offender registry to publish a list of prisoners who had been convicted of sex crimes, and urged reprisals against them. Beto guards brought copies of the list to work and distributed it to prisoners. Multiple assaults against sex offenders at the facility followed, resulting in a month-long lockdown.

During the lockdown, Moore received death threats and filed a life endangerment claim stating that a gang of prisoners had initiated a plan to "eliminate all sex offenders on the Beto Unit," and that two named prisoners were part of the group. He also said he had overheard threats specifically directed against him. Moore was attacked by one of the prisoners he had identified about three months later. Before then, he was in and out of transient lockdown housing three times while four life endangerment claims were investigated. He was twice

recommended for transfer by Unit Classification Committees that included Major Charles D. Lightfoot. Those recommendations were overruled by State Classification Committee member J. P. Guyton.

Five prisoners believed to be in the group planning the assaults, including the ringleader and one other prisoner named by Moore, were transferred from Beto. The other prisoner identified by Moore remained at the facility. Moore was allegedly coerced into returning to general population, whereupon that prisoner assaulted him. Moore filed a civil rights action pursuant to 42 U.S.C. § 1983, alleging that prison officials had failed to protect him. The defendants moved for summary judgment based on qualified immunity, which the district court denied. They then filed an interlocutory appeal.

The Fifth Circuit held that the defendants' actions may have been a violation of Moore's Eighth Amendment rights, but were objectively reasonable because they returned him to general population only after transferring five threatening prisoners, including the alleged gang leader. A reasonable prison official would not have known that was insufficient to protect Moore from assault. Therefore, the defendants

were entitled to qualified immunity. The Fifth Circuit reversed the district court's denial of summary judgment and remanded with instructions to enter an order dismissing the case. See: *Moore v. Lightfoot*, 286 Fed.Appx. 844 (5th Cir. 2008).

Based upon the appellate ruling, the district court dismissed Moore's case on remand. Moore moved for reconsideration, arguing that he still had valid claims against two defendants who "did not assert qualified immunity in their motion for summary judgment" The court denied Moore's motion, holding that it lacked the power to act on the motion given that dismissal of his case was mandated by the Court of Appeals. "While Moore appears to argue that the Fifth Circuit's decision was incorrect and that the Defendants were not entitled to qualified immunity, that is not a determination which the district court can make."

Moore appealed from that order, but the Fifth Circuit affirmed the judgment of the district court on November 4, 2009, finding that he had "presented no evidence or argument supporting reconsideration of the issue." See: *Moore v. Cockrell*, 2009 U.S. App. LEXIS 24235. ■

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From the Editor

by Paul Wright

February is traditionally the height of cold and flu season in the United States and this month's cover story probably proves the axiom that if America catches cold, prisons catch pneumonia. Swine flu has been in the news quite a bit lately including its effects in prisons and jails. Which is interesting since, all things considered, it has killed relatively few people in the US and fewer still in detention facilities while other chronic illnesses, like diabetes, AIDS, hypertension, hepatitis and MRSA kill far more prisoners each year.

The lack of adequate health care in the bulk of the nation's prisons and jails amply illustrate the complete lack of a preventive health care program in or out of prisons.

Like many diseases, swine flu is preventable and conversely, without adequate safeguards it can and does spread quickly through a confined, overcrowded, malnourished population. Prisons and barracks have long been the incubators of modern disease and it is sad to see the political actions of government employees who put the public at risk of serious pandemics rather than simply treating all citizens who are sick or at heightened risk of illness.

While we are on the subject of disasters, the earthquake in Haiti has been a major disaster. So far the only good news to come out of Haiti is that the National Penitentiary in Port Au Prince collapsed in the earthquake and all 4,000 of the prisoners (it was built to hold 800) have fled.

Like most countries in the Caribbean and South America, 90% of the prisoners were pretrial detainees awaiting trial. Prison reform via natural disaster is one way to look at it though I am sure that among the top priorities of the US invasion force will be rebuilding a prison system. If nothing else gets done that will. We will be reporting on details in an upcoming issue.

I would like to thank everyone who made a donation to this year's annual PLN fundraiser. As of last week we have raised a little more than \$15,000 in donations from individuals. Thank you very much for your support for PLN, it makes a big difference!

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Preventable Sacramento County Jail Death Costs Taxpayers \$1.45 Million

by David M. Reutter

The systemic failure of medical care at California's Sacramento County Main Jail (SCMJ) resulted in a prisoner's avoidable death that has cost taxpayers \$1.45 million. For years, SCMJ's healthcare system has been severely deficient – yet jail officials continue to use the county's Correctional Health Services (CHS) to provide medical treatment of questionable quality.

Only days after being booked into SCMJ on a cocaine possession charge on June 7, 2006, William Francis Sams, 27, began complaining of constipation, stomach problems, a burning sensation in his throat, gastric distress and abdominal pain. He went to sick call on June 13 and a nurse ordered milk of magnesia and told him to drink more fluids.

When Sams saw CHS physician Tamara S. Robinson the next day, he could not remain still without prompting, was crying and groaning, and moved his legs and lifted his body off the bed due to severe abdominal pain. Ignoring Sams' request to be sent to a hospital, Dr. Robinson prescribed Maalox and a "GI cocktail" before sending him back to his cell. She also ordered an abdominal X-ray and other tests that would not be done until the following day.

A short time later, guards brought Sams back for medical treatment because

he was vomiting blood. Rather than provide care for a prisoner who had been classified by jail staff as an "overbearing/flamboyant homosexual," he was returned to his cell.

Around midnight, a deputy again took Sams to the medical unit. CHS personnel noted that his skin was cold, he was perspiring and dizzy, his blood pressure and respiratory rate were high, and his body temperature was low.

"The classic signs of shock," said attorney Geri Lynn Green. At that point, Sams "needed to be transferred to a hospital."

Instead he was told to lie down on mattresses on the floor. He complained of shaking and seizures. Less than two hours later, Sams was found unresponsive; he had no pulse and was not breathing. He died just 8 days after his arrival at the jail.

An autopsy revealed that Sams' death was due to a perforated duodenal peptic ulcer. "Tragic – and wholly avoidable," said Green, who represented Sams' mother, Marilee Ann Hewitt, in a wrongful death suit against Sacramento County, the Sheriff's Department, CHS and jail officials.

The defendants dismissed Sams' death as nothing more than a bad incident that was unavoidable. "The physical

presentation by Mr. Sams did not suggest ... a perforated ulcer," said County Attorney Van Longyear. "Tragically, Mr. Sams' perforated ulcer was not diagnosed and, when [his] condition turned for the worst, classic signs of shock were not recognized, and so emergency policies and procedures were not followed in time to save him."

Apparently the only thing that SCMJ officials had tried to save was money, as evidenced by their use of an on-call doctor, William G. Douglas, who twice had an opportunity to send Sams to a hospital when he was called at home by CHS staff.

"Douglas had a long history of refusing to provide inmates at the jail with necessary and appropriate care and was repeatedly disciplined [and eventually terminated] for failing to provide" such care, Green said. "Douglas disliked his position as an on-call doctor because he was paid only \$8.00 per hour for taking calls, which he stated 'was hardly worth the effort and the responsibility.'"

A Sacramento Grand Jury report released on July 1, 2006, two weeks after Sams died, found that SCMJ's medical care system was a threat to prisoners' health. The Grand Jury noted that the jail's accreditation by the Institute for Medical Quality had lapsed in 2001, and

an attempt at re-accreditation in 2003 had failed.

Sadly, little has changed since the report was issued. The jail's healthcare system remains unaccredited and CHS's Medical Director, Dr. Peter S. Dietrich, was arrested on January 14, 2009 for writing unauthorized prescriptions for OxyContin. He reportedly obtained 1,750

of the pills, naming his mother as the patient; his medical license was suspended and he was fired on May 13, 2009.

The lawsuit filed against the county over Sams' preventable death settled in July 2009 for \$1.45 million. At the \$8.00 per hour that Dr. Douglas was paid, the settlement is equivalent to 181,250 hours – or 20.7 years – of employing a cut-rate

on-call physician to evaluate prisoners' medical needs. Had jail officials paid more for competent care it would have cost them less over the long run. See: *Hewitt v. County of Sacramento*, U.S.D.C. (E.D. Cal.), Case No. 2:07-cv-01037-DAD. 📖

Additional sources: *Sacramento Bee*, www.news10.net, *www.cbs13.com*

Free Rent for Some Washington State Parolees

Due to a roughly \$9 billion state budget deficit, the Washington State legislature approved a plan to offer 90-day rent subsidies for selected prisoners who are eligible for early release. The program is expected to save taxpayers an estimated \$1.5 million over the first two years of its implementation.

As of mid-August 2009, 31 prisoners had been approved by prison officials to receive the rent subsidies, which will be paid directly to their landlords in monthly installments of up to \$500 each over a three-month period. By the middle of 2011, as many as 700 early-release prisoners are expected to benefit from the program at a cost of

about \$955,000. This still represents a substantial savings over their cost of incarceration, which is approximately \$100 per day.

According to *The Herald* newspaper in Everett, Washington, more than 1,200 prisoners were held past their early-release dates in 2008, which effectively cost the state \$13.5 million. The feasibility of the rent subsidy program is based on the need to reduce those costs by releasing prisoners who are otherwise eligible but do not have a place to stay or the ability to rent one. One of the conditions of release, however, is that they must wear a GPS ankle monitor.

State Representative Kirk Pearson and others have opposed the rent subsidy

program. Pearson, who is the ranking Republican on the House Public Safety Committee, is reportedly watching carefully as the program progresses, ready to do what he can to end it should the opportunity arise – e.g., if released prisoners who receive subsidies abuse the program or commit new crimes.

One of the beneficiaries of a rent subsidy, former Geiger Corrections Center prisoner Matthew Reed, was able to move into a small apartment that he otherwise couldn't afford. "I appreciate it, I think it's a great program," he said "I'm not going to take advantage of something like that and lose this opportunity." 📖

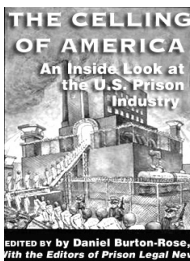
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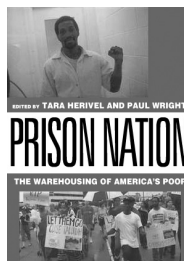
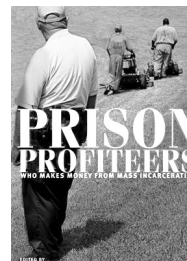
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A New Look at a Very Old Subject: The Uniform Collateral Consequences of Conviction Act

by Margaret Colgate Love¹

In the past twenty years, a relentlessly punitive political environment has given rise to a wide-ranging network of collateral penalties and disqualifications that isolate and stigmatize those convicted of crime long after the sentence imposed by the court has been fully served. As Jeremy Travis, President of John Jay College, has noted, "In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid." However, a new act approved in July 2009 by the Uniform Law Commission (ULC) promises to provoke a lively discussion in state legislatures nationwide about how to reconcile collateral consequences with pragmatic data-driven crime reduction strategies.

The ULC has worked to advance uniformity of state laws for over a century. Originally created in 1892 by state governments with the encouragement of the American Bar Association, the ULC determines what areas of the law should be uniform from state to state, and drafts statutory text to propose for enactment to state legislatures. While some commissioners serve as state legislators, most are practitioners, judges, and law professors.

The Uniform Collateral Consequences of Conviction Act (UCCCA) represents the first comprehensive effort by a mainstream law reform group to address the barriers to reentry and reintegration that are frequently the most important and lasting results of a conviction. While some collateral consequences are sensible regulatory measures, others unreasonably discourage people with a criminal record from reestablishing themselves as productive members of society, thereby burdening communities with the costs of increased recidivism -- costs that tend to fall disproportionately upon communities of color. Thus, collateral consequences pose issues not simply of fairness to convicted persons and their families, but of public safety and fiscal responsibility as well. Adoption of the UCCCA's procedural framework promises to produce a more reasoned and functional approach to the way collateral consequences are interpreted and administered.

The idea that those convicted of crime could be denied some rights and benefits

of citizenship is certainly not new. But in recent years collateral consequences have become more important and more problematic for three reasons: there are more of them, they affect more people, and their effects are more severe and long-lasting. Now that criminal background checking has become routine for most benefits and opportunities, it is difficult for anyone who has ever been convicted of a crime to put their past behind them. Aptly described as "invisible punishment," collateral consequences may restrict a person's ability to find housing and earn a living, to get an education and serve in the military, to vote and run for public office, to qualify for insurance or a license or a loan, to care for their children and maintain family ties, to become a citizen, and even to volunteer in the community. Non-citizens are automatically subject to deportation upon conviction of almost any felony, no matter how long they have lived in the United States or how strong their ties here. While some collateral consequences are reasonably related to a concern for public safety, most apply entirely without regard to their appropriateness in a particular situation.

Persons charged with a crime are rarely alerted to the fact that upon conviction their legal status will permanently change, sometimes in ways that will be devastating to them and to their families. Indeed, the judge and lawyers in the case are often unaware of collateral consequences that will predictably have a substantial impact upon a defendant. Few jurisdictions provide a reliable way of avoiding or mitigating categorical restrictions based solely on conviction even years after the fact. Fewer still give decision-makers useful guidance in applying disqualifications on a case-by-case basis, or a measure of protection against liability. The UCCCA is designed to address these systemic shortcomings in the legal system.

The key provisions of the UCCCA are as follows:

- All collateral consequences contained in state laws and regulations, and provisions for avoiding or mitigating them, must be collected in a single document. In fulfilling their obligations under the Uniform Act, jurisdictions will be assisted by the federally-financed effort to

compile collateral consequences for each jurisdiction that was authorized by the Court Security Act of 2007.

- Defendants must be notified about collateral consequences at important points in a criminal case: At or before formal notification of charges, so a defendant can make an informed decision about how to proceed; and at sentencing and when leaving custody, so that a defendant can conform his or her conduct to the law. Given that collateral consequences will have been collected in a single document, it will not be difficult to make this information available.

- Collateral sanctions may not be imposed by ordinance, policy or rule, but must be authorized by statute. An ambiguous law will be considered as authorizing only discretionary case-by-case disqualification.

- A decision-maker retains the ability to disqualify a person based on a criminal conviction, but only if it is determined, based on an individual assessment, that the essential elements of the person's crime, or the particular facts and circumstances involved, are substantially related to the benefit or opportunity at issue.

- Convictions that have been overturned or pardoned, including convictions from other jurisdictions, may not be the basis for imposing collateral consequences. The Act gives jurisdictions a choice about whether to give effect to other types of relief granted by other jurisdictions based on rehabilitation or good behavior, such as expungement or set-aside. Charges dismissed pursuant to deferred prosecution or diversion programs will not be considered a conviction for purposes of imposing collateral consequences.

- The Act creates two different forms of relief, one to be available as early as sentencing to facilitate reentry (Order of Limited Relief) and the other after a period of law-abiding conduct (Certificate of Restoration of Rights). The Order of Limited Relief permits a court or agency to lift the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider whether to disqualify a particular individual on the merits. A Certificate of Restoration of Rights

offers potential public and private employers, landlords and licensing agencies concrete and objective information about an individual under consideration for an opportunity or benefit, and a degree of assurance about that individual's progress toward rehabilitation, and will thereby facilitate the reintegration of individuals whose behavior demonstrates that they are making efforts to conform their conduct to the law.

- In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued.

In the coming months and years, as the UCCCA is debated in legislatures across the Nation, law-makers and policy-makers will have an opportunity to take a closer look at the issues of fairness, efficiency, and public safety posed by our present regime of collateral consequences. Hopefully the UCCCA will bring not only clarity and harmony, but also a new functionality to this increasingly important part of the criminal justice system. 📖

¹ Margaret Love is the American Bar Association's liaison to the Uniform Law Commission's collateral consequences project, and chaired the drafting task force for the 2004 ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons.

Arkansas Prisoner Awarded \$625 for Refusing to Clean His Cell on the Sabbath

On April 13, 2009, U.S. District Court Judge Harry F. Barnes adopted a magistrate's report and recommendation that found an Arkansas prisoner should be awarded \$625 after being punished for refusing to work on the Sabbath.

Levester Gillard, a practicing member of the New Testament House of Prayer, was told by officials at the Howard County Jail to clean his cell every day.

Gillard refused to comply on Saturdays, believing Saturday to be the Sabbath; consequently, jail officials revoked his telephone and television privileges. Gillard sued, arguing that those sanctions violated his First Amendment rights by punishing him for refusing to work on the Sabbath. The district court denied relief, and Gillard appealed.

The U.S. Court of Appeals for the Eighth Circuit reversed on October 2, 2008, holding that Gillard was entitled to an entry of judgment in his favor on his First Amendment claim.

In so holding, the appellate court concluded that the jail's policy requiring Gillard to clean his cell on the Sabbath imposed a substantial burden on his sincerely held religious beliefs. The fact that the cleaning "took only five to ten minutes" was irrelevant, the Court of Appeals wrote.

Further, the Eighth Circuit rejected the district court's conclusion that the jail's policy was valid under *Turner v. Safley*, 482 U.S. 78 (1987). Gillard was placed in

the precarious position of being "forced to choose between violating his religious beliefs or suffering punishment," the appellate court stated. The jail, on the other hand, could have accommodated its need to ensure proper sanitation by allowing Gillard to "empty his trash and clean his cell after 6 p.m." on Saturday, once his Sabbath had ended. See: *Gillard v. Kuykendall*, 295 Fed. Appx. 102 (8th Cir. 2008) (unpublished).

On remand, the district court awarded Gillard \$20 in nominal damages, a dollar for each day he was punished for not cleaning his cell on the Sabbath. Additionally, the defendants were ordered to pay Gillard's district court and appellate filing fees in the amount of \$605, for a total award of \$625. See: *Gillard v. Kuykendall*, U.S.D.C. (W.D. Ark.), Case No. 4:04-cv-04106; 2009 U.S. Dist. LEXIS 32491. 📖

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Three Years Later, CMS Still Fails to Meet Medical Standards in Delaware

by David M. Reutter

Despite federal oversight of its prison medical care, Delaware “continues to have a great deal more to achieve before it comes into substantial compliance with all provisions of the MOA” (Memorandum of Agreement) the state entered into with the U.S. Department of Justice.

That was the conclusion drawn in the fifth semi-annual report by Joshua W. Martin III, the independent monitor who oversees healthcare in Delaware’s prison system. The report was released on September 29, 2009.

PLN previously reported on the inept medical treatment provided to Delaware prisoners by the state’s contractor, Correctional Medical Services (CMS). [See: *PLN*, Dec. 2005, p.1; Dec. 2006, p.24]. That coverage included details about an outbreak of flesh-eating bacteria and the case of prisoner Anthony Pierce, who had a massive brain tumor that led to his death (Pierce’s condition was so obvious that he was called “The Brother With Two Heads”).

PLN also reported on the MOA when it went into effect in December 2006, and on the monitor’s previous semi-annual reports. [See: *PLN*, July 2007, pp.8 and 10; Feb. 2008, p.24; Nov. 2008, p.10].

While Delaware has made progress in terms of complying with the MOA, it “still has a great deal to accomplish and it does not appear that the state will have reached substantial compliance with all the provisions of the MOA by the time of the expiration of the MOA,” the monitor’s most recent report found. The MOA with the Dept. of Justice was scheduled to expire on December 29, 2009.

The MOA included a total of 217 provisions related to four prisons. Three of the facilities – the Delores J. Baylor Women’s Correctional Institution (Baylor), the Howard R. Young Correctional Institution (HRYCI) and the Sussex Correctional Institution (Sussex) – were found to be in substantial or partial compliance with the MOA, while the James T. Vaughn Correctional Center (JTVCC, previously the Delaware Correctional Center) was in non-compliance with six provisions.

The report found that only eight of 15 records reviewed at JTVCC demonstrated that a nurse had transcribed clinician orders on the day the order was written; the rest were

done the next day. Only six of 13 medication orders were transcribed accurately. The monitor also found that 17% of physician orders that involved completion of laboratory tests, X-rays or electrocardiograms were not timely implemented, and of those 39% were not implemented at all.

Further, JTVCC was in non-compliance with a provision that required juvenile offenders to receive immunizations. The monitor reviewed patients in the chronic disease clinic who were recommended for influenza and pneumococcal vaccinations. Only 2.1% had received influenza vaccine and only 2.8% received pneumococcal vaccine. Those who were vaccinated tended to have received the inoculations before being transferred to JTVCC.

Despite being advised that it was improper, JTVCC nurses still pre-poured medications prior to distributing them, which created a risk of dispensing the wrong dose or an incorrect medication. That practice was a violation of standard nursing procedures and was done solely to save time when providing medications to prisoners.

Another major problem at JTVCC was the “continuity of medications for newly arrived and existing patients with mental health disorders and chronic diseases.” The monitor’s report documented several cases of total disruption in care and continuance of medication upon an intrasystem transfer.

The pharmacy at JTVCC continued to be in non-compliance. It was described as a “cramped and cluttered environment” with a dirty floor. Although a cleaning schedule existed, no one was assigned to clean the area. Refrigeration temperatures were not documented daily, there was no system to account for the use of stock prescription medications, and expired medication was not returned to the vendor per policy.

The monitor further noted that JTVCC guards were not notifying mental health staff that prisoners needed mental health assessments. As a result, prisoners with serious mental illnesses were being placed in isolation without being assessed.

The monitor’s report also detailed the areas where only partial compliance was found. That rating “can signify that the state is nearly in substantial compli-

ance, or it can mean that the state is only slightly above a non-compliance rating.”

Of the MOA’s 217 provisions, the state was found to be in partial compliance with 147 and in substantial compliance with only 64. With profit being the primary concern of private medical contractors like CMS, obtaining substantial compliance in all areas will likely take quite some time.

As in earlier reports, the monitor expressed concern over “the lack of stable and effective leadership at the vendor-level” – that is, with CMS. State officials apparently got the message and announced in October 2009 that Delaware’s \$39 million contract for prison medical services would be re-bid.

A Request for Proposals (RFP) for a new healthcare provider was issued on November 18. The RFP allows companies to submit bids for separate parts of the contract such as mental health care, substance abuse programs or providing prescription medication. The new contract may also include a “shared risk” component in which the state pays for certain medical costs.

“In years past, the Department of Correction [DOC] could wash its hands of medical issues by saying, ‘It was the provider’s responsibilities and not ours,’” said Delaware Corrections Commissioner Carl C. Danberg. “That day has passed.”

The state’s existing contract with CMS expires on June 30, 2010; the deadline for companies wanting to bid on the RFP is February 26. DOC spokesman John R. Painter informed *PLN* that nothing in state law prevents CMS from submitting a bid proposal in an attempt to regain the contract. Hopefully, though, Delaware officials would reject CMS as a contractor, as it was that company’s inadequate medical care that resulted in the MOA with the Department of Justice in the first place.

“What we are trying to do is minimize the problems,” said Rev. Christopher Bullock, a founder of the Delaware Coalition for Prison Reform and Justice. “That begins with a credible health care provider, who understands not only the medical side but the moral and ethical side.” Bullock has worked for years to remove CMS as the DOC’s medical care provider.

Regardless of which company wins the RFP, it still will have to deal with federal monitoring. Delaware officials announced

on December 24, 2009 that they had extended the MOA with the Department of Justice until 2011. The extended agreement is "greatly reduced in scope," and the provisions related to Baylor and medical care at Sussex will no longer be covered under the MOA. Monitoring will continue for one year, then the DOC will begin self-monitoring and reporting during the second year.

"This is good news for Delaware," said state Representative J.J. Johnson, who chairs the House Corrections Committee. "The U.S. Department of Justice has clearly indicated that significant progress has been made, but we have more work to do. This agreement commits the State to finish what we started."

Delaware prisoner Edward G. Williams, who is housed at JTVCC, would agree that more needs to be done. According to a January 4, 2010 article in *The News Journal*, Williams, 50, has "a bulge the size of a cantaloupe protruding from his abdomen." He claims he is not receiving adequate treatment in retaliation for a federal lawsuit he filed in 2007 seeking surgery for his condition. "They're trying to act like it doesn't exist," Williams said. He was finally provided with a colonoscopy after filing suit, but still has not received surgery.

The U.S. District Court issued an opinion in his case on June 24, 2009, stating, "The delay in providing [Williams] the colonoscopy, from the time it was first medically determined that it was necessary, until it was finally performed a few months after the filing of the lawsuit, raises concerns of a constitutional dimension. Moreover, at the time this lawsuit was filed, hernia surgery was recommended and approved at least twice, but it was not performed."

Williams agreed to settle his suit with CMS on September 3, 2009 in exchange for \$15,000 and being allowed to see another doctor who would determine if he should receive surgery. Less than a month later, however, Williams asked the court to set aside the settlement, claiming deception by CMS attorneys and stating the monetary amount was insufficient to cover his pain and suffering, court costs, and medical and living expenses after his release. Counsel was appointed to represent Williams, and on January 12, 2010, CMS withdrew its objections to setting aside the settlement. The case is still pending. See: *Williams v. CMS*, U.S.D.C. (D. Del.), Case No. 1:07-cv-00637-JJF.

Another Delaware prisoner, Kenneth Abraham, a former deputy attorney general serving time for drug and theft offenses, received treatment for skin cancer

and an enlarged prostate only after he filed lawsuits. "I had no idea that things were this dysfunctional," he said. "I had no idea this place was run the way it is." ■

PLN acknowledges the excellent reporting by *The News Journal* concerning inad-

equated medical care in the Delaware DOC, which resulted in the MOA with the U.S. Department of Justice and improved treatment for many Delaware prisoners.

Sources: www.delawareonline.com, www.deprisonmonitor.org, *The News Journal*

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Army Prisoners Isolated, Denied Right to Legal Counsel

by Dahr Jamail

The military's treatment of Army prisoners is "part of a broader pattern the military has of just throwing people in jail and not letting them talk to their attorneys, not let visitors come, and this is outrageous. In the civilian world even murderers get visits from their friends," according to civil defense attorney James Branum.

Afghanistan war resister Travis Bishop has been held largely "incommunicado" in the Northwest Joint Regional Correctional Facility at Fort Lewis, Washington.

Bishop, who is being held by the military as a "prisoner of conscience," according to Amnesty International, was transported to Fort Lewis on September 9, 2009 to serve a 12-month sentence in the Regional Correctional Facility. He had refused orders to deploy to Afghanistan based on his religious beliefs, and had filed for Conscientious Objector (CO) status.

Bishop, who served a 13-month deployment to Iraq and was stationed at Fort Hood, Texas, was court martialed by the Army for his refusal to deploy to Afghanistan. Given that he had already filed for CO status, many local observers called his sentencing a "politically driven prosecution."

By holding Bishop incommunicado, the military violated Bishop's legal right to counsel, a violation of the Sixth Amendment to the US Constitution, according to his civilian defense attorney James Branum.

The Sixth Amendment is the part of the Bill of Rights that sets forth rights related to criminal prosecutions in federal courts, and reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Attorney LeGrande Jones, who practices in Olympia and was designated by Branum as the local counsel for Bishop, was also denied access

to Bishop, on the grounds that Jones was on an unnamed and unobtainable "watch-list," which constitutes deprivation of counsel.

Jones was denied entry to Fort Lewis and told he would never be allowed to enter the base. Fort Lewis authorities never gave him a reason for his being denied access to the base and his client. To this, Branum told *Truthout*, "Fort Lewis authorities have a duty to tell LeGrande the reasons why he is being barred from Fort Lewis, and therefore [barred] from communicating with his client in the Fort Lewis brig."

Until September 18, Bishop's condition was unclear due to his having been completely cut off from the public.

Branum, who is the legal adviser to the Oklahoma GI Rights Hotline and co-chair of the Military Law Task Force, also represents Leo Church, another war resister being held at Fort Lewis.

Church, who was also stationed at Fort Hood, went AWOL (Absent Without Leave) to prevent his wife and children from becoming homeless. The fact that he was unable to financially support his family off his military pay alone dictated that Church seek other means to support them. With his pleas to the military for assistance going unheeded, he opted to go AWOL in order to support his dependents.

According to Branum, "Church received eight months jail time because he put the safety and welfare of his children over his obligation to the Army. Leo tried to get help from his unit, but was denied."

Branum told *Truthout* that Church had been able to contact him while at Fort Lewis, but the call was monitored by a guard, violating his attorney-client privilege.

Gerry Condon, with Project Safe Haven (an advocacy group for GI resisters in Canada), and a veteran himself as a member of the Greater Seattle Veterans for Peace, told *Truthout* he believes Bishop and Church are being held in a way that is both "intolerable and unconstitutional."

Condon, who is working to try to support both Bishop and Church, told *Truthout*, "They are denied all visitors, except for immediate family, clergy and legal counsel [legal counsel is limited at

this time]. No friends or fiancés. This is not the normal practice at other brig[s]."

Speaking further of the conditions in which the military is holding Bishop and Church, Condon added, "Fort Lewis authorities have made it virtually impossible for Bishop and Church to make phone calls. They must first get money on their calling account. This must be done by money order and according to several other similarly prohibitive procedures. And the money may not be credited to the account until a month after it is received. Plus, officials at the Fort Lewis brig must approve the names of people that can be called."

Condon told *Truthout*, "Travis Bishop is a leader in what has become an international GI resistance movement that is attempting to bring troops home from both occupations by following their consciences and international law. They deserve all the support we can give them, especially while they are in prison - they are owed their constitutional liberties."

Branum told *Truthout* that as far as he knows, he may well be the only person on Bishop's call list.

Both Bishop and Church have been prevented from adding any names to their respective "authorized contacts" lists (even for family members), which effectively cuts them off from almost all contact with the outside world. According to Branum, mail and commissary funds sent by friends and supporters will likely be "returned to sender" due to what he feels is "a cruel and inhumane policy."

In addition, there are no work programs at the Fort Lewis brig, nor any classes available for soldiers to take while they are incarcerated. Generally, work programs and/or classes are available for incarcerated soldiers.

"By participating in work programs and school classes, soldiers being held in brig[s] can get time cut off their sentences," Branum explained to *Truthout*, "But these don't exist at Fort Lewis, so that means Travis and Leo can't get time taken off their sentences. Travis will do a minimum of 10 months, and could have theoretically worked an additional month off his sentence if Fort Lewis had these programs."

Branum, who is the lead attorney for both Bishop and Church, told *Truthout*

the actions of officials at Fort Lewis violate his clients' constitutional rights.

"Bishop and Church's defense team and supporters are in the process of negotiating with Fort Lewis officials to ensure transparency and that Bishop and Church's legal rights are being met," Branum stated in a press release on the matter that was published on September 17. "The unusual circumstances of isolation of these soldiers is unquestionably illegal. If Fort Lewis doesn't change its ways, we will be forced to go to court and demand justice."

On September 18, 2009, officials at Fort Lewis finally allowed Branum to speak with Bishop on the telephone, but not privately.

Bishop was accompanied by two guards, who monitored his conversation with Branum. In addition, Fort Lewis authorities claimed that the recently rebuilt/remodeled brig does not yet have proper facilities to facilitate a private telephone conversation.

Speaking further about the conversation he was finally allowed to have with Bishop, Branum added, "In the phone call we did get to do, they still refused to let Travis talk to me privately. He actually had two guards in the room with him the entire time, which obviously negates any compliance with attorney-client privilege. And presumably the phone call was taped (all of the other brigs have special rooms for attorney calls, that have phone lines to the outside that are not taped) which is completely unconstitutional. The brig of course will say, "well we won't listen to that tape" but that is bullshit, and it is illegal."

"The only reason they [Fort Lewis authorities] let me talk to Travis on Friday [September 18] was that he was finally "medically cleared," Branum told

Truthout, "This took 10 days in this case, and it looks like this is their standard operating procedure, which is completely wrong."

When *Truthout* questioned the public affairs office at Fort Lewis about Bishop's situation, we were told all matters were being handled "legally, and according to standard operating procedure," and "any wrongdoing would be investigated."

Branum added, "They are giving the excuse that "we don't have the secure room for attorney phone calls set up yet," but can't tell me when they are going to have the room set up."

Branum and Jones are planning to file a lawsuit against Fort Lewis in the near future, specifically targeting the denial of attorney-client privilege.

Both soldiers are being supported by two GI resistance cafes: Under the Hood cafe (in Killeen, Texas, near Fort Hood) and Coffee Strong (in Tacoma, Washington, near Fort Lewis).

[Editor's Note: *Prison Legal News* has been censored by officials at the Fort Lewis brig. PLN has long provided complimentary subscriptions to conscientious objectors and political prisoners who request it. Upon investigation, it turns out prisoners at the brig are not allowed to receive publications nor correspond with anyone unless they first request it. Despite requesting to receive *PLN* the publication is still being censored. *PLN* is currently

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reviewing its legal options.]

Dahr Jamail, an independent journalist, is the author of "The Will to Resist: Soldiers Who Refuse to Fight in Iraq and Afghanistan," (Haymarket Books, 2009), and "Beyond the Green Zone: Dispatches From an Unembedded Journalist in Occupied Iraq," (Haymarket Books, 2007). Jamail reported from occupied Iraq for nine months as well as from Lebanon, Syria, Jordan and Turkey over the last five years. This article is reprinted with permission of the author.

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Freedom Forum CEO Charles Overby's Dark History with Corrections Corporation of America

by Beau Hodai

Charles L. Overby is a man who leads dual lives; a man who has each foot planted firmly in two very different worlds. In one world he is a champion of the free press. In the other, he is one of a group at the helm of a corporation that has worked hard to limit freedom of information and the ability of the press to inform the public.

In one world he is chief executive officer of the Freedom Forum and the Newseum – located in Washington D.C., blocks from the Smithsonian and the Capitol Building – which literally has the First Amendment etched into its 75-foot marble edifice. He is a Pulitzer Prize-winning editor and reporter, former vice president of news and communications for Gannett Co. Inc., and former management committee member of both Gannett and the company's flagship paper, *USA Today*.

Overby, according to his Freedom Forum biography, also serves on the board of the Horatio Alger Association of Distinguished Americans and is a member of the foundation board at his alma mater, the University of Mississippi.

What Overby's Freedom Forum biography fails to disclose is that in his other world he sits on the board of directors for Corrections Corporation of America (CCA), both as a member of the Audit Committee and as chair of the Nominating and Governance Committee, and has since 2001.

This omission is easy to understand when you juxtapose the Freedom Forum's guiding principles, "free speech, free press and free spirit," against CCA's recent actions and attitudes toward the press and freedom of information.

CCA and the Press

From 2007 to 2009, CCA, the nation's largest private jailer (holding more than 70,000 prisoners in over 60 facilities and reporting \$1.6 billion in revenue for 2008), spent millions of dollars successfully lobbying against two pieces of federal legislation: the Public Safety Act, which would have outlawed private prisons, and the Private Prison Information Act of 2007. As no hearing was ever held on the Public Safety Act, it is fair to infer that

the bulk of those resources went toward suppressing the latter bill.

The Private Prison Information Act of 2007 (PPIA), introduced in the 110th Congress as HR 1889 by Pennsylvania Representative Tim Holden, would have placed privately-operated prisons that contracted with the federal government under the purview of the Freedom of Information Act (FOIA).

In June 2008, Rep. Holden testified to the need for increased public disclosure in the private prison industry, and alluded to the amount of adverse pressure facing the bill, in his comments before the House Committee on the Judiciary's Subcommittee on Crime, Terrorism and Homeland Security:

"In recent weeks, opposition to this bill has mobilized. Although I cannot testify on their behalf, I can reiterate my concern that opposition to this bill is opposition to reporting transparency, to the public's safety, and the safety of corrections officers working in these federally-contracted facilities. As you will hear, repeated attempts to ascertain information from these institutions have been rejected, if not ignored completely."

"Roughly 25,000 federal criminal prisoners are jailed in private facilities at any given time. Yet private prisons are not required to publicly disclose information about their facilities' daily operations," Rep. Holden continued. "Without strong FOIA requirements, we cannot assure whistleblowers are able to come forth and gather evidence they need to support any claims; we cannot assure public safety is paramount if the information provided is not on-par with the information provided from our state and federal institutions."

In May 2008, one such whistleblower came forward. Ronald T. Jones, a former quality assurance division senior manager at CCA's corporate office, told *TIME* magazine that CCA often issued misleading statements concerning prison disturbances – or completely glossed them over – in reports to contracting government agencies. Jones also claimed that CCA went so far as to keep two sets of books – one doctored for public consumption and one for internal use. [See: *PLN*, March 2009, p.7].

Rep. Holden also related the findings of the Ohio Correctional Institution Inspection Committee, comprised of members of the Ohio General Assembly, which conducted a surprise inspection of the CCA-owned Northeast Ohio Correctional Facility in 2006. The facility, which CCA bills as "low security," is under contract with the federal Bureau of Prisons and the U.S. Marshals Service.

The committee found that there had been 44 prisoner-on-prisoner assaults at the facility between June 2005 and May 2006. Much to their alarm, the committee noted that by comparison there were 305 recorded assaults in all of Ohio's 32 correctional facilities during 2005. When members of the media inquired as to the severity of the assaults or what subsequent actions had been taken by the administration at the CCA prison, they received no reply.

The PPIA died before the Subcommittee on Crime, Terrorism and Homeland Security with the expiration of the 110th Congress; it never made it to a vote.

"Our information was that lobbying by or on behalf of the [private prison industry] had killed it," said Alex Friedmann, associate editor of *Prison Legal News* and vice president of the Private Corrections Institute, who had testified in support of the bill at a subcommittee hearing on June 26, 2008.

Friedmann noted that the Democratic leadership in the House, under Rep. John Conyers, Jr., who chairs the House Judiciary Committee, wasn't happy with the bill as written – which likely had something to do with its demise, too. "Rep. Conyers' office wanted the FOIA provisions to be made part of contractual agreements with federal agencies, not a stand-alone law," Friedmann stated.

That same reservation was one of the chief arguments employed by Michael Flynn, director of government affairs for the Reason Foundation (publisher of *Reason* magazine), who was the only witness to testify before the subcommittee against the PPIA. Flynn had stated that by legislating FOIA requirements for private prisons, Congress would establish a dangerous precedent that would discourage private sector competition for federal

contracts.

However, as Friedmann pointed out in a statement to the subcommittee, "Mr. Flynn failed to mention that most of the leading opponents to [the PPIA] are private prison companies, their lobbyists and organizations that have received funding from the private prison industry – including the Reason Foundation.... Mr. Flynn did not see fit to mention that the Reason Foundation is a major proponent of prison privatization and has received funding from private prison companies, including CCA."

Last May, Rep. Sheila Jackson-Lee reintroduced the PPIA as the Private Prison Information Act of 2009 (HR 2450), citing concerns that the private prison industry, along with the Office of the Federal Detention Trustee, might be fabricating reports concerning immigrant detainee populations in order to gain additional funding and influence immigration policy. From the bill's reintroduction through October 2009, CCA spent \$540,000 on three sets of lobbyists with a stated interest in the PPIA.

Loyalties, Lobbyists and CCA's PAC

Overby declined to comment on his involvement with CCA, so one can only rely on arithmetic and existing documentation when trying to discern how he reconciles his role at the Freedom Forum with his role at CCA, or to which his allegiance lies.

On one hand, according to records filed with the IRS pursuant to the Forum's tax-exempt status, Overby derived over \$474,000 in compensation and expenses from the Freedom Forum in 2007. His present compensation is unknown, as there are no subsequent Freedom Forum or Newseum filings available on record with the IRS.

On the other hand, according to Forbes.com, Overby received a total of \$198,610 in compensation for serving on CCA's board of directors in 2008. As a director of CCA, he is also a shareholder in the corporation. Security and Exchange Commission records indicate that Overby was awarded 26,918 shares between 2008 and 2009 under the company's stock incentive plan for simply being reelected to the board (CCA's stock was valued at \$16.36 per share at year-end 2008 and \$24.55 at year-end 2009).

Overby's relationship with CCA is not just pocketbook deep. According to Federal Election Commission records, both

Overby and CCA President and CEO Damon Hininger maintain residences in the wealthy Nashville suburban enclave of Brentwood, not far from CCA corporate headquarters.

Overby's involvement with the extended CCA family most likely dates back to the 1979-1987 administration of Tennessee Governor (now U.S. Senator) Lamar Alexander, when Overby served as a special assistant in Alexander's administration.

In 1985, Alexander backed CCA's unsuccessful bid to take over Tennessee's prison system, at which time it was revealed that his wife, Honey, held stock in the company. Following this revelation, Honey traded in her CCA shares to the Massey-Burch Investment Group for some insurance stock – which she then sold, making \$142,000 off her initial \$8,900 CCA investment. [See: *PLN*, June 1997, p.5].

The Massey-Burch Investment Group also provided CCA co-founder Tom Beasley with venture capital to start the corporation in 1983. Beasley, a former chairman of the Tennessee Republican Party and longtime friend of Lamar Alexander, managed one of Alexander's gubernatorial campaigns. Today, Massey-Burch partner and co-founder Lucius E. Burch III sits on CCA's board of directors along with Overby.

Both Overby and his wife, Andrea, along with other CCA directors, executives and their family members, have continued to contribute thousands of dollars to Lamar Alexander's various political campaigns over the years, making the extended CCA family one of his primary sources of political capital.

And so it was that throughout the pitched battle between CCA and the PPIA, Overby and the Freedom Forum remained silent, never once weighing in to defend the assertions of media representatives and lawmakers that public inquiry into federally-contracted private prisons should be protected by the Freedom of Information Act.

From 2007 to 2009, CCA employed six sets of lobbyists assigned to several federal issues, including the PPIA. However, none of those groups – which had budgets in the hundreds of thousands of dollars – approached the monetary or professional clout of the corporation's A-list team assigned to the PPIA.

That team was composed of Overby's colleagues at CCA – executives such as

CEO Damon Hininger, General Counsel Gus Puryear, former Bureau of Prisons director and CCA Senior Vice President Michael Quinlan, and CCA Vice President of Federal and Local Customer Relations Bart Verhulst, who served as chief of staff under former U.S. Senator Bill Frist. This group of executive-level lobbyists expended \$3.45 million in lobbying primarily against the Public Safety Act and Private Prison Information Act over the course of 2007 and 2008, along with other unspecified federal issues concerning the private prison industry.

While Overby is not registered as a lobbyist with the Clerk of the House of Representatives, as are other members of CCA's top brass, it is important to note that he has paid \$35,000 into CCA's political action committee (PAC) from 2003 to date – \$10,000 of which was donated in 2007 and 2008. During that time period, the PAC – a virtual cash dispensary that favors lawmakers whom CCA imagines to be in a position to scratch its back – paid out thousands of dollars in campaign contributions to House Judiciary Committee members Zoe Lofgren and Dan Lungren (who both sit on the Subcommittee on Crime, Terrorism and Homeland



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Security), and to Judiciary Committee Chairman John Conyers. None of whom had received any money from CCA's PAC prior to the introduction of the PPIA in 2007.

Peter Sussman, former editor of the *San Francisco Chronicle*, is a co-author of the Society of Professional Journalists' Code of Ethics, a member of the SPJ's Ethics Committee and a board member of the Human Rights Defense Center which publishes *Prison Legal News*. While careful to point out that he was not speaking for the SPJ and that he had no prior knowledge of Overby's involvement with CCA, Sussman said that Overby's "dual allegiance" was troubling.

"If you're promoting freedom of the press – and it's always been my understanding that the Freedom Forum does that – and at the same time, appearing to purchase limits on press access to places that are acting on behalf of the public by contract – that just seems wrong ... it's so obvious to me that it's hard to articulate it," said Sussman. "It also troubles me when I hear that the head of an organization devoted to the freedom of the press won't talk to the press about his own alleged conflict."

Sussman noted that this conflict was especially egregious, as the press is only seeking access to institutions carrying out a function which has traditionally been one of the core responsibilities of the government.

"I really want to make clear also that you cannot hide government information by contracting out to a private company – as long as that private company is doing a function that traditionally has been a government function, and that is still by and large a governmental function – especially when it involves the liberty and access to the public of people who really have no other recourse and who are dependent on that public institution," Sussman explained.

"The only way we are going to effectively evolve crime policies, the only way we're going to be able to monitor the behavior of people who have sole control over other individuals without the access to the public that most other people have – the only way we're going to do that is to allow the public, through the press, to look into the operations of these [private prison] institutions and the behavior of

the people who run them – and also talk to those incarcerated to get their perspective on this crucial public function that we have so far failed to handle effectively." ■

Ed. Note: The 2009 version of the Private Prison Information Act was referred to the House Judiciary Committee, where it has remained pending with no action

since June 12, 2009. Although the bill has 15 co-sponsors in the House, companion legislation has not yet been introduced in the Senate.

A modified version of this article appeared in the January 2010 issue of Extra!, a publication of Fairness & Accuracy in Reporting. It is reprinted here with the author's permission.

Three Florida Guards Charged in Prisoner's Beating

by David M. Reutter

Three Florida prison guards have been arrested and charged in the December 16, 2008 beating of a handcuffed prisoner at the Charlotte Correctional Institution (CCI). The criminal proceedings can be viewed as a fulfillment of Florida Department of Corrections (FDOC) Secretary Walter McNeil's vow to prosecute rogue employees. [See: *PLN*, Dec. 2009, p.22].

Absent the submission of an incident report by a nurse, the beating of prisoner Jerome Williams, 23, would have gone unnoticed as a standard use of force. The combination of the guards' falsified reports and their intimidation of Williams with the threat of future assaults is typical of such incidents.

What the guards did not count on was nurse Maryann Henry ignoring an admonition to "[b]e careful what you say and write because there are officers here that will find out where you live and what you drive." Initially, Henry gave a witness statement that did not mention the beating. The next day, however, she broke the "code of silence" by filing a report with CCI's colonel, which triggered an internal investigation.

Williams was having mental health issues on the night of the assault; a psychological emergency was declared, which guards ignored. To get their attention, Williams tied a noose around his neck that was attached to an air vent. Guard David Lee Cox said he would call a nurse. A few minutes later, Sgt. William G. Langenbrunner came to Williams' cell door.

Langenbrunner was angry, calling Williams an "asshole" and "fuckboy." Williams replied with a few obscenities of his own. Because CCI is a segregated close-management prison, Williams was handcuffed behind his back to be taken to a shower while awaiting the nurse.

When Henry arrived, Williams was moved to a medical examination room. After taking his vital signs she asked him what his problem was. He replied that he had feelings of hurting himself and had told the "sarge," who "didn't give a fuck." He looked at Langenbrunner and said, "You don't give a fuck, do you sarge?"

Langenbrunner responded, "OK, that's it. This is over." He then grabbed Williams, and he and Cox tackled him to the floor. Both guards then began punching Williams while he was handcuffed. One of them told Henry to "get the fuck out," which she did.

Guards in the control room noticed the ruckus and signaled an alarm for assistance. Sgt. Ryan Rhodes and guards Shaun Oppe and Clint Pignatare arrived. Pignatare was instructed to retrieve a video camera to record the incident. Langenbrunner reportedly stated, "Hey Oppe, come and get some."

Oppe went over to Williams and said, "You made me run down here for no reason motherfucker." Langenbrunner replied, "Go ahead and get some shots in before the captain gets here." Oppe then kicked Williams in the groin and legs. After the captain arrived, Williams was treated for a laceration and severe swelling of his right eye, swelling to his lips and cheek, bruises and scratches on his face and forehead, bruising to his left upper shoulder and back area, and a minor laceration of his inner right thigh.

Langenbrunner took charge of the cover-up, telling control room guard Christy Sturtevant in an intimidating manner that she "didn't see anything." He also told Pignatare that "our stories have got to match." A few days after the incident, Pignatare informed Oppe that he needed to go to the warden's office to come clean.

Oppe, however, had confidence in his union, the Police Benevolent Association (PBA), replying "the PBA's gonna have that nurse's ass." He apparently based his comment on prior experience; in the past, the Police Benevolent Association had provided counsel to FDOC guards that resulted

in acquittals on homicide charges in the murder of Florida death row prisoner Frank Valdes. [See: *PLN*, Aug. 2002, p.12; Jan. 2001, p.6].

Following the FDOC's investigation, Langenbrunner, Cox and Oppe were fired. All three were charged in March and April 2009 with felony battery on a prisoner

with malicious or great bodily harm, and misdemeanor fraud for filing false reports. The only question now is whether convictions will be obtained. ■

Sources: *FDOC Office of the Inspector General, Report No. 08-54466*; *WINK News*; *Charlotte Sun-Herald*

Washington State Makes Work Release Available to Disabled Prisoners; Monetary Payments to Class Members

The Washington Department of Corrections (WDOC) agreed to a settlement in a class action lawsuit alleging violation of the Americans with Disabilities Act (ADA) that results in not only a policy change but monetary payments to class members.

Represented by the Seattle law firm of Budge and Heipt, WDOC prisoner Rickey Peralez filed a complaint that resulted in certification of a class defined as, "All otherwise eligible ADA disabled inmates of the [WDOC] who, from October 20, 2003 through January, 2008 have been partially or wholly denied participation in the [W]DOC Work Release Program by reason of a disability."

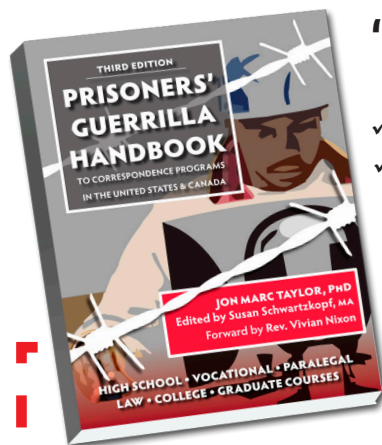
In granting the class members' partial motion for summary judgment, the district court held that to the extent WDOC's "practice of scoring inmate offenders according to a numerical profiling system known as PULHEDXT – and then uses that score as a motivating factor to exclude otherwise eligible ADA disabled offenders from [W]DOC's Work Release Program--" violates the ADA.

After that ruling, the WDOC made "significant effort to voluntarily alter and revise policies and procedures and has educated its personnel and voluntarily taken other steps designed to minimize the future potential for discriminating against disabled individuals in connection with

[W]DOC's work release program."

In addition to rescreening the 166 class members for work release programming, WDOC agreed to provide a monetary settlement to the class. The class representative, Rickey Peralez, received \$30,000 as an incentive award. The other class members each received \$1,800, for a total damages payout of \$298,000.

The Court awarded also class counsel a total of \$332,600.75 in attorney fees and costs. The judgment was entered on May 21, 2008. See: *Peralez v. Washington Department of Corrections*, USDC, W.D. Washington, Case No. C06-5625. Documents related to the case are available in *PLN*'s briefbank. ■



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Federal Judge Holds Texas Parole Board *Coleman* Hearings Unconstitutional

by Matt Clarke

On August 6, 2009, a federal judge ruled that hearings held by the Texas Board of Pardons and Paroles (BPP) to determine whether onerous sex offender conditions should be imposed on parolees not convicted of sex offenses had violated a parolee's right to procedural due process.

Ray Curtis Graham, a Texas state parolee, filed a civil rights suit pursuant to 42 U.S.C. § 1983 in U.S. District Court after the BPP placed "condition X" sex offender requirements on his parole supervision even though he had not been convicted of a sex offense. A jury trial was held.

During the trial, former BPP general counsel Laura McElroy testified that the BPP's policy was allowable under previous federal court decisions. An exasperated U.S. District Court Judge Sam Sparks told the jury, "The lady is wrong. She is stating issues of the law that are wrong." The BPP objected that Judge Sparks had improperly influenced the jury. He agreed, admitted he "was out of bounds," and declared a mistrial.

The mistrial didn't stop Sparks from issuing an order stating that Graham had been denied due process. Sparks noted that in *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) [*PLN*, July 2006, p.27], the Fifth Circuit held that sex offender conditions were "qualitatively different" from standard parole conditions and may be placed on a parolee who was not convicted of a sex offense "only if he is determined to constitute a threat to society by reason of his lack of sexual control," after affording the parolee an appropriate hearing.

Judge Sparks found that the *Coleman* "hearing" held by the BPP in Graham's case did not meet procedural due process standards because: (1) neither Graham nor his attorney was allowed to attend the hearing; (2) Graham was not allowed to review the evidence used against him, including the report of a licensed sex offender treatment provider who had interviewed Graham; and (3) "never in the entire *Coleman* process was a knowing, explicit finding made by anybody that Mr. Graham 'constituted a threat to society by reason of his lack of sexual control.'"

In the latter regard, one of the two

voting parole commissioners from Graham's *Coleman* hearing testified – "to the Court's stunned disbelief – that he did not know who, if anyone, was to make this finding." The only finding made was that Graham "could pose a threat to society," which Sparks observed could apply to anyone.

The court ordered the BPP to hold a new *Coleman* hearing with Graham and his attorney present, allow Graham's attorney a 20 minute oral presentation, and have a court reporter record the proceedings. The order also stated that Graham could recover attorney fees and costs from his civil rights suit if he subsequently prevailed at trial, because BPP officials admitted that the suit had caused them to change their policies.

Sparks showed impatience at what he considered to be the BPP's ignoring earlier federal court decisions and a recent directive he had issued. "It's time for the parole division and the Board of Pardons and Paroles to stop being defensive and start trying not to use technical defenses," he said.

Another *Coleman* hearing was held in compliance with the court's order, and the BPP again found that Graham should be subject to sex offender conditions. Although Graham later challenged that finding in his federal suit, the court denied his motion, stating, "The [BPP] commissioners' reasons for making such a determination, however nefarious they may be, are simply beyond the purview of this Court as long as their procedures complied with the Court's order." Sparks held that because the second hearing comported "with the procedural due process requirements set forth [in] *Coleman*," he would not mandate the exact procedures the BPP had to follow.

"This is all on a collision course," stated Scott Medlock, prisoners' rights program director for the Texas Civil Rights Project. "Three federal judges and two appellate courts have told them the system has to change ... but the state's litigation strategy is that the [5th U.S. Circuit Court of Appeals] will bail them out. I don't think so."

"I think this case displays the arrogance of power that permeates the parole

board," said William T. Habern, one of Graham's attorneys.

Habern, who has fought for parole policy changes for years, now sees change through federal court intervention as inevitable regardless of how much the BPP resists. However, BPP officials continue to claim that their policies are constitutional and refuse to comment on any changes they might be considering.

The BPP's seven board members and eleven commissioners review about 23,000 prisoners for parole each year. They also determine whether parole violators should be revoked, and rule on applications for pardons. The BPP members spend an average of four minutes on each case when deciding whether to grant or deny parole, and such cursory examinations lead to numerous errors.

"There are hundreds of cases each month that have to be voted again because the board didn't impose the conditions they should have, because they didn't read the files," stated Sandra Pickell, former assistant director of review and release for the Parole Division (PD) of the Texas Department of Criminal Justice. The PD doesn't review parole files for errors that might jeopardize a prisoner's potential parole. The only errors they look for are when, for example, the BPP fails to require a DWI parolee to attend substance abuse meetings or a sex offender parolee to attend therapy sessions.

"It's horrible, a totally unbelievable system that is not working right," remarked former BPP member Burt Reyna.

Reyna, who left the BPP in 2004, said that case summary reports should at least be disclosed to potential parolees and their attorneys. "There are too many mistakes in those files that are never caught, because there are currently no checks and balances in the system," he stated.

Until recently the BPP's files remained a closely-guarded secret, effectively concealing potential errors and misinformation from outside review.

The files are still mostly secret, but in June 2009 the BPP changed its policy related to whether a parolee not convicted of a sex crime is subject to sex offender conditions. Under the new policy such

parolees can see their evaluation reports, which previously were confidential. The policy was also changed to require a finding of whether the parolee is a continuing threat to society due to a lack of sexual control, as required by *Coleman*.

A re-trial in Graham's lawsuit was held on October 5, 2009. The jury found that BPP Chairman Rissie Owens and PD Director Stuart Jenkins had violated Graham's constitutional right to procedural due process, and that Owens' actions were objectively unreasonable in light of clearly established law. The jury awarded damages in the amount of \$15,000 for mental anguish or loss of enjoyment of life and \$6,250 for out-of-pocket expenses.

However, on November 10, 2009, the district court held in a post-trial motion for judgment as a matter of law that while Graham's due process rights had been violated, Owens could not be held personally liable under 42 U.S.C. § 1983 because she did not vote in Graham's *Coleman* hearing, there was insufficient evidence of supervisory liability, and she was not subject to vicarious liability. The damages award was therefore voided.

Separately, the court held Assistant Attorney General Kim Coogan, who

had represented Jenkins, in contempt of court "for insubordination and repeated violations of the Court's instructions in the presence of the jury," and imposed a \$500 fine. Graham's motion for attorney fees remains pending and he has appealed the district court's ruling that voided the damages award. See: *Graham v. Owens*, U.S.D.C. (W.D. Tex.), Case No. 1:08-cv-00006-SS.

PLN has previously reported on

challenges to sex offender conditions being placed on Texas parolees who have not been convicted of sex offenses. [See: *PLN*, Sept. 2009, p.20; Oct. 2009, p.30]. Apparently, it will take more than federal lawsuits and court orders before such conditions are imposed by the BPP in a constitutional manner. ■

Additional source: *Austin American-Statesman*

\$6,000 Settlement in Illegal Arrest of Washington State Probationer

The State of Washington paid \$6,000 to settle a wrongful imprisonment claim.

The claim involved the probation violation arrest of Kenneth Butler. When he reported to the community corrections office on January 23, 2008, as required, he was advised that his probation officer, Andrea Maldonado, wanted him to check in using the kiosk. After doing as instructed, the kiosk printed a receipt advising that Butler was to again report in on February 6, 2008.

Alleging he violated the terms of his probation for not reporting, Maldonado

issued a warrant for Butler's arrest on January 30, 2008. Butler was arrested on February 5, 2008, and taken to the Snohomish County Jail. He remained there until a February 19, 2008 DOC hearing that found he was not guilty of violating his release terms.

Represented by Seattle attorney Daniel R. Whitmore, Butler filed a standard tort claim with the Risk Management Division in April 2008. On May 12, 2008, the matter was settled for \$6,000. See: Washington State Division of Risk Management, Claim No. 31063440. ■

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Denial of Medical Care Causes Two Riots at GEO Group Texas Prison

by Matt Clarke

On December 12, 2008, a riot erupted at the GEO Group-run Reeves County Detention Center (RCDC) in Pecos, Texas, which houses federal immigration detainees. The uprising was triggered by the death of a prisoner who had received inadequate medical care. A second, more serious riot at the 3,000-bed facility broke out on January 31, 2009. [See: *PLN*, June 2009, p.1]. Prison officials' refusal to provide detainees with medical treatment was again the cause.

The pair of riots and many other problems at GEO facilities in Texas have led some to re-evaluate the wisdom of prison privatization. Regardless, last year GEO landed a multi-million dollar contract to operate a new mental health prison hospital in Montgomery County, near Houston.

In December 2008, Jesus Manuel Galindo, 32, of Ciudad Juárez, Mexico, was serving a 30-month sentence at RCDC for illegally re-entering the U.S. He suffered from severe epileptic seizures and was taking Dilantin, a medication that must be administered at precise times and confirmed therapeutic levels.

Galindo became concerned for his health. He called his mother and told her he wasn't being given his medication frequently enough or at the full dosage. When he complained, RCDC officials put him in segregation. His mother mailed his medical records to the GEO-run prison; they were refused, and she was told not to send them again. Meanwhile, Galindo continued to suffer seizures in his segregation cell in the facility's Secure Housing Unit (SHU).

Galindo contacted his public defender and told her he was afraid he would die. She sent investigator Octavio Vasquez to the facility on December 4, 2008. Galindo told Vasquez about the problems he was having with his medication; in turn, Vasquez talked to RCDC officials, who promised that Galindo would be returned to general population where other prisoners could help look after him. They lied. Instead, he remained in segregation.

At 7:00 a.m. on December 12, 2008, a month after he had been placed in the SHU, Galindo's fears were realized when GEO guards discovered his body in full rigor mortis. He had been dead for hours.

An autopsy attributed his death to his epileptic condition, and noted there were "below-therapeutic levels" of Dilantin in his system.

"With multiple seizures, inadequate levels of medication and left in isolation without supervision, he was set up to die," said Robert Cain, an Austin doctor who reviewed the autopsy report.

Prisoners who had been incarcerated with Galindo when he was in general population saw him being removed from the SHU in a body bag. That touched off the first riot. Worried about his health, they had been trying to get RCDC officials to let Galindo out of segregation and provide him with medical care. Their requests had been ignored.

The riot lasted several hours, and two prison employees were briefly held hostage. Prisoners demanded to meet with the Mexican Consulate, federal officials and the warden to discuss problems at the facility, particularly health care. The disturbance ended without serious injuries to any detainees or guards, but with significant damage to the prison's recreation center.

Twenty-six prisoners were indicted by a federal grand jury in April and May 2009 for offenses related to the incident; they pleaded guilty after being threatened with 10-year mandatory minimum sentences. Of course, no RCDC employees were indicted for failing to provide adequate medical care, which resulted in the uprising.

Even after the riot, guards at the GEO facility continued to put prisoners in the SHU if they complained about health-related problems, for "medical observation." On January 31, 2009, the detainees at RCDC had had enough. They rioted again.

The second riot was worse than the first, involving about 2,000 prisoners and lasting five days. Law enforcement officers used rubber bullets and tear gas to put down the uprising. Three of the prison's buildings were torched, causing huge plumes of black smoke and millions of dollars worth of damage. Following the riot, prisoners were held in tents due to extensive damage to the housing units.

According to one detainee, the second disturbance began after prisoner Ramon Garcia was put in segregation when he

said he felt sick and dizzy. "All we wanted was for them to give him medical care and because they didn't, things got out of control and people started fires in several offices," the unidentified detainee stated.

The Reeves County Commission has already approved \$948,000 in repair costs for the second riot and \$320,000 for the first. Some estimate the total will be as high as \$20-40 million, all of which has to be paid by the county or its insurance company. This calls the cost-benefit analysis of private prison management into question, as it was GEO's mismanagement that left the county responsible for repairs to the facility.

Reeves County had issued about \$115 million in revenue bonds to finance construction and expansion at RCDC since 1985; at the time of the riots, the county's outstanding bond debt was around \$92 million. To cover the cost of repairs incurred due to the riots not paid by its insurer, the county recently approved another \$15.5 million in bonds.

Plus there is potential liability in a civil lawsuit, as Galindo's family has filed a wrongful death claim. "There are a lot of layers to this case, but for us it's simple. They should have provided medical care right there and treated him decently and they didn't," said attorney Miguel Torres, who represents Galindo's parents, both legal U.S. residents.

"We don't understand how there can be so little humanity there in the prison," observed Galindo's father. "Animals aren't even treated as badly as they treated our son, keeping him locked up in the hole so sick and without any company. It was so cruel, and he died sick and afraid."

Physicians Network Association (PNA) of Lubbock, Texas was contracted to provide medical services at RCDC, at a cost of \$6.03 per detainee per day. PNA has contracts at ten GEO facilities as well as prisons run by Management and Training Corporation (MTC). The company claims to be a leader in prison health care with 14 years of experience and "no record of substantiated grievances in any facility."

Yet in March 2003, the U.S. Department of Justice found widespread medical neglect and abuse at the Santa Fe County Adult Detention Center, a prison owned by Santa Fe County and

operated by MTC, which contracted with PNA. That investigation followed the suicide of a prisoner who suffered from severe claustrophobia, who killed himself while on suicide watch. The Justice Department noted that the prison had no on-site doctor, nor a psychologist or psychiatrist.

The nearest doctor was in Lubbock, two hours away. On average, a physician visited the facility once every six weeks and saw only a few prisoners during each visit. The detention center's nurse had been given a written order not to spend more than five minutes with any prisoner patient. Although the nurse had no mental health training and was not licensed to prescribe medications, she was giving drugs to mentally ill prisoners. PNA's formulary (a list of approved medications) didn't have many name-brand medicines but included "less expensive, less effective" drugs.

A similar situation existed at the GEO-run RCDC, which didn't even have an infirmary. This was confirmed by Reeves County Judge Sam Contreras, who stated at a public meeting that the absence of a medical unit was "what caused the disturbance – because [prisoners] were placed in the SHU when they didn't do nothing wrong. They are just sick." Federal officials have since asked that an infirmary be built at RCDC, at an estimated cost of \$1.8 million.

Several advocacy groups have staged protests over the conditions at RCDC, including the Southwest Workers Union, the ACLU of Texas, Grassroots Leadership, and the National Network for Immi-

grant and Refugee Rights. On December 10, 2009 – International Human Rights Day – dozens of protestors descended on GEO Group's regional headquarters in New Braunfels, Texas to protest the deaths of Galindo and eight other detainees at RCDC since 2005. They called for an investigation by the Department of Justice.

"[P]risoners at the Reeves County Detention Center, many of whom are only serving time for immigration violations, report conditions that include medical neglect, abuse by guards, overcrowding, inadequate food and unsanitary conditions," said Bob Libal, Texas coordinator for Grassroots Leadership.

Another protest was held outside RCDC on December 12, 2009 – the one-year anniversary of Galindo's death. According to ACLU Outreach & Advocacy Coordinator Tracey Hayes, "The conditions have not improved and since the uprising, they've gotten worse." Lisa Graybill, legal director for the ACLU of Texas, agreed. "We continue to receive complaints that the Bureau of Prisons and its contractors, GEO and Physicians Network Association, are systemically failing to address life-threatening and chronic medical conditions of detainees," she said.

GEO Group has had other high-profile problems in Texas. Last April, in a scathing opinion, a Texas Court of Appeals affirmed a \$42.5 million jury award against the company in a suit involving the death of Gregorio de la Rosa, Jr., a prisoner who was beaten to death at a GEO-run facility in Willacy County.

Prison officials had watched de la Rosa die, smirking and laughing, then covered-up evidence. [See: *PLN*, June 2009, p.10; Feb. 2007, p.34]. Following the appellate ruling, the case settled in January 2010 under confidential terms.

In 2007, GEO was forced to close a juvenile prison in Coke County after Texas Youth Commission officials found atrocious and unsafe conditions at the facility. [See: *PLN*, Nov. 2008, p.18; July 2008, p.18].

Scot Noble Payne, an out-of-state Idaho prisoner, committed suicide at a GEO-run Texas prison in 2007, leaving letters that said he couldn't stand the squalid conditions in his segregation cell. Idaho subsequently pulled all of its prisoners out of the facility. [See: *PLN*, Dec. 2007, p.23]. A lawsuit filed over Payne's death settled for \$100,000 in Sept. 2009. See: *Payne v. Sandy*, U.S.D.C. (D. Idaho), Case No. 4:09-cv-00089-BLW.

Then there were allegations, reported in May 2008, that GEO employees had engaged in widespread sexual abuse of female detainees at the company's South Texas Detention Center in Pearsall. Some of the prisoners reportedly became pregnant. That same facility was the subject of a lawsuit claiming two prisoners had received inadequate mental health care and were subjected to discrimination and retaliation. The suit is still pending, with a trial date set for March 29, 2010. See: *Rodriguez-Grava v. GEO Group*, U.S.D.C. (W.D. Tex.), Case No. 5:07-cv-00717-OLG-JWP.

Plus there are the many cases in which GEO employees have been arrested for

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Riots at Texas Prisons (cont.)

bribery, fraud, smuggling contraband and other misconduct. Such as GEO guard Jose Alberto Ybarra, who was charged in March 2008 with bringing marijuana into the Val Verde Correctional Center; former RCDC guard Katherin Elizabeth Terry, who pleaded guilty in November 2009 to bribery and contraband-related charges; and Keith Clark, GEO's business manager at RCDC, who was arrested in September 2009 on charges of credit card fraud.

Further, as previously reported in *PLN*, there was Moises B. Martinez, Jr., a case manager at RCDC, who was sentenced on July 31, 2009 to 2½ years in prison and three years probation for attempting to smuggle tobacco and other contraband into the facility; former RCDC life skills instructor Velma Jean Payan, sentenced on Sept. 2, 2009 to 24 months on contraband charges; and former RCDC guards Jerri Ornelas, Silvia Chairez and Jacob C. Guzman, who were sentenced on similar charges on Sept. 3, 2009. Ornelas and Chairez received 24 months in prison, while Guzman got 46 months; all three also must serve three years on supervised release. [See: *PLN*, Nov. 2009, p.50].

Despite these numerous problems – particularly those involving the provision of medical and mental health services – GEO Group subsidiary GEO Care was selected by Montgomery County, Texas in July 2009 for a \$7.5 million contract to run the new 110-bed Montgomery County Forensic Mental Hospital. The facility, to be completed in 2011 at a cost of \$35 million, is needed to house a backlog of prisoners awaiting competency hearings and mental health treatment.

Mental health advocates complained that there was never any public discussion about the contract for operating the hospital. “Why would we want to use an entity that hasn’t had a stellar reputation?” asked Monica Thyssen, a mental health policy specialist for Advocacy, Inc. “If the process had been more transparent, there probably would have been other state officials who would’ve said, ‘I don’t know if GEO is the best use of state dollars.’”

That is all too true, but with Texas becoming the private prison Mecca of the United States – the state is home to at least 56 privately-operated facilities – GEO depends on the general public and government officials not knowing about

its shoddy track record when it comes to running prisons.

Then again, it’s not as though state prisons don’t have problems, too. “Some of [GEO’s] facilities are pretty darn good, and some are not as good as the others,” opined Texas state Rep. Jerry Madden. “But that’s the exact same problem we have with the state-run facilities.”

The difference? Public prisons don’t have to cut corners, or deny medical care

that results in prisoners’ deaths, to make a profit. ■

Sources: *Dallas Morning News*, *Brownsville Herald*, *Associated Press*, www.mywesttexas.com, www.kwes.com, www.whatsappub.com, www.workers.org, www.kristv.com, *ACLU National Prison Project*, www.southernstudies.org, www.texasprisonbidness.org, www.mysanantonio.com, www.texasobserver.org

Special Treatment for Jewish Prisoners, Rappers Leads to Employee Discipline, Resignations at New York Jails

by Gary Hunter

Five corrections employees at the Manhattan Detention Complex in New York City, also called “the Tombs,” were disciplined after it was learned that the jail chaplain in charge of Jewish affairs threw a lavish six-hour party for an Orthodox Jewish prisoner. Two of those employees later resigned.

Rabbi Leib Glanz sought and obtained permission to perform a bar mitzvah ceremony at the Tombs for the son of Tuvia Stern, a notorious public figure recently captured after he jumped bail and spent almost 20 years on the run. Stern had fled to Brazil after being indicted in connection with a \$1.7 million financial scam. He was sentenced in March 2009 to 2½ to 7½ years.

The catered bar mitzvah took place in the jail’s gymnasium on December 30, 2008 and included sixty guests, a local singer and a band. Guests were served kosher food on real china with metal knives and forks, and were allowed to keep and use their cell phones. Metal utensils and cell phones are a violation of jail security policies.

Stern was permitted to dress in street clothes, and those who attended the event were entertained by popular Orthodox singer Yaakov Shwekey. Jail guards reportedly were paid overtime to supervise the celebration.

Rabbi Glanz had long been known as a mover and shaker in the New York political community. Unlike most applicants who are thoroughly vetted before being hired, Glanz was appointed chaplain in 2000 by the administration of former New York mayor Rudy Giuliani. Glanz’s reputation stemmed from his position as a go-between for political officials and the

powerful Jewish Satmar community. He made his way into the company of such powerful figures as State Senator Eric Adams, 1996 presidential candidate Bob Dole and Kevin Sheekey, deputy to Mayor Michael Bloomberg.

During his tenure as jail chaplain, Glanz was known for his propensity to make life a little easier for Jewish prisoners and often had them transferred from the more punitive Rikers Island facility to the Tombs. Former prisoners told the *New York Post* that Glanz’s office was like a safe haven inside the jail. Jewish prisoners would go to his office to use his unmonitored phone for a variety of reasons, some of them illicit. Some would place sports bets. Others would try to raise bail money. One prisoner called a friend for assistance in hiding evidence in his case.

“Guys are fighting with their wives, guys are calling up saying, ‘I want to lay \$600 down on this game, that game, I want to bet this horse’ ... guys are calling girls for a little phone sex,” said a former prisoner. “Some of us would use his desk as a craps table and shoot craps for commissary items.”

Beyond the fiasco involving the bar mitzvah, Glanz had also arranged a satellite TV hook-up outside the jail so a Hasidic prisoner could watch a relative’s wedding in Israel. According to one source, the video feed was two-way so the wedding guests could see the prisoner.

“The rabbi had brought in wine and food and everything ... and they sat in the visiting area for hours,” said an unnamed retired jail official. “The rank-and-file [guards] were like, ‘You gotta be shitting me.’”

According to former prisoner Robert

Feder, Rabbi Glanz had so much power at the jail that he was able to have guards transferred elsewhere if they interfered with him or his favored Jewish prisoners. "If an inmate had a problem with an officer, that problem disappeared – that officer wasn't there anymore," said Feder.

Given his political connections and influence, it was no surprise to his supervisors when Glanz asked for and received permission to perform a bar mitzvah ceremony at the Tombs. Glanz even provided the number of guests who would attend the event.

What his supervisors didn't know was how lavish an affair Glanz intended to provide or the negative backlash that would result. The fallout was not immediate. In fact, the event went so well that Glanz used the jail's gym again, to hold an engagement party for Stern's daughter in April 2009. Glanz also wrote a letter to the judge presiding over Stern's case, asking for "maximum leniency."

Once the story broke in the news media last June, disciplinary action was taken against the Department of Corrections' assistant commissioner for ministerial services, Imam Umar Abdul-Jamil, as well as Warden George Okada, Chief Peter Curcio, Chief Frank Squillante and Rabbi Glanz. The discipline included suspensions and loss of vacation time.

On June 15, 2009, Chief Curcio announced his retirement from the department. He had been appointed chief just one month before the bar mitzvah took place, and was one of the officials who approved the event.

Glanz tendered his resignation the next day. Following media reports about the lavish bar mitzvah, most of the Jewish prisoners held at the Tombs were moved to other facilities.

Rabbi Glanz and the four other jail officials were not the only New York City corrections employees to come under fire for lapses in judgment and giving prisoners preferential treatment. On May 30, 2006, Warden Emmanuel Bailey had booked hip-hop performer "Papoose" for a nearly two-hour concert at the Rikers Island jail.

Toward the end of his performance, Papoose, whose real name is Shamele Mackie, gave a shout-out taunt to his former friend Miguel "Dough Boy" Jeffrey, who was a prisoner at Rikers. Jeffrey claimed that Mackie had shorted him on studio time; in retaliation he fired shots at Mackie's entourage and stole a \$40,000

gold chain from one of the rapper's relatives.

Jeffrey, who was serving a 12-year sentence for armed robbery and assault, was not allowed to attend the concert because officials were aware of the friction between the two. Mackie's on-stage "dissing" of his former friend "was like throwing a match on gasoline," said Jeffrey, who had a leadership position in the Bloods gang.

Jeffrey reportedly ordered retaliation, and in the months following the concert there were 8 stabbings or slashings involving gang members and Mackie's imprisoned friends at the George Motchan Detention Center on Rikers Island.

Bailey was reprimanded for failing to get approval for the concert. Corrections Department spokesman Stephen Morello said "a procedural step may have been missed." However, that didn't mean "the handling of this event involved venality, corruption or a lack of competence," he stated.

According to the *New York Post*, Corrections Chief of Department Carolyn Thomas initially ignored requests to investigate the concert and the subsequent violence at Rikers. Ironically, it was preferential treatment for another rapper – Foxy Brown – that led to the resignation of Thomas and two other jail officials.

Brown (whose real name is Inga Marchand) was serving a one-year sentence at Rikers Island for violating her probation in an earlier case involving an assault on two manicurists. While incarcerated she was allowed to conduct a magazine interview and photo shoot to promote her new album, and allegedly had unlimited phone and TV access and wore Gucci shoes.

Brown was released from jail on April 18, 2008 after serving less than nine months. She denied receiving any special treatment, saying, "It was incarceration, not vacation. I only wore the designer clothing I was allowed to have."

Morello defended the actions of corrections officials. "Inmates were entitled to wear their own clothing," he said, and noted the magazine interview had been approved by the Department of Media Services as "a matter of routine."

News of the photo shoot became public in late June 2009, and Carolyn Thomas, Warden Okada and Chief Squillante all resigned four months later in October. Imam Abdul-Jalil, who had been disciplined in the bar mitzvah scandal,

was also reportedly involved in arranging preferential treatment for Brown.

"It is imperative for a new team of leadership to take over, clean house, and immediately restore accountability, which has been absent for too long," said Norman Seabrook, president of the Corrections Officers Benevolence Association. ■

Sources: *New York Post*, *New York Times*, www.cnn.com, www.thejewishweek.com, *New York Daily News*, www.starpulse.com

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Maine Prison System's Board of Visitors: Secret, Unaccountable and Co-Opted

by Lance Tapley

The state prison in Warren has been hammered in recent months by a prisoner murder and other violence, a prisoner hunger strike, legislative investigations exposing mismanagement and poor guard morale, and a request by human-rights groups for a federal probe of prisoner mistreatment. Most recently, the state Corrections commissioner, Martin Magnusson, told legislators that budget cuts have reduced staff to a precariously low level.

Many prison problems have persisted or gotten worse for years. So why hasn't the Maine State Prison Board of Visitors, the blue-ribbon panel of five citizens appointed by the governor to oversee the way the prison is run, corrected at least some of the problems? This is a recurrent question among people concerned with prison issues.

To look into this question is to have a glimpse into a black hole of officialdom. The Board of Visitors, first set up 78 years ago, is composed of officials who generally meet in secret and rarely — if ever — challenge the administrators they oversee. The board didn't even get around to writing and giving to the Legislature its legally required annual reports for the past four years until July 29, 2009, after the *Phoenix* asked to see them.

The board's chairman, Jon Wilson, of Brooklin, a magazine publisher and member for eight years, claims his group has "made a difference" in prison management, but in a phone interview is awkwardly unable to cite an example. Another board member, John Atwood, of Sheepscot, hung up on this reporter when he was asked to cite a board accomplishment. Atwood, a former Superior Court judge and state commissioner of public safety, has been on the board for six years.

Denise Altvater, who runs a youth group at the Passamaquoddy reservation in Perry and was appointed last year, refused to talk with this reporter. Ed Courtenay, of Warren, a former prison guard supervisor who has served on the board for 13 years, crisply says he sees the board's role as limited and expresses deference to prison officials. The woman who had been the fifth

member, Kendra Bryant, a Rockland psychologist, resigned earlier this year after two years on the board, and has not been replaced.

The law governing the board — which gives it broad powers to inspect the prison, review its management, and make recommendations in an annual report — specifically says the group is subject to the state's Freedom of Access law, which obliges meetings to be public except for such things as personnel and litigation discussions and establishes a strict protocol for going into nonpublic sessions.

But chairman Wilson admits the board has conducted most of its meetings with the public excluded. The most recent, on July 15, 2009 in Augusta, had no advertised public notice, and previous to it Wilson told this reporter it was closed. (He later admitted there should have been public notice.)

The annual reports are supposed to be distributed to the prison warden, the corrections commissioner, and the Legislature's Criminal Justice and Public Safety Committee, but since they hadn't been in years it's no wonder that Senator Earl McCormick, a West Gardiner Republican who served on the Criminal Justice Committee in the last Legislature, says, "I certainly haven't heard that they've done a lot. I don't recall they ever came before us."

Impressions of the board's invisibility and ineffectualness run deep.

"I've always wondered what they are supposed to do," says Zachary Heiden, the staff attorney for the Maine Civil Liberties Union, who as part of his job follows corrections issues.

Likewise: "I have no idea what it does," says Sue Rudalevidge, a former Maine Council of Churches advocate for better treatment of prisoners.

This mental picture of the board goes back a ways.

Speaking about his extensive activism for prisoner rights in the 1970s and 1980s, Pine Tree Legal Assistance attorney Paul Thibeault, of Machias, says the board was "useless." They were a "figurehead" group, he says.

In the present day, the board is "toothless," says Ira Scheer, a former

president of the prison's guards union who no longer works for the state: "I've never seen anything done" by the board.

Summing up a common perception, Barbara Pierce Parker, a prisoner-rights activist, says board members "haven't challenged" the Department of Corrections.

Board chairman Wilson paints a different picture, although it vividly reveals the board's intimacy with the Department of Corrections.

Wilson, 63, is energetic and reflective. *Wooden Boat*, a magazine he founded in the 1970s, has long thrived. He had an unsuccessful experience, however, with an inspirational magazine called *Hope*. He closed it down in 2004, but he wrote articles for *Hope* about people who brought together convicted criminals and victims — or, in the case of murderers, the victims' survivors — so the prisoners could face deeply what they had done. The work appealed to Wilson because, he says, he is "deeply angered" by abuse of authority, including "criminal attempts to control others."

In 2001, the year then-governor Angus King appointed him to his first three-year term on the visitors board, Wilson founded a nonprofit, JUST Alternatives, through which he conducts training sessions in "victim-offender dialogue" at prisons around the country. Despite his victim-rights efforts, Wilson says, "I work respectfully with offenders," and "I am passionately oriented toward human and individual rights." He became the visitors board chairman in 2005.

Wilson employs a couple of mantras to explain the board's activities: "listening" and "responsibility without authority." These words reflect his view of the board's role.

He says board members spend much of their time listening to concerns of prisoners, guards, and the employees running the prison's programs. These concerns are then taken to prison management.

Wilson says Warden Jeffrey Merrill "looks carefully" at the concerns, but for reform Merrill "doesn't get all the support he needs from the Legislature." Problems at the prison have a lot to do

with an insufficient budget, Wilson believes. (Merrill declined to be interviewed for this article.)

Wilson's other mantra, "responsibility without authority," defines in his mind the Board of Visitors limits. It's not a governing board, but an advisory group, he says. There is no staff, and members receive no pay.

He has worked to have the group meet more regularly (it meets now about eight times a year), he says, and this year he partially opened two meetings to the public. He is aware of the state's Freedom of Access law, but claims security and confidentiality concerns restrict how much the deliberations can be public.

Although Wilson appears careful to protect his relationship with prison authorities, he can be sharply critical of the prison. The institution is not run correctly, he says. "I think it needs help. . . . There are a lot of issues that need work."

Nobody appreciates the overworked, underpaid guards in this understaffed, high-turnover institution, he says. There's not enough money "to run that prison the way it was designed to run." Among the often-inexperienced guards the stress, he says, is "like working in a war zone."

The 100-man, solitary-confinement Supermax or Special Management Unit he sees as a special problem. It's horrible to mix impulsive and mentally ill prisoners there, he says. But the state is "not willing to fund the alternative," a major mental-health facility for prisoners.

Also horrible, he says, is the high recidivism or the return to crime by prisoners who have served their sentences: "It's a failure rate. The public needs to understand the system is not working."

He keeps coming back to the fact that the Legislature doesn't pay attention to the prison. And this is because "most people" — voters — "don't want to look at it."

Yet his criticism doesn't get translated into action. "We don't lobby," he says flatly. Sometimes his words seem fatalistic: "It's a huge, huge ship to turn."

When he is asked about the prison's liability in the April death of wheelchair-bound sex offender Sheldon Weinstein, a murder apparently committed by prisoners but with possible responsibility on the part of prison staff, Wilson replies in a similar fatalistic manner that prison murders are inevitable: "If somebody wants to hurt somebody, they can. . . . I don't think the prison is responsible."

So who is responsible for the bad

things that take place in a state institution? In addition to believing that the board doesn't have authority, it would appear that Wilson actually doesn't believe the board has much responsibility, either.

Wilson's attitude is shared by a former member of the Board of Visitors, Tom Ewell. While he, too, sees the prison as a troubled place, he believes the board is limited in what it can do to correct the problems. For 19 years the executive director of the Maine Council of Churches, Ewell, 66, retired in 2006, left the prison board after three years, and moved to Washington state. Like Wilson, he emphasizes the board's role in "listening," in being an intermediary. Although he says he kept "pushing for more active participation" of the board in prison affairs — and describes meeting resistance in "a world of distrust and secrecy" — he admits that he and the board didn't do much as advocates for change.

Like Wilson, he can't name a reform the board brought about, though he says he unsuccessfully tried to reduce the high phone charges that Corrections demands prisoners and their families pay for prisoner calls. "We were more diplomatic than adversarial" vis-à-vis the prison administration, he says.

He agrees state law "would have allowed a more adversarial role," but the group works "from the inside." That is the tradition: The board is not expected to be activist. He feels one of his accomplishments was obtaining the trust of commissioner Magnusson and prison staff: "I gave them the benefit of the doubt."

When he was on the board, he says, the idea of public meetings "never even occurred to us." Neither did the idea of annual reports with recommendations to the Legislature. He characterizes the attitude of the assistant attorney general who advises Corrections and the board, Diane Sleek, as "give [the public] the least amount of information," calling her "the bulldog of the whole system."

Blunt and thoughtful, Ewell, like Wilson, can be sharply critical of the prison.

Supermax solitary confinement he calls "inhumane" and "just cruel." He expresses satisfaction that, as a Maine Council of Churches lobbyist, he helped stop Corrections from building a much larger Supermax back in the late 1980s.

As for the vast number of mentally ill

people in prison, he expresses sympathy with prison staff: "They have mentally ill people thrown at them. What can they do?"

Like Wilson, he appears to throw up his hands at possibilities for significant reform.

Perhaps there is value in the limited role of "listening" that Ewell and Wilson see for the Board of Visitors. But if Wilson is personally angered by abuse of authority and passionately oriented toward human rights, as he claims, why hasn't he led the board to correct the human-rights abuses against prisoners that responsible organizations believe take place regularly at the Maine State Prison? Why haven't he and other board members advocated before the Legislature for less abusive treatment of the guards — fuller staffing and better pay, supervision, and working conditions? Why has the board largely kept its activities secret? Wilson and Ewell don't have answers to these questions except this is way things have been done.

But Pine Tree Legal Assistance attorney Paul Thibeault has an answer: Board members "feel like they're part of Corrections instead of representing the public."

In other words, the Board of Visitors has been co-opted.

"You have to open yourself to civilian input," says Jamie Bissonette, an American Friends Service Committee prison activist, speaking of the board's secrecy. Otherwise, "it's just a chat with the warden."

And while the chat goes on, the abuse continues. ■

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Rikers Guards Charged With Using Juvenile Prisoners to Run Extortion Ring

by Gary Hunter

On January 22, 2009, Rikers Island, New York guards Michael “Mack” McKie and Khalid “Nel” Nelson were charged with enterprise corruption after it was learned they were using a group of prisoners to enforce discipline and extort other offenders at the Rikers facility for juveniles. A third guard, Denise “Mama A” Albright, was charged with assault, conspiracy and sundry other crimes.

The three came under investigation after 18-year-old Rikers prisoner Christopher Robinson was beaten to death on October 18, 2008. [See: *PLN*, Jan. 2009, p.20]. Juvenile offenders at the facility have claimed the three indicted guards ran a criminal enterprise known as “the Program.” Prosecutors agreed – according to the Bronx District Attorney, the jail was an “incubator for violent criminal activity sanctioned by adults in positions of authority.”

Prisoners were used as enforcers under the guards’ direction to extort other offenders into giving up their commissary and phone privileges. Those who failed to follow the Program were beaten into compliance while the guards orchestrated a cover-up. McKie and Nelson were also accused of showing their enforcers, called “the Team,” how to subdue and attack other prisoners in ways that could not be detected, such as not hitting them in the face. Members of the Team would dictate who could come out of their cells, sit in the dayroom, or even use the bathroom. The situation was described as a “gladiator school” or a scenario reminiscent of Lord of the Flies.

However, attorney Joe Jackson, who represents McKie and Albright, pointed out that his clients were not even at the jail when Robinson was beaten to death. He said the accusations were “predicated upon inmates who now, in an effort to save themselves, are pointing fingers,” and called the indictments a “web of lies.”

Then-New York City Correction Commissioner Martin F. Horn, who resigned last July, insisted that the misconduct was isolated to just one section of the Robert N. Davoren Center (RNDC) at Rikers, and that steps had been taken before the incident to prevent similar problems.

“We were both proactive and aware of bullying and extortionate behaviors among the adolescents at RNDC and in other jails,” Horn said. “That is why, long prior to the Robinson homicide, we took steps to prevent such behavior.”

Jail officials knew about such problems in part because the exact same scenario had occurred at the facility before, when Rikers guard Lloyd Nicholson was indicted in February 2008 for using a group of juveniles as enforcers to assault other prisoners. Nicholson’s scheme was also called “the Program.” [See: *PLN*, Jan. 2009, p.20]. Yet evidently not much changed at the jail after Nicholson was charged.

Within the first ten months of 2008, there were 39 reported assaults at RNDC that resulted in serious facial injuries such as broken noses, jaws or eye sockets. Most of those incidents involved juvenile offenders and gang members exerting control over other prisoners. “That’s an extremely high number any way you cut it,” said Steve J. Martin, an Austin, Texas-based use-of-force consultant. “It’s evidence that there’s something incredibly wrong in that institution.”

Extortion and abuse have been part of the Rikers jail system for years. In 2003, prisoner Donald Jackson was beaten until he “was bleeding badly, and unconscious.” According to a subsequent lawsuit, guards not only looked the other way but “the officers delayed in obtaining medical treatment” for him. The city settled his claim for \$500,000. [See: *PLN*, Jan. 2009, p.20; June 2007, p.41].

Schmi Caballero was beaten after a guard became angry with him for spending too long on the phone with his mother. The guard ordered another prisoner to “discipline” Caballero with a broomstick; he was left with a broken nose and blurred vision. The case settled for \$97,500 in March 2008. See: *Caballero v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:07-cv-06357-RMB.

At least seven other federal lawsuits have been filed over comparable incidents. Attorney Julia P. Kuan is litigating two claims currently pending against jail officials for prisoner assaults at Rikers. According to Kuan, “The city’s been on

notice because these lawsuits have been pending for quite some time, and the fact patterns are so similar.”

For example, one month before Robinson was beaten to death, RNDC prisoner Alicedes Polanco, 18, was severely assaulted by a group of offenders involved in the Program. “My right eye socket was broken,” he said. “My jaw was hit, the right side of my ribs was all bruised.” Polanco has since sued the city. See: *Polanco v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:09-cv-10131-RMB.

Another lawsuit was filed in February 2009 by Tyreek Shuford, for a beating he received in 2007. Shuford was attacked by prisoner “enforcers” at RNDC with the guards’ permission, then not allowed to go to the infirmary for two days. He was later beaten by the guards themselves. His suit settled in October 2009 for \$373,300 paid by the city, plus \$1,500 from guard Jason Davis and \$200 from guard Darlene Sanders. See: *Shuford v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:09-cv-00945-PKC.

Jonathan S. Abady, Shuford’s attorney, said the jail was infected with “an intractable culture of permissiveness [by guards] coupled with a disturbing attitude of denial by higher level supervisors.” Attorney Joel Berger, who represented Caballero, added, “Sometimes the officers are afraid to do something about it.”

But that fear appears to be fading. Some corrections officials provided the *New York Times* with documents verifying that jail administrators had known about the problem for years. The *Village Voice* reported that “the second and third highest officials in the city Correction Department had been receiving regular intelligence reports about gang violence and extortion – some of it encouraged by correction officers – in the jail for teenagers” up to a year before Robinson was murdered.

Twelve prisoners have been indicted in connection with Robinson’s death; three face manslaughter charges. McKie and Nelson are currently being held on \$200,000 bond, and could face up to 25 years in prison if convicted. Albright has a \$50,000 bond and faces up to 15 years.

"They didn't turn a blind eye to violence. They authorized and directed it," stated Assistant DA James Goward. Nevertheless, none of the guards were charged with Christopher Robinson's death.

On May 11, 2009, as a direct result of Robinson's death, New York City Mayor Michael R. Bloomberg approved a law that requires the Dept. of Correction to publicly release statistics related to violence involving juvenile offenders, whether caused by guards or other prisoners.

In August 2009, Robinson's mother, Charnel, filed a wrongful death suit in Bronx Supreme Court; the case was later removed to federal court. She is seeking \$20 million. "The pain of not having my son hasn't gotten any easier," she said. "I have no choice but to seek justice." See: *Robinson v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:09-cv-07446-LTS. Robinson had been incarcerated at Rikers on a minor parole violation. He was asked to work late at his job, and missed a curfew.

Jail officials say they have since made improvements at RND. "The list of actions we have taken both prior to and since Robinson's death] includes plenty of steps the department has taken to address violence, including, specifically, in adolescent housing units," said Dept. of Correction spokesman Stephen Morello.

As if Rikers didn't have enough problems, on December 29, 2009, the *New York Post* reported that guard Nadja Green had been disciplined after jail officials found she was sleeping on the job. The evidence was compelling: One of her co-workers had taken a photo of her asleep, leaning back in a chair with her mouth open, while a nearby prisoner flashed a peace sign. The picture had been e-mailed to the *Post*. The guard who took the photo, Claudel Barrau, also was disciplined. "We do not expect this type of behavior or performance from our officers, nor do we tolerate it," said Morello.

At least when the guards at Rikers are asleep they aren't abusing prisoners

or directing violent extortion rings. That behavior shouldn't be tolerated either. ■

Sources: www.nytimes.com, [\[sun.com\]\(http://sun.com\), \[abclocal.go.com\]\(http://abclocal.go.com\), *New York Post*, \[www.villagevoice.com\]\(http://www.villagevoice.com\), *New York Daily News*, *Associated Press*, \[www.front-pagemag.com\]\(http://www.front-pagemag.com\)](http://www.ny-</p></div><div data-bbox=)

Maryland: Parole Supervision Fee Likely Does More Harm than Good

by Bob Williams

In a 2009 report by the Brennan Center for Justice, a think tank and public interest advocacy group at New York University School of Law, the authors conclude that the state of Maryland's assessment of a \$40 monthly parole supervision fee is "a penny-wise, pound-foolish policy" that likely does more harm than good to society's interests in fostering public safety and reducing the burden on taxpayers arising from the costs of incarceration.

In 1991, as part of a national trend to charge those convicted of crime with the costs of their punishment, Maryland enacted a law obligating parolees to pay a fee of \$40 for each month they remained on parole supervision. The purpose behind the fee was to generate revenue to finance general state operations -- not the parolee's actual supervision.

For the sample of 7,524 parolee cases analyzed by the Brennan center report, supervision fees averaged \$743, but ranged as high as \$5,600. In nine out of ten cases, the parolee failed to fully repay this debt upon discharge from parole, largely because of significant hurdles in obtaining and maintaining employment. Indeed, while they face a multitude of financial obligations -- including child support, drug and alcohol testing fees, and, in some cases, fees for participation in drug treatment and other programs that are conditions of their parole -- the vast majority of parolees are unemployed. Thus, not surprisingly, only 17 percent of

the total amount of supervision fees assessed in the sample were collected.

When a parolee fails to pay his or her monthly fee, the Division of Parole and Probation ("DPP") sends a computer-generated letter threatening parole revocation. Although DPP's practice generally is not to seek actual revocation of parole based solely on non-payment of the parole supervision fee, the threatening letters nonetheless create fear and frustration among the recipients, sometimes pushing parolees over the edge. Thus, in an ironic twist, some parolees reported that they felt they had to resort to crime to pay off their debts -- in order to avoid having their paroles revoked! How often this occurred is not precisely known. But, with incarceration costing Maryland taxpayers an average of about \$32,000 per prisoner annually, if the fear of parole revocation played a role in just 11 parolees returning to prison for a year, the costs to the state would exceed the \$334,752 in revenue raised by the supervision fee in fiscal year 2008.

The Brennan Center report recommends that the Maryland Legislature abolish the parole supervision fee as being inconsistent with the state's efforts to promote the successful reentry of offenders to society. Source: *Maryland's Parole Supervision Fee: A Barrier to Reentry* by Diller, Greene, and Jacobs. The report is available on PLN's website. ■

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Department of Justice Releases Arrest-Related Death Statistics

by Matt Clarke

The Bureau of Justice Statistics recently released statistics on state and local law enforcement arrest-related deaths for the years 2003 to 2006. Although Georgia, Montana and Maryland failed to respond to the survey and Nevada and Wyoming only provided information for one year, the statistics showed that there were 2,686 arrest-related deaths from 2003-2006. 1,540 were homicides by law enforcement officers.

The major causes of arrest-related deaths for all three years was homicide by law enforcement (57.3%), drug/alcohol intoxication (11.8%), suicide (10.8%), accidental injury (6.8%) and illness/natural causes (5.2%). Males made up 95.8% of the deaths. 43.3% were white, 31.8% black and 21.1% Hispanic. The age group with the greatest percentage of deaths was 25-34 (29.7%), followed by 35-44 (27.4%) and 18-24 (19.2%). 56.2% of the suicide deaths and 45.5% of the illness deaths were Whites. Blacks led deaths by drug or alcohol intoxication (39.6%) and accident (42.7%).

California led all states in the number of arrest-related deaths in 2003-2006 (465), followed by Texas (380) and Florida (277). The deaths were regionally concentrated in the West (938) and South (907) while the Northeast had only 369 and the Midwest 472 arrest-related deaths. Naturally, large-population states such as New York (142), Pennsylvania (113), Illinois (100) and Ohio (97) had more deaths than small population states like Alaska (4), South Dakota (5), Vermont (5) and West Virginia (7).

Homicide as a cause of arrest-related death was highest in California (277), Florida (157), Texas (153) and Arizona (114). This compares with New York (72), Illinois (67), Pennsylvania (75), Ohio (66), Washington State (51), Oregon (46) and New Mexico (42). Suicides were most prevalent in Texas (77), Arizona (34), California (21) and New Mexico (15). Drug and alcohol intoxication deaths were most common in Texas (77), California (70), Florida (24), New York (17), Arizona (17) and Ohio (12).

57.6% of the arrestees who died had violent offenses as their most serious offense. 13.6% had public-order offenses, 7.4% property offenses and 7.3% drug offenses. 3.8% of the deaths involved

medical or mental health transport. In 10.4%, no criminal activity had been reported.

Local police departments were involved in 1,952 of the arrest-related deaths, followed by Sheriff's offices (541) and state police or highway patrol (150). As expected, the larger the law enforcement agency, the more reported deaths.

Other than seeming to be a very low number for the total number of arrest-related deaths considering the number that are sensationalized every day on the nightly news, the statistics show some alarming trends. Police actions seem to lead to death much more often in the South and West, indicating a possible

culture of police violence. The high rate of drug-and-alcohol-related deaths in California and Texas may indicate a need for better understanding and response by police to arrestees under the influence of those substances. The high suicide rate in Texas, Arizona and New Mexico may indicate a need for a better arrest strategy or the availability of psychiatrists and/or psychologists at arrest scenes. The numbers are self reported by the agencies with no independent verification.

Source: The Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, *Deaths in Custody Statistical Tables*, available on PLN's website. ■

Homelessness a Significant Problem for Released Prisoners

by John E. Dannenberg and Alex Friedmann

On August 8, 2008, the U.S. Bureau of Prisons (BOP) discharged disabled prisoner Michael R. McHone from FCI Edgefield in South Carolina to spend his first night at a motel. The next day – a Saturday – a prison employee drove McHone to Asheville and dropped him off in front of the Western Carolina Rescue Mission at 10 a.m. The Mission didn't open until 4 p.m., so the BOP worker pushed McHone two blocks in his wheelchair to A-Hope, a day care program for medically needy indigents. A-Hope is open until noon on Saturdays.

A-Hope personnel observed McHone's debilitated condition. He was so disabled that he couldn't move his own wheelchair or speak clearly. "It was pretty easy to take one look at him and know he wasn't going to be able to take care of himself, even in a shelter," said A-Hope staffer Bryan Landis. "He was bad. I don't care what crime he committed. He didn't deserve to be treated like that," added John Hairston, another A-Hope employee.

McHone had just finished a four-year sentence for aiding and abetting an escape in 1990. BOP spokesperson Rita Teel said that when prisoners are due for release, the BOP cannot keep them any longer. They are assigned case managers who help them plan for their release and most either go to a halfway house or stay with family.

McHone was told to contact his case manager on Monday, but he was too disabled to remain on his own until then.

A-Hope called the Buncombe County Department of Social Services for help. Hours later, however, Social Services still couldn't decide what to do. When A-Hope closed at noon, Landis called 911 and had McHone taken to Mission Hospitals, where he was reported in fair condition.

Beyond the inhumanity of dumping a severely disabled prisoner at a temporary shelter unable to provide for his medical needs, releasing prisoners who have no place to live increases the likelihood that they will reoffend, which is a disservice both to the ex-prisoners and society.

"If we continue to dump our prisoners into the shelter system simply because it's a convenient solution, are we not exacerbating the problem?" asked Joe Finn, executive director of the Massachusetts Housing and Shelter Alliance.

Consider Mark Anthony Griffin, a homeless man who cycled in and out of jail in Florida due to alcoholism. He accumulated more than 50 charges over the years, mostly misdemeanor offenses that included public intoxication and trespassing. Lacking a place to live, he was released from prison back to the streets. That cycle continued until his most recent crime, which was stealing a

box of Lucky Charms and a can of milk from a Walgreens; he was then prosecuted as a "prison releasee reoffender" and received a 15-year sentence on September 25, 2009.

"I've never seen national statistics," said Michael Stoops, Director of Community Organizing for the National Coalition for the Homeless. "But we are trying to work with various jurisdictions to change the laws on releasing people to the streets or to shelters." The fact that most ex-offenders are barred from living in public housing and some state-funded housing programs doesn't help matters.

According to a 2008 research study by Prof. Stephen Metraux, Caterina G. Roman and Richard S. Cho titled *Incarceration and Homelessness*, prisons are often situated in rural areas far from the urban locations where prisoners were living before they were incarcerated. "This geographic mismatch renders it difficult to connect returning prisoners to the available housing market or for discharge staff and social workers to even attempt to provide housing assistance, as they are unlikely to have sufficient knowledge of the housing landscape to aid returning prisoners," the study concluded.

In Ventura County, California, the county's 10-year plan to end homelessness includes a zero-tolerance policy for releasing people from jails, hospitals or other institutions when they have no place to live, according to a January 3, 2010 article in the *Ventura County Star*. The object of the plan is to connect people at risk of becoming homeless with programs designed to serve their needs.

The Returning Home Initiative of the Corporation for Supportive Housing (CSH) in Illinois has a similar goal. The initiative "aims to end the cycle of incarceration and homelessness that thousands of people face by engaging the criminal justice systems and integrating the efforts of housing, human service, corrections and other agencies," according to the organization's website.

"We know how to keep people out of jail and keep them healthy," noted John Fallon, senior program manager for CSH. "But we continue to invest in building more prisons instead of investing in prevention." Fallon said one priority was ensuring that prisoners are provided with health insurance after they are released, such as Medicaid. "If a person goes to jail disabled, they don't leave without a

disability," he said. "So they need health insurance to get necessary services." This is particularly true for mentally ill prisoners, who are at higher risk of becoming homeless after their release.

A 2007 study by the Colorado-based Piton Foundation found that 36.7 percent of prisoners released on parole in the Denver area were homeless or living in temporary housing such as shelters or motels. And even that number may be low. "This statistic is limited because it only takes into consideration people released [on parole] from state prison," said Christie Donner, executive director of the Colorado Criminal Justice Reform Coalition. The Piton study also found that 48 percent of parolees who violated parole said finding a place to live was one of their "biggest problems."

Bureau of Prisons' officials should take note and make changes to their release policies before they dump more prisoners like McHone at homeless shelters. ■

Sources: *www.citizen-times.com*, *http://homelessness.change.org*, *Ventura County Star*, *http://news.medill.northwestern.edu*, *The Ledger*, *Boston Herald*, *Denver Voice*

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Arizona Prisoner, Abandoned in Outdoor Cage, Bakes to Death

by Gary Hunter

On May 19, 2009, Arizona state prisoner Marcia Powell, 48, collapsed after being left in an unshaded outdoor chain-link cage for four hours under a scorching summer sun. She later died. Temperatures at the Arizona State Prison Complex-Perryville had reached as high as 107 degrees that afternoon. The guards responsible for watching Powell as she slowly baked to death sat in a control room just 20 yards away.

"It is intended to be temporary," Arizona Dept. of Corrections (ADC) interim director Charles Ryan said of the outdoor cages. "It is not intended to be a place where [prisoners] are held for an inordinate amount of time." However good those intentions, they did little to prevent Marcia Powell's senseless death.

Powell, who was mentally ill, had been placed in the outdoor cage while she was waiting to be transferred to another cell. According to prison regulations, prisoners are not to be left in the cages for more than two hours and should continuously receive water; further, the cages are not to be used as punishment. ADC officials insisted Powell was provided with water, though that was disputed by other prisoners who said guards either ignored or mocked her when she pleaded for something to drink.

Once prison employees realized that Powell had collapsed and was unconscious, she was transferred to West Valley Hospital and placed on life support. She had first and second-degree burns and blisters, and a core body temperature of at least 108 degrees. Doctors were unsure of her exact temperature because their thermometers did not go any higher. Mere hours later, after a cursory investigation determined that Powell had no next of kin, Ryan decided to pull the plug and end her life.

On June 5, 2009, Roger Coventry, an investigator with the Maricopa County Public Fiduciary's office, informed court officials that he had found Powell's adoptive mother, Joanne Buck, who lived in La Quinta, California. His investigation also revealed much about Powell's personal family history, including that she had a brother who could not be located and two children who had been adopted by other families. One of her children

had been murdered; the other couldn't be found.

Additionally, due to her impaired mental condition, Powell had a court-appointed guardian – the Maricopa County Public Fiduciary. A representative from that office had visited Powell in prison less than two months before she died; thus, ADC officials should have been aware that she had a guardian who should have been consulted before she was taken off life support. Ryan defended his actions, saying the emergency room doctor told him Powell was terminal and it would be inhumane to keep her alive.

At the time of her death, Powell had served almost a year of her 27-month sentence on a prostitution charge. Though she had a long history of arrests, she also had been diagnosed with "disorganized schizophrenia, polysubstance abuse and mild mental retardation." According to ADC reports, Powell said she was suicidal and was awaiting transfer to an observation cell after seeing a psychologist when she was placed in the outdoor cage. It was later learned that she had been on anti-psychotic medications, which may have made her more sensitive to hot temperatures.

"The death of Marcia Powell is a tragedy and a failure," Ryan stated. "The investigation will determine whether there was negligence and will tell us how to remedy our failures." He called the incident the "most significant example of abuse" he had seen in the ADC.

Powell's death raised serious concerns about the Arizona prison system's use of unshaded outdoor cages. Rep. Kyrsten Sinema called the cages "inhumane," and said, "I think this would be an appropriate time to review that policy to see if it's a good idea to use them at all."

Elizabeth Alexander, former director of the ACLU's National Prison Project, said the outdoor cages should have been questioned long ago. "If [the cage] wasn't shaded, and it was Arizona in the summer, that's extraordinarily dangerous," she noted. "It's rather surprising to me that no one thought about the risk from this situation, given that this is Arizona."

Prisoners had complained about the cages for years, but of course who was going to listen to them? A volunteer teacher at the Perryville prison, who asked to

remain anonymous, said the "general public doesn't know what's going on behind those doors. Granted these individuals have committed a crime.... But I don't think these individuals should be treated in such an inhumane fashion."

Apart from being held in outdoor chain-link cages in intolerable heat, prisoners also complained that guards would sometimes refuse them the opportunity to use the bathroom after sitting in the cages for hours. That apparently happened to Powell, who defecated in the cage after her request to use a toilet was denied.

Immediately after Powell's death, ADC officials said the cages would no longer be used until shade and water could be provided. On June 3, 2009, Governor Jan Brewer announced that the outdoor cages would be permanently discontinued. Ryan and Brewer then reached a compromise that allowed limited use of the cages as short-term waiting areas and exercise pens for prisoners in segregation. New regulations dictate that guards must check on caged prisoners every half-hour, and the cages are now shaded and have mist-sprayers and benches.

During the subsequent investigation into Powell's death, it was learned that guards at the Perryville prison had a "wait-them-out" approach in which prisoners were placed in indoor and outdoor cells for lengthy periods of time as an alternative to using force. According to one report, three days before Powell died another female prisoner had been held in an outdoor cage for twenty hours. That prisoner reportedly did not require medical treatment.

On September 22, 2009, Ryan announced that disciplinary action had been taken against 16 ADC employees in connection with Powell's death. Three prison employees were fired, two quit instead of being fired, ten were suspended from 40 to 80 hours, and one was demoted. The remaining two, who were on medical leave, would be disciplined when they returned to work. The names of the ADC employees were not released; they included a deputy warden, a psychologist and a chief of security.

An autopsy report concluded that Powell's death was accidental, caused by environmental heat exposure. Donna Hamm, director of Middle Ground Prison

Reform, disagreed. "She was obviously left there without water, shade and attention," Hamm said. "I don't know what other elements have to be present to call it a negligent homicide."

Criminal charges are being considered by the Maricopa County Attorney's Office. According to Hamm, should any ADC employees be charged, "the message [would be] crystal clear to department employees about their responsibilities and the consequences of not following their own policy." Hamm was appointed by the Probate Court to handle Powell's funeral arrangements. About two hundred people attended her memorial service at Encanto Community Church, including Ryan.

Powell's death provoked mixed reactions among the general public. In response to news reports that Powell had next of kin and a guardian, some readers applauded the investigation and decried the fact that she was taken off life support so soon.

Another reader, who described himself as "a tax paying business owner," claimed that no one cared about Powell's "wasted life." That reader's comments went on to say that "society wanted the plug pulled on [her] and many others years ago."

But Powell's life wasn't wasted. In spite of what many would view as a tragic existence, her inexcusable, intentional death at the hands of the state served to raise the public's awareness and ultimately improve conditions within the prison system. Her death enhanced the level of human rights for other prisoners.

That's far from being a wasted life. ■

Sources: *Associated Press, KSWT-TV, Arizona Republic, Phoenix New Times, www.ascentral.com, www.dailymail.co.uk, www.kpho.com*

Massachusetts Sex Offender Registry Board Member Brags About Bias

Tyson Lynch is a hearing examiner for the Massachusetts Sex Offender Registry Board; his job responsibilities include determining which convicted sex offenders pose a threat to the community. Yet it wasn't long after he was hired in October 2008 that Lynch began to brag openly on Facebook, an on-line social networking site, about the "great satisfaction" he gets from badgering the offenders he is supposed to objectively assess.

In one post he wrote, "It's always a mistake when people testify because they always get destroyed in cross examination."

"But it's so entertaining," responded fellow hearing examiner Mel Maisel. Lynch also referred to some of the attorneys who represented sex offenders as "crazy" and "incompetent," and said, "It's always awkward when I see one of my pervers in the parking lot after a hearing." Defense attorneys took exception to Lynch's blatantly unprofessional approach to his new job. "This is not entertaining, these are people's lives we're talking about," stated attorney Eric Tennen. "He's expressing opinions about how these hearings have been conducted, essentially showing that he's made up his mind before they're finished."

Undoubtedly, sex offenders are not high on anyone's sympathy list. Still, Tennen explained the potentially dangerous nature of Lynch's cavalier comments.

"If he misses something, then it may very well be that a high-level offender gets a low level classification that the public never knows and maybe vice versa," Tennen said.

Attorney Terrence Noonan agreed. "They're instrumental. Those are the people who are making the final assess-

ment of dangerousness. And if they get it wrong, either way we all suffer."

Lynch's on-line postings became so numerous and outrageous that they attracted the attention of the media. Sean Kelly, of Boston's Team 5 Investigates, confronted Lynch in front of the Sex Offender Registry Board office.

"Is there a reason why you're spending so much time on Facebook? Don't you take your job seriously?" she asked.

Lynch refused to respond to Kelly's questions, but in a final Facebook post he informed interested readers that he was making his account private because his agency had become "the subject of too many news exposés."

Attorneys Noonan and Tennen insisted that all of Lynch's hearings should be redone due to his obvious bias. The Sex Offender Registry Board did not say whether it would review any of Lynch's decisions or if he would be disciplined, but indicated that corrective action had been taken. ■

Source: www.thebostonchannel.com

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False Sense of Security: The Real Cost And Benefits Of The Adam Walsh Act

by *Brandon Sample*

The Adam Walsh Act (AWA) was enacted by Congress in 2006 with much fanfare. Proponents argued that the law, which requires the establishment of a national sex offender registry, would help protect children from predators. But according to a recent report from the Justice Policy Institute, the AWA has actually had the opposite effect.

The AWA is the latest effort by lawmakers to “get tough” on sex offenders. The AWA expands registration requirements to more offenses, applies retroactively to offenders convicted before its enactment, increases the amount of information about offenders on registries, requires offenders to post their picture online and makes an offender’s failure to comply a crime punishable by at least a year imprisonment.

But who is the law really protecting children from? The vast majority of all sex offenses in the United States are committed by individuals who know the victim; only seven percent are committed by strangers. On top of that, most who commit sex offenses are first time offenders, which means they are not on a registry to begin with.

What good are registries then? Not much. If you are politician, they make it seem like you are doing something about child predators. But if you are parent, they provide a false sense of security—you can’t just visit a website to see if your child is in danger.

Moreover, due to the sweeping nature of the AWA, children as young as 14 are subject to registration for certain crimes. Take the now famous case of Genarlow Wilson, a 17-year-old convicted of having consensual oral sex with a fifteen year old girl at a party. Wilson was convicted of felony aggravated child molestation and sentenced to 10 years in prison and ordered to register as a sex offender for the rest of his life. Wilson was released from prison in 2007 at the age of 21, but only after the Georgia Supreme


Court declared his sentence “cruel and unusual punishment.”

It is no wonder then that the Justice Policy Institute concluded that the AWA “needlessly targets children and families” and “undermines rehabilitation” of juve-

nile offenders.

Aside from the human cost of the law, the AWA imposes real financial burdens on already cash strapped states. According to estimates from the Justice Policy Institute, it will cost states millions of dollars to implement the AWA in 2009. States that fail to comply face losing a percentage of federal money provided each year for state criminal justice programs. It is cheaper, though, for states to lose this money rather than comply with the AWA. In California, for instance, the cost for complying with the AWA in 2009 is estimated at \$59,287,816. The amount of funds lost for noncompliance total only \$2,187,682.

Given the questionable benefits of the AWA, the Justice Policy Institute recommends states forego compliance with the AWA and instead opt for the adoption of real, “proactive strategies” to reduce sexual violence, such as better training for teachers, social workers and parents to help prevent and identify sexual abuse. Additionally, underage offenders should not be listed on registries, the Institute concluded, because young offenders are not likely to reoffend, and because listing interferes with their rehabilitation.

Source: *Registering Harm: A Briefing Book on the Adam Walsh Act* by the Justice Policy Institute. It is available on PLN’s website. 

Prison Supervisors Can be Liable for Guard’s Sexual Abuse

by *David M. Reutter*

In denying a motion to dismiss, the U.S. District Court for Massachusetts held on July 1, 2009 that prison supervisors could be held liable for the sexual abuse of a prisoner because they failed to train, supervise and investigate claims concerning repeated rumors of a guard’s sexual misconduct.

While at Massachusetts’ South Middlesex Correctional Center (SMCC), prisoner Christina Chao had 50 to 100 sexual encounters with guard Moises Ballista from mid-2003 to May 2004. State law presumes that prisoners cannot consent to such encounters under any circumstances. Ballista was later criminally prosecuted, and Chao, who was released from prison in 2004, filed suit seeking damages.

Chao alleged in her complaint that the numerous sexual encounters occurred without detection and that Ballista had sexual relations with at least one other prisoner. While rumors of the sexual misconduct resulted in Ballista being re-assigned to other duties at the prison, the abuse continued.

In fact, “after or about the time of these rumors surfaced,” Chao was transferred to SMCC’s third floor, where Ballista was “regularly posted” from 11:00 p.m. to 7:00 a.m., providing him with

easier access to her. Other guards allowed Ballista to leave his control room post and enter areas where female prisoners were housed. Finally, Chao claimed that SMCC’s nursing staff placed her on oral contraceptive pills during the time period when Ballista was having sex with her.

The district court held that those allegations raised a plausible inference that the supervisory defendants had failed to adequately train, supervise or investigate Ballista’s year-long sexual encounters with Chao. The court’s finding also encompassed a failure to adopt policies and procedures that would have prevented the abuse.

The district court said that widespread attention to sexual abuse in prison and the repetitive, long-lasting sexual encounters alleged in Chao’s complaint allowed a fair inference that prison officials – including DOC Commissioner Kathleen Dennehey – were deliberately indifferent to the risks and reality of the abuse. While this view could change during the course of the proceedings, the allegations in Chao’s complaint were sufficient to defeat a motion to dismiss.

In ruling on the defendants’ qualified immunity defense, the court found it ironic that they would claim their liability ended

with Chao's denials of sexual encounters, as prison officials regularly came before the court insisting that prisoners' expectations of privacy were diminished. "On that basis, they seek to justify their authority to monitor phone calls and prison mail, to control the daily activities of prisoners, and to gather intelligence information of all kinds," the court noted. Yet when a prisoner denies that a sexual assault by a guard took place (perhaps fearing retaliation), prison officials argued that should

excuse them from further investigation.

On the record, prison officials cannot be immune from suit, as sexual abuse of prisoners by guards is a clearly established constitutional violation. Qualified immunity was denied at this stage of the proceedings, though that defense could be renewed on a summary judgment motion. See: *Chao v. Ballista*, 630 F.Supp.2d 170 (D. Mass. 2009).

In a subsequent order on August 20, the district court rejected the defendants'

argument that Chao's suit should be barred by the statute of limitations. The court found that the original lawsuit had been timely filed. After being dismissed due to insufficient service of process, the suit was re-filed in 23 days – which was within the statute of limitations period under applicable Massachusetts law. Further, as the defendants had notice of the suit in early 2007, they were not prejudiced by any delay. See: *Chao v. Ballista*, 645 F.Supp.2d 51 (D. Mass. 2009). ■

One of Every 11 Prisoners Now Serving Life Sentence

by Bob Williams

In a July 2009 report by The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal justice policy issues, Ashley Nellis and Ryan S. King examine the consequences of the expanding use of life sentences in America and make recommendations for changes in law, policy and practice to address what the authors believe are the principal deficiencies in the sentencing of people to life in prison.

The report notes that legislators have expanded the types of offenses that result in a life sentence and established a wide range of habitual offender laws that subject a growing proportion of defendants to potential life terms. The authors note how the politics of fear has largely fueled the increasing use of life without parole ("LWOP") sentences, an increasing willingness to impose life sentences on juveniles, an increasing reluctance on the part of parole boards and governors to release parole-eligible life prisoners and how, as a consequence, the population of life prisoners is both growing and aging, with ever-increasing costs to society. With a wealth of data, they drive home the point that racial and ethnic minorities serve a disproportionate share of life sentences. (In an appendix concerning the methodology of the study they conducted, the authors note but do not elaborate on the point that ethnicity and race are distinct traits. Elsewhere, they note that their study is "the first national collection of state-level life sentence data by race and ethnicity.")

Many of the report's key findings are worth citing: 2.3 million people are incarcerated in prisons or jails throughout the United States, a seven-fold increase since 1972; 140,610 prisoners are serving life sentences, representing one of every 11

people (9.5%) in prison; 41,095 (29% of prisoners serving life sentences) have no possibility of parole; in five states -- Alabama, California, Massachusetts, Nevada, and New York -- at least one of every six prisoners is serving a life sentence; California has the highest proportion of life sentences (20%) relative to the prison population; its 34,164 life sentences are nearly a quarter of the nation's total; two-thirds of prisoners with life sentences are non-White, reaching as high as 84% of the lifer population in the state of New York; 6,807 juveniles are serving life sentences, with more than 1/4 of those serving LWOP sentences; 77% of juveniles sentenced to life are youth of color; and 4,694 women and girls are serving life sentences, with

more than 1/4 of those serving LWOP sentences.

Nationally, the authors note, nearly half (48.3%) of the lifer population is African-American. For the sake of comparison, 33.4% of the lifer population is white, while 14.4% of the lifer population is Hispanic. The authors conclude their report by recommending that LWOP sentences be abolished, particularly for juveniles; that, in order to prepare them for release from prison, reentry programs be made more readily available to parole-eligible life prisoners; and that the process of parole be depoliticized. Source: *No Exit: The Expanding Use of Life Sentences in America*. The report is available on PLN's website. ■

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Wisconsin Enacts New Early Release Law

by Matt Clarke

When Wisconsin Governor Jim Doyle signed legislation to grant early release to certain prisoners, he just couldn't win. "It went too far," said Republicans. "It didn't go far enough," retorted his fellow Democrats. What in fact Governor Doyle did was authorize a new form of parole.

Wisconsin effectively eliminated its discretionary parole system in 1999, when truth-in-sentencing legislation was passed that required prisoners to serve their entire sentence followed by mandatory post-release "extended supervision." This caused the state's prison population to increase by 14% between 2000 and 2007; it now stands at about 23,000 prisoners. The population was projected to increase another 25% by 2019, costing the state \$2.5 billion in additional prison construction and operating costs.

This budget-busting projection motivated Governor Doyle, the Chief Justice of the State Supreme Court, the Republican Assembly speaker and the Democratic Senate president to commission the non-partisan Justice Center of the Council on State Governments to analyze the causes of Wisconsin's prison population growth.

The Center found that a main factor was long prison terms for technical parole violators, which was estimated to cost the state \$99 million annually. The Center, which had successfully helped Kansas and Texas avert prison crowding crises through an approach called the Justice Reinvestment Initiative [See: *PLN*, Nov. 2009, p.18], made several recommendations. Those recommendations included capping prison time for technical parole violators at 6 months, capping the amount of extended supervision after release to 75% of the time served in prison, setting a goal to reduce recidivism by 25% within the next two years, spending \$30 million to expand community-based reentry services for releasees, and authorizing judges to impose shorter sentences conditioned on the completion of treatment programs.

The Democrats in Wisconsin's legislature included most of the suggested reforms in the state budget. However, when the budget reached Governor Doyle's office he vetoed all of the initiatives except \$10 million in funding for community-based treatment programs and the

creation of a new form of parole.

The new parole system will be managed by the Earned Release Review Commission, which is appointed by the Governor and replaces the existing Parole Board (which is responsible for parole decisions for prisoners whose sentences predate the 1999 truth-in-sentencing law). The Department of Corrections will have control over much of the process of determining which prisoners will be allowed earned release. The most violent offenders and sex offenders are excluded.

Republicans were livid, warning voters of the release of "thousands of dangerous criminals" that "may be coming to a neighborhood near you."

State Representative Joe Parisi, who chairs the Assembly Corrections Committee, didn't understand such criticism. "These recommendations are tested, they're evidence-based, they've been used in a number of other states. And definitely not soft-on-crime states. We're talking Texas. We're talking Kansas," he said. By the same token, Parisi was disappointed that the Center's other recommendations had been vetoed. "What the governor did

was a start, but we could have accomplished so much more."

Maybe a start is all that Wisconsin prisoners can hope for after so many years of tough-on-crime, soft-on-thinking political rhetoric. At least state officials recognized there was a problem and tried to do something different – even if the end result after Governor Doyle's veto was underfunded and only a small part of the recommended solution.

Following months of screening by the Department of Corrections, the first twenty-one prisoners eligible for early release under the new parole plan were released on January 5, 2010. Around 3,000 Wisconsin prisoners may eventually qualify for earned release if they maintain good institutional behavior.

Wisconsin Assemblyman Scott Suder saw it another way, saying the early releases amounted to "rewarding bad behavior," alluding to the crimes the prisoners had committed that resulted in their incarceration. ■

Sources: *www.madison.com*, *Associated Press*, *Wisconsin state budget summary*

California Parents and Guardians Assessed Fees to Offset Juvenile Detention Costs

by Michael Brodheim

On February 13, 2009, following an investigation by the *Los Angeles Times*, the L.A. County Probation Department suspended its practice of billing parents and legal guardians for each day their children spent in juvenile detention.

The practice was generally legal under a 20-year-old California law intended to prevent families from using the juvenile justice system as a baby-sitting service (Cal. Welfare and Institutions Code, Section 903). However, critics complained it was being administered in a manner contrary to state law – that is, without consideration of whether or not a family could actually afford to pay the detention fees.

With 19 probation camps and three juvenile halls, which are presently under federal monitoring due to problems related to safety, staff training and medical

care, Los Angeles County has one of the largest juvenile justice populations in the U.S. In 2008, approximately 20,000 youths were processed through the county's juvenile system at a cost of \$100 to \$200 per day of detention.

To partially offset those costs, county officials billed parents and legal guardians for the misbehavior of their children, assessing fees of \$11.94 for each day of detention at a probation camp and \$23.63 for each day at a juvenile hall.

Although Probation Department Chief Robert Taylor defended the practice, he agreed to temporarily suspend the fees pending a review to determine whether they were consistent with the law. "We're not going to collect any money or send out any letters until we have a chance to examine how we do this," he said.

Critics noted that state law allows counties to charge only those who can

afford to pay, yet the Probation Department's aggressive billing and collection practices had forced some families to go into debt while others had liens placed against their homes. The county was apparently using a 2003-2004 income scale to determine ability to pay and did not consider living expenses.

In one case, a special education teacher who volunteered to take in two 16-year-olds received a bill in October 2008 for almost \$10,000, even though one of the teens had been held in detention before coming to live with him.

Only \$2.6 million of the \$23.6 million billed by the Probation Department in fiscal year 2008 was collected – and to recover that amount the county had to spend \$812,000 for a fee collections office and \$56,000 to hire a collections agency. Of the 8,100 people who were billed that year but did not pay, only 198 had the fees waived. Fifty-seven of those were receiving public assistance.

According to the *Times*, county officials improperly sought to recover costs from extended family members, grandparents and foster parents. The people who received questionable bills included a homeless mother in a Los Angeles shelter and a disabled postal worker who had adopted his 17-year-old nephew. The Probation Department spent \$12,800 on private attorneys to recover \$1,004 from a disabled grandmother, though that bill was later dismissed.

"The county does not appear to have made the effort to discern who can afford to pay and who cannot," said Zev Yaroslavsky, a Los Angeles County Supervisor.

"There ought to be a high level of concern about what we're doing."

The Youth Justice Coalition in Inglewood, California found that over 95 percent of families with children involved in the juvenile justice system were low-income or received government assistance. "There is no doubt that the financial consequences are disastrous for families," said Kim McGill, co-founder of the Coalition.

"You have to give some leniency to families that are poor, particularly now with the economy being the way it is and people out of work," acknowledged Probation Commission President Clay Hollopeter.

In an interview with *PLN*, Elizabeth Calvin, Senior Children's Rights Advocate for Human Rights Watch, said the County Board of Supervisors had ordered a panel to study and report on the issue of billing parents and guardians of juvenile offenders. The report was produced behind schedule, on September 22, 2009; it concluded that the Probation Department should continue collecting fees after making certain changes. Those changes included no expansion in the "use of private sector outsourcing" for bill collections, and using only earned wages to calculate a family's ability to pay.

However, Human Rights Watch, in a

letter to the Board of Supervisors dated October 8, 2009, noted that other provisions in the 12-page report appeared "to reflect a decision to pursue collections more aggressively." For example, the report proposed "enhanced techniques such as wage garnishments and bank account levies," and pursuing collection of SSI benefits from parents and guardians. Additionally, the department has proposed increasing the fees to \$14.96 a day for youths held in probation camps and \$29.28 per day for those held in juvenile halls.

According to Calvin, the Probation Department's moratorium on billing parents and guardians to recover juvenile detention costs is still in effect. Other counties in California have safeguards to prevent improper billing and do not collect from legal guardians, unlike Los Angeles County. ■

Sources: *Los Angeles Times*, *La Opinión*, *Human Rights Watch*

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\$245,000 Settlement in Michigan Jail Prisoner's Death

In what one lawyer described as round one, Michigan's Lenawee County has paid \$245,000 to settle a lawsuit alleging that the deficient medical care at the County's jail caused a prisoner's death.

The 24 page second amended complaint in the action begins with an outline of a County that was overwhelmed by the costs to provide staff and medical at its new jail. Since adequate staff had to be provided, the medical care was sacrificed.

Left behind were costly prescription medications and nursing. When a prisoner entered the jail under the influence of illegal drugs or alcohol, they would be denied life-sustaining medications. The Lenawee County Jail (LCJ) received only 2.6 hours of nursing care per day for a total of 18.5 hours per week.

The complaint detailed several instances of prisoners being deprived of medical even where it was obvious they had serious medical needs. One situation involved a prisoner entering the jail on October of 2006 with a broken right fibula. Despite excessive swelling and the leg turning black and purple, proper care was not rendered until May 2007 when the prisoner was taken to the Michigan Department of Corrections.

It was into this atmosphere that Yolanda Flores entered CCJ on December 11, 2006. She was arrested for two warrants based upon writing checks without an account. Upon booking, Flores advised guard Ryan Toadvine that she was a "type II insulin dependent diabetic." She also had other medical issues that Toadvine failed to record.

On December 12, Flores advised guard Paul Dye that she had not received her medication and was in dire need of it. Rather than have her referred to medical to provide these medications, Dye followed the policy that saved the County money: He allowed the family of "a known intravenous drug user" to bring medications that had no chain of custody to the jail.

In addition to jail personnel having prior knowledge of Flores's serious medical conditions that were treated during previous incarcerations at the jail, the medications brought to the jail were for hypertension, congestive heart failure and diabetes. Staff, however, became too busy to provide those medications to Flores in her isolation cell.

Rather than attribute Flores's pleas for help as one for needed medical care,

guards considered her to be in the throes of heroin withdrawal. Other detainees heard guard Adam Ondovick yell in response to Flores to "shut the fuck up you junky, go lay down and sleep it off, I am sick of you bothering me."

Around 10:20 a.m., guard David Borton asked Flores if she wanted her medications. He said he would be back with them, but he became busy with other matters. About an hour later, Flores died

in her cell on December 13, 2006.

Flores's estate settled with Lenawee County on August 11, 2009. As many as 6 to 10 more lawsuits are expected against the County. "This is the conclusion of round one. We're just getting started," said Craig Tank, the Flores estate's attorney. See: *Flores v. Lenawee County*, USDC, E.D. Michigan, Case No. 07-cv-11288. ■

Additional source: *Daily Telegram*

\$325,000 Settlement in Michigan Jail Prisoner's Ruptured Appendix Lawsuit

Michigan's Lenawee County Jail (LCJ) paid \$325,000 to settle a lawsuit brought by a former prisoner who was denied medical care before and after his appendix ruptured. This is the second such settlement within a month. (See accompanying article.)

As was reported in our previous coverage of a settlement in which a prisoner died due to being denied life essential medications, LCJ had a policy of not only providing inadequate medical care to prisoners, but of having its untrained guards make medical decisions.

The effects of those policies will have lifelong implications for Aaron Borck, who was sentenced to 90 days in LCJ for a probation violation of missing an Alcoholics Anonymous meeting. Borck's medical problems came on quickly around lunchtime as he was working as a kitchen trustee on March 13, 2007.

Feeling so bad, he retired to his bunk, unable to work, eat lunch or dinner or sleep. For the next two days, Borck continued in this state, vomiting any time he attempted to eat. Whenever guards came by to count or pass out meals, Borck requested to see a doctor or nurse. He was told none were at the jail. His requests to go to the hospital were met with the comment that "he'd have to be dying."

Nurse Bonie Mason came to LCJ on March 16. He described "a sharp, radiating abdominal pain and back pain, presented with a distended abdomen, fever, and decreased bowel sounds." He also told Mason that he had no appetite, no bowel movement and had been vomiting.

Mason told Borck that he did not have an appendix issue; he was just "jam-packed" and that an enema would solve

the problem. The diagnosis of constipation resulted from Mason failing to advise Dr. Stickney, the doctor over the jail, of the totality of Borck's symptoms.

After Borck self-administered the "Fleet's enema," his symptoms and pain worsened. The enema, as its label warned, should not have been used with appendicitis symptoms such as abdominal pain, nausea or vomiting being present. An enema can cause an appendix to rupture.

It was not until March 18 that Borck was referred to see Dr. Stickney. That referral did not occur until after Sgt. Mary Neill saw that her own medical "diagnosis" of flu and "treatment" of "drink fluids, eat soft foods, and walk around" failed to alleviate his condition.

When Borck finally saw Dr. Stickney on March 19, he was promptly sent to the hospital to receive emergency surgery. It is unknown when his appendix ruptured, but the result was so infectious that a portion of his colon and bowels had to be removed. The scar from the surgery is about 8 inches long.

LCJ was so intent on avoiding medical costs that on the day Borck went to the hospital it gave him a "technical release." Yet, it sent him a bill for "Inmate Housing" through March 26. Borck also was stuck with the medical bills.

The ironic part of the whole sordid situation at LCJ is that its current health care contact carries an annual cost of around \$400,000. So far, it has paid out \$570,000 in settlements with more lawsuits to follow for incidents that occurred within months of each other.

Borck was ably represented by Southfield attorney David A. Robinson. See: *Borck v. County of Lenawee*, USDC, E.D. Michigan, Case No. 07-cv-15124. ■

Unprovoked Texas Cattle Prod Shocking More Than De Minimis Injury, Case Settles for \$20,000

by Matt Clarke

On September 5, 2007, the Fifth Circuit Court of Appeals held that a guard who used a cattle prod to shock a prisoner without any provocation caused more than a de minimis injury.

Dale Keith Payne, a Texas state prisoner, was working at the back gate of the Estelle Unit when a horticulture truck drove up. Payne opened the truck's hood to allow a guard to search the engine compartment. While he was doing this, TDCJ guard Jimmy Parnell, wielding a cattle prod he had confiscated from another vehicle, approached Payne from behind and shocked him in the back, making him "jump and holler."

Payne fled, with Parnell in pursuit trying to shock him again. Payne made it into a bathroom and Parnell attempted to shock him through the door using the knob to conduct electricity. Payne did not immediately report this incident. However, after Parnell allegedly threatened him with a knife at a later time, he reported both incidents to prison staff and filed a grievance against Parnell. Parnell, who is white, had also reportedly used racial slurs against Payne, who is black, on numerous occasions.

Parnell initially told the prison system's Office of Inspector General (OIG) that he never shocked Payne, but later confessed after Payne and a second prisoner passed a lie detector test and another guard signed a witness statement. The

OIG determined that Parnell had committed "reckless conduct" by shocking Payne, and he was suspended without pay for two days and placed on probation for three months.

Payne filed a federal civil rights suit under 42 U.S.C. § 1983, alleging that Parnell had violated the Eighth Amendment's prohibition against cruel and unusual punishment by his threats and actions. Dismissing the suit on summary judgment, the district court found Payne's injuries were de minimis and were inflicted "jokingly" or during "horseplay" when Parnell didn't know the cattle prod was charged. Payne appealed.

The Fifth Circuit held that a jury could have found that "Parnell acted maliciously and sadistically in unnecessarily and wantonly inflicting pain on Payne." The fact that Parnell chased Payne around, trying to shock him again, made it likely a jury would find that the first shock was not done "jokingly" or as a result of "horseplay," and that Parnell knew the cattle prod was charged.

The other prisoner witness who passed a polygraph test also related numerous occasions when Parnell had hit and harassed Payne without provocation, making it likely a jury would find that Parnell intended to harm Payne with the cattle prod. Likewise, Parnell's initial denial of the incident might also cause a jury to

disbelieve his version of the incident.

The appellate court noted that the "lack of any long-term damage is not dispositive on the question of whether Payne's injury was de minimis." Instead, "the amount of injury required [for an Eighth Amendment violation] is directly related to the amount of force that is constitutionally permitted under the circumstances." Because Payne was merely performing his prison job, there was no justification for applying any force. Thus, "the deliberate, unnecessary application of an electric shock from a cattle prod in this case resulted in more than de minimis injuries."

Summary judgment in Parnell's favor was therefore improper. However, the Fifth Circuit upheld the district court's summary judgment ruling in favor of supervisory personnel who allegedly failed to adequately supervise Parnell. The case was returned to the district court for further proceedings. See: *Payne v. Parnell*, 246 Fed.Appx. 884 (5th Cir. 2007) (unpublished).

Following remand, Payne agreed to settle his lawsuit on February 14, 2008 for \$20,000, subject to the approval of the Governor's office, the state Comptroller and the Attorney General's office. Payne, who has since been released on parole, was represented by attorney Scott Medlock with the Austin-based Texas Civil Rights Project. ■



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Ohio Inspector General Finds Wrongful Acts by Prison System's Assistant Director

by Matt Clarke

On July 29, 2009, the State of Ohio's Office of the Inspector General (OIG) released an investigative report concerning the relationship between Ohio Department of Rehabilitation and Correction (ODRC) Assistant Director Michael Randle and Keith B. Key, President of Columbus-based KBK Enterprises, a real estate development company. The focus of the report was on allegations that their personal relationship had influenced business dealings between ODRC's Ohio Penal Industries (OPI) and KBK.

The OIG investigation was sparked by an on-line report that alleged KBK subsidiary Key Industries was allowed to purchase OPI products at OPI's net cost for material and labor – a special pricing arrangement that was not even available to state agencies.

The OIG learned that Randle and Key shared a personal relationship. Both had attended Ohio State University at the same time, were members of the same fraternity, and lived in the same fraternity house for about a year. More recently, they had socialized and even vacationed together.

The OIG found that Randle had a minimal role in the drafting of a memorandum of understanding (MOU) between OPI and KBK, for KBK to sell prison industry-made goods and share the profit with OPI. Although Randle did not directly profit from the MOU, he failed to reveal his relationship with Key to ODRC and OPI employees who were dealing with the company. Further, whenever KBK had a problem with the MOU, company officials went to Randle, who then called OPI and supported KBK's position. The OIG found that this created an appearance of impropriety on Randle's part.

OPI and KBK did not get along well. The MOU was terminated before it expired, and no formal contract ensued. Therefore, the OIG had no reasonable cause to believe that a wrongful act or omission had occurred with regard to the MOU.

The OIG found more serious problems in a KBK transaction with ODRC. Randle had attended a presentation by Israel-based Elmo-Tech related to that company's electronic tracking devices. He expressed ODRC's interest in using

the devices to track outside prisoner work crews, and gave Elmo-Tech representatives Key's name as the owner of a company that could be an Ohio distributor for their products.

ODRC paid KBK a total of \$120,000 for eight sets of the tracking devices. KDK paid Elmo-Tech \$80,000, realizing a 50% profit. Elmo-Tech officials told the OIG they would have sold the devices to ODRC directly for less than the 50% markup, but went through KBK because Randle had given them Key's name.

Randle said that Elmo-Tech wanted to work through an Ohio distributor, and that he gave them the names of KBK and other minority-owned businesses because ODRC wanted to increase the percentage of its business conducted with minority-owned companies. The OIG found "reasonable cause to believe that wrongful acts or omissions occurred in this instance."

In both cases, the OIG found no evidence that Randle personally benefited from business dealings involving KBK and Elmo-Tech. Therefore, there was no violation of criminal laws. The OIG did find that the appearance of impropriety was enhanced by the fact that ODRC could have purchased the tracking devices directly from Elmo-Tech at a lower cost. It also found that profit-sharing terms were not included in the MOU between OPI and KBK Enterprises, but should have been.

Even before the critical OIG report was released, Randle had already moved on – more precisely, he had moved out of Ohio. On May 14, 2009, he was appointed director of the Illinois Department of Corrections. The OIG report is available on PLN's website. ■

Sources: *Associated Press; OIG Report, File No. 2009105*

PLN Prevails in Connecticut FOI Case; City Appeals

by Alex Friedmann

On September 22, 2008, *PLN* requested public documents from the City of Hartford, Connecticut related to a lawsuit involving a prisoner who committed suicide; the suit had resulted in a \$403,164 judgment against the City. [See: *PLN*, Feb. 2009, p.24].

Hartford Assistant Corporation Counsel Jonathan Beamon agreed to provide the documents pursuant to the state's Freedom of Information (FOI) Act, at a cost of \$27.50. *PLN* requested a fee waiver, stating it was a non-profit media organization and the records would be used to benefit the public through *PLN*'s news reporting. The fee waiver was denied, as was *PLN*'s request that the documents be provided in electronic format (such as via email or fax), which would have cost the City nothing.

Although *PLN* requested information regarding the FOI appeals process, after a two-week delay Beamon responded by stating, "My understanding is the City of Hartford does not have an internal or administrative appeal process." He ne-

glected to mention, however, that under Connecticut law denials of FOI requests can be appealed to the state FOI Commission. *PLN* submitted a renewed records request which also was denied, then filed a formal appeal with the Commission on January 2, 2009.

A hearing was held before Commissioner Sherman D. London on April 17, 2009. *PLN* editor Paul Wright represented *PLN*. The hearing resulted in a proposed final decision to affirm the City's denial of a fee waiver and refusal to produce the requested records in electronic format. Represented by attorney Brett Dignam at Yale Law School's Jerome N. Frank Legal Services Organization, and Robyn Gallagher, a second-year law student at Western New England College School of Law, *PLN* presented its case before the full five-member FOI Commission on September 23, 2009.

In a unanimous ruling issued the same day, the Commission held that the City had abused its discretion by refusing to grant a fee waiver for *PLN*'s public

records request, as the City “did not take into consideration the purpose for which the information was sought or the benefit to the public from its disclosure and publication.” Further, the Commission rejected the City’s argument that waiving the \$27.50 fee would constitute a financial burden, observing that if such a proposition was accepted it “would effectively lead to denials of all fee waivers, eviscerating the [FOI fee waiver] statute.” The City was ordered to provide *PLN* with “a copy of the requested records free of charge.”

The Commission upheld the City’s refusal to produce the requested records in electronic format, finding that the records were not maintained in electronic format in the City’s computer system.

“The spirit and force of the Freedom of Information Act was evident in a small Connecticut hearing room today,” said Ms. Dignam. Ms. Gallagher agreed, stating, “As a result of this decision, media organizations such as *Prison Legal News* will be able to obtain and disseminate information that is truly essential to securing an informed people and promoting self-governance.”

“This ruling affirms the importance

of ensuring public access to public records,” noted *PLN* editor Paul Wright. “It is unfortunate that the City chose to expend substantial resources, far in excess of the purported \$27.50 copying fee, to argue against its obligations under the Freedom of Information Act.” Apparently, however, the City’s attorneys were not done spending taxpayer money in an effort to prevent *PLN* from obtaining a public records fee waiver.

On November 12, 2009, the City appealed the FOI Commission’s ruling to Superior Court. The City paid a \$300 fee to file the appeal – over ten times the amount of the \$27.50 fee the City had demanded for copies of the public records requested by *PLN*.

“This gives new meaning to ‘penny-wise and pound-foolish,’” said Wright. “The City of Hartford is spending far more money, resources and staff time in its attempt to use high fees to deny media access to government records. This is a financial defeat for Hartford taxpayers whose City attorney refused to simply fax documents by claiming his office was not required to do so.”

According to a July 1, 2009 letter

from Hartford Mayor Eddie A. Perez, the City’s budget for fiscal year 2009-2010 was “the toughest budget ever.” Mayor Perez noted that “sacrifice on all levels has been made and will continue to be made” due to the “harshest economic times since the Great Depression.” The staff at the Office of Corporation Counsel must not have received that memo, as they continue to expend public funds to fight *PLN*’s public records case and the City stands to lose money even if it eventually prevails, having spent \$300 to appeal a \$27.50 fee waiver. All of which could have been avoided had the requested documents been emailed or faxed to *PLN* at no government cost.

PLN will vigorously oppose the City’s appeal, and is represented in Superior Court by Ms. Dignam, Ms. Gallagher and Megan Quattlebaum – a Yale law student. See: *In the Matter of a Complaint by Paul Wright, et al. against Office of the Corporation Counsel, City of Hartford*, FOI Commission of the State of Connecticut, Docket #FIC 2009-018, on appeal at *Office of City Corporation v. Freedom of Information Commission*, Superior Court, Judicial District of New Britain, Connecticut. 📧

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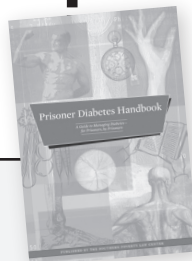
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Judge Enjoins Collection of Cost of Incarceration Fees From Federal Prisoner in Washington State Prison

On February 25, 2008, Judge William Thomas McPhee of the Thurston County Superior Court entered an injunction prohibiting the Washington Department of Corrections (DOC) from withholding cost of incarceration and crime victim compensation from a federal prisoner serving time in the DOC.

Harry Whitman was transferred to the custody of the DOC pursuant to an intergovernmental agreement between the Bureau of Prisons (BOP) and the DOC. While serving his federal sentence in the DOC, the DOC began deducting cost of incarceration and crime victim compen-

sation from money Whitman earned or received.

Whitman sought injunctive relief, arguing that the deductions violated state and federal law, and his due process rights under the United States and Washington constitutions.

Judge McPhee agreed with Whitman that he was not subject to the collection of the fees. McPhee based his decision primarily on the fact that Whitman's federal sentencing judge waived the imposition of a fine, and the language of the intergovernmental agreement which required the DOC to provide Whitman with the same

rights he would have if confined in the BOP. In the BOP, a cost of incarceration fee may not be collected when a court waives a fine.

By exempting Whitman, the DOC argued that it would be violating the "equal treatment" provision of the intergovernmental agreement. Judge McPhee disagreed, holding that the DOC was acting "solely as an agent" for the BOP and as such, Whitman's rights were defined by the BOP. See: *Whitman v. State of Washington*, No. 05-2-02279-2 (Sup. Ct. Wash.). The unpublished decision is available on PLN's website. ■

Settlement in Idaho Jail Condition Class-Action Suit

by Matt Clarke

On August 4, 2009, a consent decree was entered in a class-action lawsuit brought on behalf of jail prisoners with the help of the American Civil Liberties Union (ACLU) over conditions of confinement at the Canyon County Jail in Caldwell, Idaho. The defendants agreed to eliminate overcrowding and improve ventilation, laundry, temperature control, recreation, plumbing, sanitation and medical care.

Amanda Davis, Alisha Baker, Troy Fenster, Desiree Comingo, Parnell Williams and Pedro Martin, six prisoners incarcerated at the Canyon County Jail, filed a federal class-action suit against Canyon County, the Board of County Commissioners and Sheriff Chris Smith in March 2009. They alleged that unconstitutional conditions of confinement existed at the facility due to severe overcrowding. Davis, who entered the jail when she was five months pregnant, had to sleep on the floor and was denied a second mattress.

The jail has three detention buildings: the 62-bed Annex, built in the 1940s; the Dale G. Haile Detention Center (DHDC), built in 1993; and the 216-bed Work Release Center, built in 2006, which was not part of the suit. The Annex was twice abandoned, only to be reopened due to overcrowding. Sheriff Smith believed the Annex should be closed permanently.

Under Idaho Sheriff's Association (ISA) guidelines, DHDC's functional capacity is 296 prisoners. Its optimal capacity is 255. However, DHDC has 488 beds and the daily population sometimes

exceeds available bed space.

An August 28, 2007 report by the ISA found that "overcrowding would seem to be the inherent problem that creates security issues, tasks the staff and the physical plant [and] makes it very difficult to keep up maintenance, cleaning and refurbishment of the facility." Prisoners reported a multitude of serious problems at the jail, including stale, humid air; mold on walls, ceilings and shower areas; condensing water on ceilings and other surfaces; a lack of sanitation supplies with no routine cleaning of shower or toilet areas; a lack of routine or emergency maintenance of the plumbing system; exposure to temperature extremes; inadequate recreation; inadequate bedding and laundry services; and insufficient staffing. The prisoners also complained of arbitrary enforcement of unposted rules, inadequate medical care, insufficient guard training and supervision, and discrimination against female prisoners.

"The kinds of conditions that exist at the Haile Detention Center should force all of us to consider the impact of our society's over-reliance on incarceration," said Monica Hopkins, Executive Director of the ACLU of Idaho.

The parties agreed to enter into a consent decree that required the defendants to implement the terms of the settlement within 30 days unless they involved physical plant improvements. The jail will remain under monitoring by the court and the plaintiffs' attorneys for at least two years before the suit becomes subject

to the dismissal provisions of the PLRA, 18 U.S.C. § 3626(b). The consent decree requires a reduction in the number of beds to 296 at the DHDC; the jail is required to keep prisoner populations within that level except for temporary, unforeseen population spikes.

Further, jail staff must regularly issue cleaning supplies, perform sanitation and routine plumbing maintenance, improve ventilation, issue and dispose of razors daily, improve laundry services, and allow one hour of recreation a day. The jail is also required to maintain temperatures between 65 and 80 degrees, post the Inmate Handbook and grievance procedures, and offer special meals to prisoners with food allergies. The medical co-payment is to be reduced from \$10 to \$5 for nurse or doctor visits. Female work-release prisoners must be given privileges comparable to their male counterparts. Housing area mold remediation must be completed by April 30, 2010, and the fire alarm system is to be kept in proper working order.

The consent decree was approved by the U.S. District Court on November 12, 2009, the plaintiffs later negotiated an attorney fee award of \$190,000. The prisoners in the class-action suit were represented by ACLU attorneys Stephen L. Pevar of Hartford, Connecticut and Lea C. Cooper of Boise, and ACLU cooperating attorney Dean J. Miller of Boise. See: *Davis v. Canyon County*, U.S.D.C. (D. Idaho), Case No. 1:09-cv-00107-BLW. ■

Additional source: *ACLU press release*

Wyoming's Prison Industry Mushroom Farm Sold at Auction

by Matt Clarke

On October 15, 2009, the Wyoming Department of Corrections' Wind River Mushroom Farm in Shoshoni was sold at auction for an undisclosed amount. The agricultural program, which began in 2004 as an \$8 million public-private partnership that used state funds and federal loan guarantees, was once called the nation's premier prison industry. It closed in 2006 due to "labor challenges."

Initially the labor force was provided by prisoners from the Wyoming Honor Farm at Riverton, but they proved too slow at picking and sorting the portabello and crimini mushrooms grown at the farm. That prompted Doug Tanner, the farm's president and CEO, to hire trained immigrants from Guatemala as supplemental labor. However, those workers left after a check by ICE revealed problems with some of their immigration documents.

Tanner blamed the state's labor shortage for the farm's closure. "I wish I had never seen the state of Wyoming," he said. "I thought it was a great opportunity for everybody, for the inmates, for me and for DOC. But it didn't turn out that way." Tanner claimed the Honor Farm prisoners "didn't want to work. They didn't want to pick mushrooms."

It may have been more accurate to say the prisoners didn't want to work for the meager wages they were paid – \$.12 per pound of mushrooms picked, or minimum wage of \$5.15 per hour if they couldn't make more at the piecework rate. "I had meetings with the inmates and said we had to get mushrooms picked to stay in business," Tanner said. "They didn't care. Instead of going faster, they slowed down even more."

"It's their job to manage the work force, establish guidelines, motivate the staff and the workers," countered Billy Carter, manager of correctional industries for the Wyoming DOC at the time. "We were not involved and should not have been involved in running their business." The mushroom farm was a Private Industry Enhancement (PIE) program, which allows private companies to use prison labor. While in operation it employed 40 to 60 prisoners.

The First Interstate Bank of Jackson had made a \$3 million loan backed by the

U.S. Department of Agriculture for start-up funding for the mushroom farm. The Wyoming Business Council had a \$250,000 stake in the loan. The bank, which owned the farm, ordered the auction of 158 acres of land as well as structures and equipment that included three late-model modular homes, a 10,000-square-foot industrial shop and a 92,902-square-foot heavy industrial processing warehouse. Which illustrates the obvious that prison slavery is not a cost effective business and absent massive government subsidies is not economically viable.

The new owners of the Wind River

Mushroom Farm said they wanted to establish a revenue-generating industry at the facility. "We are definitely going to try to create something that will stay in business rather than going out of business," remarked Kenneth Hostetter, who bought the farm at auction.

Other prison industry programs in Wyoming include a tilapia fish farm at the Women's Center in Lusk, a clothing factory and print shop at the State Penitentiary in Rawlins, and a program that produces PortionPac janitorial products. ■

Sources: *Billings Gazette*, www.trib.com

\$2.1 Million Award in Excessive Force Death of California Prisoner

In April, 2009, a federal jury awarded \$2.1 million in a lawsuit filed against guards at California's Richard J. Donovan Correctional Facility for their negligence and excessive use of force that caused a prisoner's death.

The prisoner, John Fitzgerald Young, suffered from chronic mental illness that required psychiatric medication. On December 30, 2004, guards said Young began to act in an unusual manner on the recreation yard. Their response was to assault him while he laid on his stomach; they also placed him "in choke holds and head locks, kneeled on his neck and back, and stomped on his neck and back, all of which resulted in Mr. Young's death," according to the lawsuit filed by his mother, Gretchen Young.

The jury agreed in an April 29, 2009 verdict, finding that guard Robert Craig had used excessive force in a malicious and sadistic manner for the purpose of causing Young harm. The jurors also found that Craig and guards Edwin Fontan, Jose Rodriguez and Edward Wamil acted with deliberate indifference to Young's safety, and that their conduct had caused him harm. Young's

estate was awarded \$100,000 on the suit's Eighth Amendment claim.

A \$2 million award was returned for the negligence claim raised in the complaint. The jury held that Craig, Fontan, Rodriguez and Wamil were negligent for breaching their duty of care owed to Young. It further determined that the actions of Craig and Rodriguez were a substantial factor in Young's death.

Additionally, the jury found the prison's psychiatric and medical employees negligent, and held their conduct was likewise a substantial factor in Young's death. Young's mother was represented by San Diego attorneys Thomas D. Luneau and Robert Hamparyan. See: *Young v. State of California*, U.S.D.C. (S.D. Cal.), Case No. 3:05-cv-02375-JLS-CAB. ■

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Jury Awards \$6,500 to California Prisoner for Negligence, Deliberate Indifference by Doctor

On May 22, 2009, a California federal jury awarded a state prisoner \$6,500 on his claims of medical negligence and deliberate indifference. Todd A. Ashker, a prisoner at California's Pelican Bay State Prison (PBSP), sued Dr. M.C. Sayre after Sayre discontinued Ashker's pain medication and treatment for his disabled right arm.

Ashker had complained of inadequate medical care for his arm for over seven years. In 2002, PBSP staff agreed to pay him \$37,500 to settle a lawsuit concerning his medical care. In addition to the monetary compensation, the settlement required PBSP to provide Ashker with physical therapy, continued and appropriate use of an arm brace, referral for a pain management examination, and implementation of the pain management regimen recommended by the pain specialist.

PBSP staff never referred Ashker to see a pain management specialist; instead he was prescribed Tramadol, which controlled his pain. With the Tramadol, physical therapy and other care that he received, Ashker seemed satisfied. At least until 2005.

Starting in 2005, PBSP medical staff started giving Ashker the run-around, taking him on and off his pain medication. In 2006, Dr. Sayre stopped prescribing Tramadol entirely, instead substituting Ibuprofen and Tylenol, both of which Dr. Sayre knew caused Ashker severe stomach pain. Further, Sayre discontinued physical therapy for Ashker's disabled arm, along with the use of different therapeutic devices, believing his arm would not benefit from further treatment.

A different doctor examined Ashker in 2007. According to Dr. Cory Weinstein, Ashker's complaints of chronic pain were not surprising given the severe nature of his disability. Dr. Weinstein noted that Tramadol had been used "routinely and with excellent efficacy in the management of chronic pain," and that the Ibuprofen prescribed by Dr. Sayre had caused Ashker stomach irritation, ulcers and severe discomfort. Finally, contrary to Dr. Sayre's conclusion that Ashker's arm would not benefit from further treatment, Dr. Weinstein recommended continued rehabilitative care.

Faced with these conflicting opinions and Dr. Sayre's familiarity with Ashker's medical condition, prior treatment

regimen and the 2002 settlement, the jury concluded that Sayre had been both negligent and deliberately indifferent in his treatment of Ashker's pain management and disability. The jury awarded \$6,500 in compensatory damages; no punitive damages were awarded.

Judgment was not immediately entered following the trial, as the court still

had to resolve Ashker's request for injunctive relief concerning breach of the 2002 settlement agreement. Thus, Ashker's post-trial motions for a new damages trial and for taxation of costs and recovery of expert fees were denied as being premature. Ashker litigated the case pro se. See: *Ashker v. Sayre*, U.S.D.C. (N.D. Cal.), Case No. 05-03759. ■

Settlement Promises Improvements at Baltimore City Jail

by Matt Clarke

On August 18, 2009, a settlement was reached in a class-action lawsuit over conditions of confinement at the Baltimore City Detention Center (BCDC). The lawsuit dates back to 1971 and had been on the federal district court's inactive docket from 1999 until 2004 following a 1993 consent decree. In 2004, the court granted a motion to restore the case to the active docket filed by attorneys from the National Prison Project (NPP) of the American Civil Liberties Union (ACLU) and the Public Justice Center (PJC) representing the prisoners. Since then, some improvements have been made, such as air conditioning the Women's Detention Center. However, the conditions of confinement in the jail remained abysmal, especially in the areas of medical care, vermin infestation, inadequate ventilation and non-functioning plumbing.

"This agreement will help ensure that all detainees receive the kind of medical care that they are constitutionally entitled to, and state officials [deserve] credit for agreeing to these improvements," said Washington D.C. attorney and former NPP Director Elizabeth Alexander. "Detainees have been forced to endure undue pain and suffering for far too long, and the hope is that this agreement will go great lengths toward alleviating the neglect of their medical needs by jail officials."

"We are hopeful that this settlement will not only effectively provide access to health care for those in the jail, but will also address a serious public health concern for the city of Baltimore," said Baltimore PJC attorney Wendy Hess. "Given the tens of thousands of people with treatable, chronic and often commu-

nicable diseases that move in and out of the jail every year, this agreement affects the health of everyone in the city."

The specific steps required by the settlement include the following: Newly-arriving prisoners must receive medications they were previously prescribed within tight time limits. The sick-call system and medical records keeping are to be improved. New treatment protocols for asthma, cardiac disease, diabetes, hypertension, HIV, Hepatitis C, TB, drug-resistant staph, seizure disorder and pregnancy must be initiated.

Unlicensed medical staff are not to perform any function which might contribute to a medical evaluation, such as taking vital signs. LPNs are not to triage sick call requests. RNs may not diagnose or treat patients outside their specialties. Health care staff must make daily cell-to-cell rounds in segregation, speaking to each prisoner.

Mental health services will be improved. A psychiatrist shall be available five days a week and on-call within one hour at all times. Suicide watch cells must have fixtures that could be used for hanging removed. Pregnant prisoners must be provided pre- and post-natal care by a health care provider certified for obstetrical patients. Cells used by handicapped prisoners must be equipped for handicapped use and access. Staff may not interfere with access to medical care. The range of discipline for such interference must include termination.

All ventilation fans must be repaired. The ventilation fans and air exhaust system must be maintained and regularly cleaned. Low-security prisoners at risk from heat

must be housed in air conditioned areas. Temperature monitoring equipment must be installed in all housing areas and heat injury prevention protocols followed when the temperature exceeds 88 degrees.

Plumbing shall be repaired. The laundry shall implement a procedure for routinely cleaning personal laundry. Issued linens must be cleaned at least once a week.

Sanitation must be improved and cleaning supplies made available to pris-

oners. Rodent and insect control shall be provided in the housing units and food service areas. Feral cats shall be removed. The use of common bar soap shall be discontinued and personal soap shall be supplied.

Plaintiffs' attorneys may monitor compliance for two years and must be given access to prisoners and their medical records if released by the prisoners. BCDC must provide the attorneys with an annual list

of prisoner deaths at BCDC and quarterly compliance reports. Plaintiffs may seek attorney fees. The settlement does not preclude future relief for medium- and high-security prisoners at high heat injury risk. See: *Duvall v. O'Malley*, U.S.D.C -D. Maryland, Case No. JFM-94-254. The settlement is available on PLN's website. 📄

Additional sources: ACLU Press Release; *Baltimore Sun*

Tenth Circuit: Dismissal of Prison Newsletter Censorship Case Reversed in Part

On July 16, 2009, the Tenth Circuit Court of Appeals reversed in part a district court's dismissal of a lawsuit involving the nondelivery of newsletters sent in bulk to a Wyoming state prison.

Derrick R. Parkhurst, a Wyoming prisoner, is chairman of the Wyoming Prisoners' Association (WPA) and an official in the Wyoming chapter of Citizens United for the Rehabilitation of Errants (CURE). He is also the editor of a combined newsletter for both organizations, the "WPA Law Review and CURE Newsletter," which publishes synopses of legal opinions and news of interest to Wyoming prisoners.

In his capacity as editor, Parkhurst sent 693 newsletters to the Wyoming State Penitentiary (WSP) in a single FedEx box. Although each newsletter was individually addressed with a prisoner's name and number, WSP officials refused to deliver them based on Wyoming Policy and Procedure (WPP) #5.401 (IV)(C)(l)(k), which states that mail may be rejected if it contains material intended for parties other than the addressee. Parkhurst also mailed several copies of the newsletter individually, including one to himself, which were delivered by WSP officials.

Parkhurst filed a civil rights action in U.S. District Court pursuant to 42 U.S.C § 1983, alleging that WSP officials, in their individual and official capacities, had violated his First Amendment right to freedom of expression and his rights under the Wyoming Constitution to freedom of speech and the press. He requested damages for recopying and reissuing the newsletter, plus an injunction prohibiting future non-delivery.

The district court granted the defendants' motion for summary judgment on the grounds of mootness, because WPP #5.401 (IV)(C)(l)(k) had been amended after the incident; on standing, because

Parkhurst had received his copy of the newsletter that was individually mailed to him; and on qualified immunity. Parkhurst appealed.

The Tenth Circuit held that the revised WPP #5.401 (IV)(C)(l)(k) contained language materially identical to the language at issue in the prior version of the policy, so the lawsuit was not moot. The Court of Appeals also found that *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which was relied upon by the district court, was not on point because Parkhurst was asserting his First Amendment rights as a publisher, not a receiver of publications.

Because Parkhurst had sent the bulk mailing of newsletters to WSP, not to individual prisoners, the security concerns regarding bulk mailings expressed in *Jones* – for example, the possible inclusion of contraband or assistance in prisoner-to-prisoner solicitation of union membership – did not apply. Furthermore, in *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) [*PLN*, April 2001, p.18], the Ninth Circuit held that prohibiting lower-cost mailings (in that case, bulk rate mail) could implicate the First Amendment

rights of publishers and prisoners who subscribe to newsletters.

However, it was unclear whether Parkhurst had sent the newsletters pursuant to subscriptions. Furthermore, a single case from another circuit did not constitute clearly established law. The Tenth Circuit therefore held the defendants were entitled to qualified immunity. But as the defendants had never advanced a legitimate penological objective for the application of WPP #5.401 (IV)(C)(l)(k), Parkhurst may still have a valid claim for injunctive relief.

The lower court's judgment was affirmed as to the qualified immunity ruling and reversed as to the issues involving mootness and injunctive relief. The case was returned to the district court for further proceedings, where it remains pending. See: *Parkhurst v. Lampert*, 2009 U.S. App. LEXIS 15850 (10th Cir. 2009). 📄

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Ineligible Texas Prisoners Receive Federal Stimulus Checks

by Jimmy Franks

Between May and June of last year, hundreds of federal economic stimulus checks began to arrive at various Texas prisons, addressed to prisoners who were thought to be eligible to receive them. Those payments were part of 1,700 stimulus checks erroneously sent to prisoners nationwide.

On February 13, 2009, Congress allocated \$13 billion to the American Recovery and Reinvestment Act. One section of the Act allowed certain people to receive a one-time \$250 stimulus check, including those eligible for Social Security or SSI payments, railroad retirement beneficiaries, and disabled veterans who collected benefits from the Dept. of Veterans Affairs (VA). Most people in prison are ineligible for such benefits, and poor record keeping led to a scramble to retrieve the stimulus checks sent to prisoners who didn't qualify.

According to Wes Davis, a spokesman for the Social Security Administration, approximately 3,900 stimulus checks were mailed to incarcerated persons nationwide, 1,700 of whom were not eligible for the payments. To meet eligibility requirements, one had to have been outside prison or jail between November 2008 and January 2009, and be eligible for benefits from the Social Security Administration, VA or Railroad Retirement Board.

Of the 240 checks sent to Texas prisoners, all but nine had to be returned to government officials. Most of the payments were issued by the VA, all of which had to be sent back.

The checks mailed to ineligible prisoners totaled approximately \$425,000. The spokesman for the Social Security Administration's Office of the Inspector General, George E. Penn, said an audit was underway to ensure that checks incorrectly sent to prisoners were returned. The Inspector General for the Texas Department of Criminal Justice, John Moriarty, said, "We caught this because of the procedures we have in place. We think we caught everything that shouldn't have gone through."

Which leaves one to wonder about the deficient procedures that allowed such a mix-up to occur in the first place. "It is unacceptable for convicts to be getting stimulus funds. It speaks to the lack of oversight and accountability to have such nonsense

coming out of Washington. Where is the accountability?" said U.S. Rep. Eric Cantor.

Then again, considering that around 52 million citizens were eligible for the stimulus payments, mistakenly sending 1,700 checks to prisoners – or an error rate of .0000326 – isn't bad for government

work. Other stimulus checks were erroneously sent to people who were fugitives, living outside the U.S., or dead. ■

Sources: *Austin American-Statesman*, www.ss.com, *Associated Press*, www.fox-news.com

Exposure to Freezing Cold More than De Minimis in Texas Retaliation Case

The Fifth Circuit Court of Appeals held that a district court had erred when it dismissed a prisoner's retaliation-based civil rights suit as de minimis when the prisoner's alleged injury was exposure to freezing cold for four-and-a-half hours on four consecutive nights.

Juarez Miguel Bibbs, a Texas state prisoner, filed a civil rights action under 42 U.S.C. § 1983 in U.S. District Court. He alleged that guards had retaliated against him for filing grievances by turning on a "purge fan" which blew cold air into his cell for four-and-a-half hours on four consecutive nights, "causing the temperatures in his cell to drop below freezing." The district court granted summary judgment to the defendants on the basis that the injury – exposure to cold – was de minimis.

Bibbs alleged that he had filed grievances against Clements Unit guards Leslie Early and Jamie Burkholder for failing to conduct proper ingress and egress to cells. One to two months after the grievances were filed, Early, Burkholder and guard Richard Gibson allegedly turned on a "purge fan" which drew large amounts of unheated outdoor air into Bibbs' pod and cell. This occurred on four consecutive nights. Bibbs said he tried to stay warm by putting on all of his clothes and using the two blankets assigned to him; nonetheless, he developed flu-like symptoms which he treated with "cough syrup and cold tablets." He did not request medical attention.

According to Bibbs and other prisoners whose unsworn statements were filed with his lawsuit, the guards told prisoners who complained of the purge fans either that the fans were automatic and beyond their control, or that they wouldn't have any problem being cold if they would stop writing grievances against the guards. The fans were not automatic and were

controlled by the guards.

On appeal, the Fifth Circuit noted that the defendants did not dispute that Bibbs had alleged sufficient facts and produced evidence to establish a specific constitutional right (filing grievances). The Court further noted that retaliation is actionable only if it is capable of deterring a person of ordinary firmness from exercising his constitutional rights.

The defendants argued that the fact that Bibbs had filed grievances about the retaliation necessarily meant he was not deterred. The Fifth Circuit held that whereas Bibbs wasn't constitutionally entitled "to the comforts of everyday life," he "raised a cognizable claim of retaliation by alleging and providing supporting evidence that he exercised his First Amendment rights and was then subjected to below-freezing temperatures for more than four hours on four consecutive nights – a measure of retaliation."

Even though the cold to which Bibbs was exposed was not the "extreme" type that rose to an Eighth Amendment violation, it "might well 'chill or silence a person of ordinary firmness from future First Amendment activities' – in more ways than one," the Court wrote. "The fact that Bibbs, following his exposure to the purge fan, filed a 'Step 1 and Step 2 grievance on the retaliation claim forming the basis of the instant suit'" did not convince the appellate court otherwise.

The Fifth Circuit also held that Bibbs had sufficiently proved causation despite the one- to two-month delay between his filing of the grievances and the alleged retaliation, by presenting evidence about the guards' statements linking the use of the purge fan to prisoners' grievances. The summary judgment order was reversed and the case returned to the district court for further proceedings. See: *Bibbs v.*

Early, 541 F.3d 267 (5th Cir. 2008).

Following remand, the district court denied Bibbs' motion to appoint counsel, and the case went to a jury trial on

March 25, 2009. The jury ruled in favor of the defendants and the court assessed costs against Bibbs. He has appealed the judgment. ■

\$50,000 Awarded to Florida Prisoner in Excessive Force Case

A federal jury has awarded \$50,000 to a prisoner who was subjected to excessive use of force while in handcuffs at Florida's Everglades Correctional Institution (ECI).

When housed at ECI on July 1, 2006, prisoner Michael Curry was called to the captain's office to be questioned about an incident in the recreation yard. After Curry denied that he had exposed himself to a female guard in a perimeter patrol vehicle, Captain Christopher Forrest ordered him handcuffed and taken to segregation.

From that point forward, the facts were hotly disputed. Forrest filed a "Report of Force Used," stating that as he approached Curry while Sgt. Demetrius Montgomery was attempting to restrain him, Curry struck Forrest with a clenched fist on the left side of his face. As Curry continued to be combative, Forrest pushed him away. Sgt. Montgomery then took Curry to the ground.

Curry, however, said that after being handcuffed he asked why he was going to segregation. Forrest cursed and said not to question him, then punched Curry in the face and head repeatedly, knocking him to the floor. Curry claimed that while

he was on the ground pleading for the guards to stop, Forrest, Montgomery, Sgt. D. Segovia, Sgt. G. Diaz and guard T. Linero punched, kicked and hit him with their radios.

As a result of the incident, Curry received a gaping five-inch head wound that required 9 staples to close. He also lost two teeth. Based upon Forrest's report, Curry was criminally charged with battery on a law enforcement officer. That case was dismissed on June 4, 2007, though prison disciplinary charges were upheld.

Curry filed suit against all of the guards involved in November 2007, but only his claim against Montgomery proceeded to trial. On August 4, 2009 a federal jury entered judgment in Curry's favor, awarding him \$25,000 in compensatory damages and \$25,000 in punitive damages. However, the state has refused to indemnify Montgomery and pay the judgment, which will make collection difficult.

Curry was represented by Miami attorneys Matthew Mazzarella and Francisco Ramos, Jr. of Clarke, Silvergate & Campbell, P.A. See: *Curry v. Montgomery*, U.S.D.C. (S.D. Fla.), Case No. 1:07-cv-22899-UU. ■

Head of California's Prison System Arrested for Drunk Driving

On June 7, 2009, Scott Kernan, undersecretary of the California Department of Corrections and Rehabilitation (CDCR) – the operational head of the state's sprawling prison system – was arrested by the California Highway Patrol for driving under the influence in his state-issued vehicle.

Kernan, who was subsequently suspended from work for six weeks without pay, released a statement expressing remorse for his actions. Acknowledging that there was "no excuse" for his "poor judgment" and that his conduct reflected poorly on Governor Schwarzenegger, who had appointed him in 2008, Kernan announced his intention to plead guilty

to DUI charges at a subsequent court hearing.

Kernan entered the guilty plea on July 16, 2009 and was ordered to pay a \$2,000 fine, complete 48 hours of community service and attend a DUI class. According to the CDCR's 2008 California Prisoners & Paroles report, 2,701 state prisoners were serving prison terms for DUI offenses. ■

Sources: *Sacramento Bee*, www.sacramentotrafficattorney.com

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Remedial Sanctions Denied in Wisconsin Class-Action Jail Suit

by Jimmy Franks

In July 2009, the Supreme Court of Wisconsin entered an opinion reversing an appellate court's decision that instructed a lower court to order remedial damages in a class-action lawsuit filed on behalf of Milwaukee County jail prisoners.

The suit was originally filed pro se in March 1996 by Milton J. Christensen, a prisoner at the jail, and alleged constitutional violations due to dangerous conditions that were caused by overcrowding, exposure to communicable diseases and insufficient time spent outside of cells.

On May 8, 1996, a circuit court appointed the Legal Aid Society of Milwaukee to represent Christensen; soon afterwards, the complaint was amended to include "all persons who are now or in the future will be confined in the Milwaukee County Jail."

In May 2001, the parties entered into a 48-page Consent Decree that was later approved by the court. One issue addressed in the Decree dealt with the overcrowding problem. Among other provisions, the agreement stipulated that no individual would be housed longer than 30 hours in the booking-open waiting area.

Plaintiffs' counsel moved to conduct discovery on March 23, 2004, and six months later filed a motion accusing the county of repeatedly violating the Consent Decree's 30-hour rule. The plaintiffs claimed that the rule had been violated 16,662 times, and "requested both contempt-of-court and breach-of-contract remedies." The county said it had made good faith efforts to comply with the Consent Decree and the violations "were the result of breakdowns in communications among administrators and were not intentional."

The circuit court determined that the "staggering" number of 30-hour violations were in fact intentional. Although the court held the county had breached the agreement with willful intent, monetary damages were denied because the Consent Decree failed to mention money damages and because the 30-hour rule violations had stopped after the filing of the discovery motion. Since remedial sanctions are "imposed for the purpose of terminating a continuing contempt of court" and the violations had already ceased, the court determined sanctions

could not be imposed.

On appeal, the appellate court disagreed with that decision and remanded the case with instructions for the circuit court to determine a "sum of money sufficient to compensate the inmates held in violation of the Consent Decree for the loss or injury suffered." See: *Christensen v. Sullivan*, 746 N.W.2d 553, 2008 WI App 18 (Wis. Ct. App. 2008) [See: *PLN*, Oct. 2008, p.38]. The Wisconsin Supreme Court granted the county's petition for review.

In a split decision filed by the Court on July 21, 2009, the majority upheld the circuit court's finding that remedial sanctions were outside its discretion because

the county's contemptuous action – in the form of the 30-hour rule violations – had already stopped.

A dissenting opinion filed by Chief Justice Shirley Abrahamson, joined by Justices Ann Walsh Bradley and N. Patrick Crooks, argued that such a narrow reading of Wisconsin law created a void that limited a circuit court's power to protect enforcement of its orders. The dissent further stated the majority opinion represented "a sharp break from the traditional law of contempt in Wisconsin, is contrary to statutory and legislative history, and produces an absurd result." See: *Christensen v. Sullivan*, 768 N.W.2d 798, 2009 WI 87 (Wisc. 2009). ▀

Eighth Circuit Upholds \$1,500 Award for Failure to Provide Kosher Diet; Grooming Restrictions Also Upheld

The Eighth Circuit Court of Appeals upheld a district court's award of \$1,500 to an Arkansas prisoner who was denied kosher meals. The Court of Appeals also affirmed the lower court's ruling that upheld the prison system's grooming policy.

Michael J. Fegans, an Arkansas state prisoner, filed a civil rights action against officials with the Arkansas Department of Corrections (ADC) in U.S. District Court, alleging violations of his First and Fourteenth Amendment rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, *et seq.*, due to the ADC's refusal to provide kosher meals or allow him to grow a beard or long hair.

Fegans had converted to the beliefs of the Assemblies of Yahweh, "a Christian sect which requires its members to follow Old Testament law," after listening to religious radio programs while incarcerated. His beliefs included following a kosher diet and not "rounding the corners" of his hair or beard.

Fegans' grooming requirements became a problem after the ADC issued an Administrative Directive that prohibited facial hair other than a neatly-trimmed mustache and required male prisoners to keep their hair above the ears and no longer than the middle of the nape of the neck. Exceptions allowed female prisoners to wear shoulder-length hair and men with

a dermatological problem that caused shaving complications to keep a beard of no more than ¼ inch in length. Fegans refused to shave his beard or cut his hair and received multiple disciplinary infractions, eventually landing in a supermax facility. The ADC also refused to provide Fegans with kosher meals.

Following a bench trial, the district court ruled that prison officials had violated Fegans' right to receive kosher meals, which had been established by *Love v. Evans*, U.S.D.C. (E.D. Ark.), Case No. 2:00-cv-00091. The court awarded Fegans \$1,500 for the denial of kosher meals from December 19, 2002 until March 3, 2004.

The district court also held that Fegans had a sincere religious objection to the ADC's grooming policy, but found the policy did not violate the First Amendment or RLUIPA. The First Amendment challenge was foreclosed by *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996) [*PLN*, Oct. 1996, p.20], while the RLUIPA claim failed because the grooming policy served a compelling state interest and was no more restrictive than necessary to further that interest. The court also rejected Fegans' equal protection challenges, finding that male and female ADC prisoners were not equally situated. Fegans appealed both the judgment and damage award.

The Eighth Circuit upheld all aspects

of the district court's order. The Court of Appeals found the lower court's decision to award nominal damages of \$1.44 per constitutional violation was not an abuse of discretion. The Court agreed that the First Amendment challenge was foreclosed by *Hamilton*, and found the ADC director's

explanation that there were greater security concerns for male prisoners sufficient to defeat the equal protection and RLUIPA claims. It also held that the existence of a medical exception to the beard regulation did not help Fegans, because he had never said he would be satisfied with a ¼ inch beard.

The judgment of the district court was therefore affirmed. One dissenting judge would have remanded the case for an individual review of RLUIPA claims related to the grooming policy as applied to Fegans. See: *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). ■

Third-Party Calling Disconnects at Jail Net \$1.25 Million Settlement; Customers Get Nothing

by David M. Reutter

When it comes to prison and jail telephone services, it's all about how much money can be made without regard to the people who are bilked by for-profit phone companies. That is the sad conclusion that must be drawn from a recent decision by Florida's Public Service Commission (PSC).

After the PSC received a complaint in March 2004 claiming that calls from the collect-only phone system at the Miami-Dade Pretrial Detention Center (MDPDC) were being improperly disconnected, the agency opened an investigation.

That investigation, conducted between 2004 and 2007, determined that three-way calling detection software was causing prisoners' phone calls to prematurely disconnect. As a result, prisoners would have to call back to complete their conversation. That caused customers to incur additional surcharges of \$2.25 per local call and \$1.75 per intrastate toll call.

The MDPDC's phone service provider, TCG Public Communications, Inc., was previously a wholly-owned subsidiary of AT&T; it was acquired by Global Tel*Link Corporation in June 2005. TCG replaced the errant three-way calling detection software in March 2008, and responded to the PSC complaint by offering to establish a settlement fund of \$175,000 to provide refunds for affected customers.

PSC staff recommended in September 2008 that TCG's offer be refused, and that the company be ordered to show cause why it should not pay a \$1.26 million fine. It was further recommended that TCG pay \$6.29 million in refunds to customers who had been overcharged; however, that suggestion was later dropped. [See: *PLN*, April 2009, p.38].

The Commissioners directed PSC staff and TCG to negotiate a settlement. The company filed a revised settlement of-

fer on May 27, 2009, proposing a payment of \$1.25 million into Florida's General Revenue Fund and an 18-month monitoring program for its phone operations at MDPDC.

The PSC approved the settlement at a hearing on August 18, 2009. While the state will benefit from the \$1.25 million paid by TCG, the people who were over-

charged due to improperly disconnected calls from prisoners at MDPDC – mostly prisoners' family members – will get nothing. In Florida, that's what they call public service. ■

Sources: *Associated Press*; *Florida Public Service Commission*, Docket No. 060614-TC

Alabama Ends Policy Barring HIV+ Prisoners from Work Release

After more than two decades of intense advocacy by the ACLU, in August 2009 the Alabama Department of Corrections (ADOC) agreed to end its practice of prohibiting prisoners with HIV from participating in work release programs. *PLN* has previously reported on this issue. [See: *PLN*, Dec. 2008, p.28].

Since 1987, the ACLU has fought against the ADOC's policy of banning HIV-positive prisoners from work release. Eligible prisoners at the HIV segregation units at Limestone Correctional Facility and the Tutwiler Prison for Women now await transfer to work release programs as beds become available.

"One of the prisoners told us that when she recently received notice that she had been approved for work release, she wanted to weep," said Olivia Turner, Executive Director of the ACLU of Alabama. "There is no way to overstate the humiliation these prisoners have suffered for so long, from being ostracized, isolated, and denied participation in a program that has been available to everyone else."

With the ADOC's policy reversal, South Carolina stands alone as the only prison system in the nation that bans HIV-positive prisoners from work release. The ACLU noted that there is more work to be done in Alabama, as the ADOC

continues to bar prisoners with HIV from faith-based honor dorms, prison dining halls, and residential substance abuse and reentry programs. Such prisoners also have limited access to recreational opportunities and most prison jobs.

In 2003, the Alabama Governor's HIV Commission for Children, Youth and Adults issued a report that found "the evidence is overwhelming that the exclusion of prisoners from educational, vocational, rehabilitative or community-based corrections programs, simply on the basis of HIV status, has no public health or correctional justification." ■

Source: *ACLU Press Releases*

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Alabama: On October 30, 2009, Richard Hawthorne, 51, a member of the Escambia County School Board, was indicted on seven charges stemming from allegations that he fondled female prisoners at the Escambia County Detention Center where he formerly worked as a guard. Two female prisoners reported that Hawthorne had molested them in a jail van – one on March 4 while transporting her to prison and the other on April 27 while driving her to a mental health facility. Hawthorne resigned from his position at the jail after the allegations surfaced. He was released on \$100,000 bond, which was posted by his wife.

Arkansas: A federal defamation lawsuit filed against the Dixie Chicks was dismissed on December 1, 2009 after a U.S. District judge found that singer Natalie Maines had not acted with “actual malice” when she posted comments on the band’s website suggesting a man was guilty of murder. Maines had claimed that Terry Hobbs was implicated in the death of his 8-year-old stepson, Stevie Branch, who was murdered with two other children in 1993. Three teenagers – Damien Echols, Jessie Misskelley, Jr. and Jason Baldwin – were prosecuted and convicted for that crime, and Maines became convinced that the defendants, known as the West Memphis Three, deserved a new trial. Misskelley and Baldwin are serving life sentences, while Echols is on death row. They have maintained their innocence.

Arkansas: On December 9, 2009, Charles Lanell Williams, 41, was sentenced to 11 years in prison for beating his wife in the visiting room of the Clark County Jail. On May 19, Williams’ wife and child came to visit him at the facility. At the end of the visit he ran past jail guards and began beating his wife in front of their child. The reason for the assault is unknown. The 11-year sentence will be added to a 25-year term Williams was already serving for a drug conviction.

Brazil: On December 27, 2009, six men disguised as police officers and armed with rifles entered Rio de Janeiro’s Grajaú neighborhood police station and freed 28 prisoners. The men pretended they were booking a prisoner and, without arousing suspicion, made their way to the cellblock where they overpowered two guards. They then unlocked five cells housing 30 prisoners. Two of the prisoners refused to leave. Three of the 28 escapees were captured

nearby, but the rest remain at large. Police station commander Orlando Zaccone acknowledged that the incident revealed problems in the jail’s security measures.

Florida: On December 8, 2009, Lawrence Vieitez, a guard at the Escambia County Road Camp, was arrested for offering an unnamed prisoner Xanax in exchange for oral sex. The prisoner had previously reported a similar offer to Sheriff’s officials, who fitted him with a listening device and sent him out on a work crew with Vieitez. Authorities arrested Vieitez when he repeated his offer of drugs for oral sex. He was placed on administrative leave and freed on \$25,000 bail.

Georgia: Denita Shaw, 41, a former Fulton County jail guard, was arrested on a civil rights charge on December 11, 2009. She allegedly struck a prisoner in the head with a milk crate while he was handcuffed. Shaw was fired from the jail on August 29; following her arrest she was released on a non-monetary bond.

Idaho: Cody Vealton Thompson, 31, was sentenced to life in prison on December 22, 2009. He had been convicted the previous month for raping his cellmate in September 2008. Thompson also received a life sentence for being a persistent offender, plus a 2 1/2 year sentence for intimidating a witness. This is the first time in Idaho history that a male prisoner has been convicted of raping another male prisoner.

Illinois: James Fuller and Aaron Cook escaped from the Peoria County Jail on November 17, 2009. Fuller spent more than a year patiently chipping away at concrete on the ceiling of his cell; when the hole was finally large enough, he and Cook made good their escape via the jail’s roof. Both were captured shortly after their escape. Cook was found within 24 hours at a friend’s house, while Fuller was tracked down using the GPS feature on a cell phone he had stolen.

Illinois: A 37-year-old prisoner at the Pinckneyville Correctional Center was shot and killed on the evening of December 15, 2009. The fatal shooting ended a seven-hour standoff during which prisoner Alonje Walton held an unidentified 62-year-old female employee hostage. Walton was serving time for aggravated criminal sexual assault and kidnapping; the hostage-taking incident is being investigated by the state police.

Kentucky: On September 20, 2009, Joshua Vittitoe, 25, was booked into the Louisville Metro Corrections Center on various charges. Guards failed to notice during booking that he had a quantity of Xanax pills concealed on his person. Within 24 hours after Vittitoe’s arrival at the jail, guards began to notice a number of prisoners displaying odd behavior, including being lethargic and disoriented. Jail guards and police officers searched the facility, found a number of the Xanax pills, and began questioning prisoners. Last October, Vittitoe was charged with one count of trafficking narcotics and 49 counts of wanton endangerment. Prisoner Adrian Cook, 25, was charged with possession of narcotics and related offenses. Forty-nine other prisoners face charges of promoting contraband and drug trafficking for consuming the pills.

Mississippi: On December 16, 2009, Dr. Kentrell Liddell, 35, former Chief Medical Officer for the Mississippi DOC, pleaded guilty to 13 counts of embezzlement. Hinds County Circuit Court Judge Malcom Harrison sentenced her to 10 years in prison but suspended all but two years. Harrison also imposed a \$5,000 fine and \$94,745 in restitution to the MDOC, as well as court costs. Liddell reported to prison on January 4, 2010, but her attorney has asked the court to modify her sentence and place her on house arrest. *PLN* previously reported Liddell’s arrest and indictment. [See: *PLN*, Nov. 2009, p.44].

New Mexico: In December 2009 it was reported that Reyna Lujan, 29, formerly a guard at the Metropolitan Detention Center in Albuquerque, had been charged with three counts of criminal sexual penetration for having sex with prisoner Erik Braman, 29, on numerous occasions between November 2008 and January 2009. Jail officials discovered their sexual relationship when they received a tip from an informant and monitored phone calls from Braman to Lujan’s cell phone. Lujan is allegedly pregnant with Braman’s child, and Braman moved in with her following his release. Lujan was placed on administrative leave in March and resigned several weeks later due to “complications” with her pregnancy.

North Carolina: Tina Lynn Devore, 42, a former counselor at the Craggy Correctional Center north of Asheville, was indicted on December 7, 2009 on charges

of having sex with a prisoner. She is accused of engaging in sexual relations with David Lee Williams, who is serving a life sentence for second-degree murder. Devore was employed as a substance abuse counselor for the NC DOC; she resigned last April.

Oklahoma: On December 26, 2009, a fire broke out in a supply closet at the Key Correctional Facility. All 174 prisoners in the unit were moved to the gym. The blaze was quickly contained, and no injuries were reported. The cause of the fire is unknown.

Philippines: In the early morning hours of December 13, 2009, suspected Islamic militants knocked down a concrete wall with sledge hammers and used bolt cutters on padlocks at the provincial jail in Isabela City to free several detained Muslim guerrillas. Approximately 70 heavily-armed men were involved. At least 31 prisoners managed to escape

with the men into the nearby jungle. One militant and a guard were killed during a brief gun battle following the mass break-out. The run-down jail has had a history of escapes, most notably when three militants accused of beheading 10 marines escaped by overpowering guards in December 2008.

Tennessee: On November 23, 2009, 24-year-old Joshua Ryan Jones and 40-year-old Roger Forrester, former guards at the Northwest Correctional Complex in Tiptonville, pleaded guilty in federal court to civil rights and obstruction of justice charges. Jones and Forester admitted they had kicked and punched a handcuffed prisoner on April 15, 2008, and then lied about the incident during a subsequent investigation. They face up to six years in prison and a \$350,000 fine.

Texas: Texas prisoner Jerry Duane Martin was sentenced to death on December 8, 2009 for the murder of TDCJ

guard Susan Canfield, 59, during his short-lived escape from the Wynne Unit in September 2007 [See: *PLN*, April 2008, p.16]. State officials agreed to reimburse Walker County for all legal fees incurred in prosecuting the capital case, which are expected to exceed \$450,000. Prisoner John Ray Falk, who escaped with Martin, is awaiting trial on similar charges.

Texas: Dallas County jail guard Kytrina Lewis resigned on December 9, 2009 during an investigation into an incident in which jail prisoner Gregory Miller performed a sexually suggestive dance for her behind her desk. "He was moving his hips in a circular slow motion and motioning his body in a sexually erotic way as if he were a male dancer," stated guard Jerkeithra Hawkins, who reported the incident. Lewis was also accused of bringing a CD player into the jail and giving Miller her cell phone,

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News In Brief (cont.)

which contained pictures of her.

Texas: On December 25, 2009, Nacogdoches County jail prisoner Lesedric McClain stabbed an unidentified jailer in the forehead with a ball-point pen, above the right eye. A portion of the pen broke off inside the guard's head, just missing his brain. The jail guard was reportedly in "relatively good condition" after being hospitalized following the attack. McClain, who fought with two other guards, now faces charges of first degree felony aggravated assault.

Vermont: College student Kellye Stephens, 23, was sentenced to 30 days in jail on December 8, 2009, for sending an innocent man to prison for three months. Stephens created fake e-mails containing

death threats that she claimed were sent by Rick Anderson, a man she had once met and then chatted with online. She created the false e-mails and had Anderson jailed because she said she feared him, though he had never done anything remotely threatening or dangerous. Anderson and prosecutor Tom Kelly stated they were disappointed that Stephens was not required to spend 92 days in jail – the same amount of time that Anderson had served due to her lies. Anderson recently settled a lawsuit with the insurance company for Stephens' family, for \$10,000.

Washington: Two Franklin County jail guards, Kevin Still and Sonya Symons, were arrested and charged with federal drug conspiracy offenses in October 2009. Symons' brother, Troy Green, also was arrested. Apparently the trio used connections with former prisoners to try to

become marijuana dealers. Authorities apprehended them based on evidence gathered by a confidential informant. Still and Symons, who live together, have been suspended from their jail positions without pay.

West Virginia: On December 6, 2009, USP Hazelton was locked down following a brawl among six federal prisoners that resulted in one death. Prisoner Jimmy Lee Wilson, 26, was killed and the other five prisoners involved in the fight suffered non-serious injuries. According to Warden James Cross the incident was racially motivated, though he would not disclose the identity or ethnicity of the prisoners involved. He said the U.S. Attorney's office and FBI were investigating and plan to prosecute at least some of the prisoners based on surveillance video of the incident. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

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Failure to Raise Issue in Rule 50 Motion Prohibits Argument on Appeal; \$214,000 Verdict Upheld

The Sixth Circuit Court of Appeals has affirmed a jury's verdict that found a municipality liable despite there being no finding of liability on the part of the individual defendants. The facts in this case involved a claim of deliberate indifference to a prisoner's serious medical needs.

In January 2003, Amy Lynn Ford was arrested on a probation violation and booked into Michigan's Grand Traverse County Jail. While being questioned during the intake process, Ford informed the guard that she was an epileptic who took Dilantin. The guard noted that Ford had not taken her medication that day, and placed the medical screening form in the nurse's inbox.

As she was being escorted to her cell, Ford told the guards that she was epileptic, had not taken her seizure medication, and needed a bottom bunk. When another prisoner was ordered to make a bottom bunk available by moving to the top, Ford said, "[no], I'm fine," and proceeded to sleep in the top bunk.

A few hours later Ford had a seizure and fell from the top bunk. She sustained significant injuries to her right hip and right clavicle. Ford then brought a civil rights action naming the four jail guards who were aware of her condition as well as Grand Traverse County. She claimed the guards had violated her Eighth and Fourteenth Amendment rights to medical treatment by failing to ensure that she was given Dilantin or to otherwise protect her from injuries due to her epilepsy. Further, she alleged the county's policy and custom of not having a nurse on duty at the jail on the weekend had caused her injuries, as it prevented her from timely receiving her medication.

The matter proceeded to a jury trial in May 2006. The jury found the individual defendants were not liable, but decided that the county's policy and custom had caused Ford's injuries. She was awarded \$214,000 in damages. [See: *PLN*, Jan. 2007, p.33]. Following the verdict, the county filed two motions for judgment as a matter of law. The district court denied the motions and the county appealed.

The county raised two issues on appeal. First, it argued that it could not be held liable under 42 U.S.C. § 1983 in the absence of a constitutional violation by

any of the individual guards. Second, it contended there was insufficient evidence to establish a causal link between the county's policy or custom and Ford's injuries.

Ford argued that the first issue was barred because the county had not included it in its Rule 50(a) motion. Her argument was based on the well-established proposition that a post-trial motion for judgment as a matter of law "is not available at anyone's request on an issue not brought before the court prior to submission of the case to the jury." The county contended its motion for a directed verdict was specific enough to preserve the objection raised in its post-trial motion for judgment as a matter of law.

The Sixth Circuit disagreed. The Court of Appeals said the only similarity between the county's insufficiency-of-the-evidence motion during the trial and its post-verdict motion was to challenge the liability of the county. In finding the county had waived its first argument on appeal, the appellate court held that if it were "to conclude that the County's

preverdict motion in this case constitutes the requisite 'specific grounds' for the issue raised in its post-verdict motion, that requirement would as a practical matter cease to provide any limitation at all."

The Court of Appeals then turned to the county's causation argument. The Court held that the evidence, when viewed in the light most favorable to Ford, could allow a jury to conclude there was a direct causal link between the county's policy or custom and Ford's injuries. While that link existed, the Sixth Circuit was less certain as to whether the policy constituted deliberate indifference. However, the county had "abandoned its strongest argument – that the County's policy did not constitute deliberate indifference to Ford's serious medical needs," instead deciding to challenge the causal link.

The Court of Appeals declined "to disrupt the jury's verdict," and the district court's judgment was therefore affirmed. See: *Ford v. County of Grand Traverse*, 535 F.3d 483 (6th Cir. 2008); *rehearing and rehearing en banc denied*, 2008 U.S. App. LEXIS 27699 (6th Cir., Dec. 17, 2008). ☐

Four-Year Statute of Limitations Applies to § 1983 Claims Filed in Florida

The Eleventh Circuit Court of Appeals has held that 42 U.S.C. § 1983 actions filed in Florida have a four-year statute of limitations. The appellate court's ruling reversed a Florida federal district court's dismissal of a civil rights complaint filed by a prisoner who alleged he had been assaulted by a jail guard.

According to a complaint filed by Pinellas County Jail prisoner Johnny E. Ellison, in March 2004 guard Jeremy Lester destroyed his legal mail and personal property, and assaulted him while he was handcuffed. The complaint also charged that other guards had failed to intervene.

Pursuant to 28 U.S.C. § 1915(e), the district court dismissed the complaint

as untimely. The court found the statute of limitations was governed by Florida Statutes § 95.11(5)(g), which specifies a one-year time limit for "action[s] brought by or on behalf of a prisoner ... relating to the conditions of the prisoner's confinement."

The Eleventh Circuit, however, held that federal courts apply a state's statute of limitations for personal injury actions to complaints brought under § 1983. Thus, the four-year limitations period in § 95.11(3) applies to § 1983 claims arising in Florida. See: *Ellison v. Lester*, 275 Fed. Appx. 900 (11th Cir. 2008) (unpublished). ☐

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March 2010

The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned

by Bob Sloan

From the late 19th century into the depression years, Americans struggled economically. For the man and woman on the street to the businesses, companies and manufacturers vainly trying to keep their enterprises afloat, those were difficult times. States strained to overcome the desperate financial situation which held citizens captive as a result of few jobs and even less income or money available for business capital.

To partially overcome the public's lack of – and need for – everyday household, agricultural and other necessary items, many states began allowing their prison systems to put prisoners to work

producing products for consumers. Some of those goods were distributed outside the state of manufacture and began to compete with private sector companies, which were already having difficulty finding markets for their products in the slow economy.

Legislating Limits on Prison Industry Programs

In 1924, the U.S. Secretary of Commerce, Herbert Hoover, held a conference on the “ruinous and unfair competition between prison-made products and free industry and labor” (70 Cong. Rec. S656 (1928)). As a result of that conference, an advisory committee was formed to study the issue. The need for such a committee was in response to complaints from private sector businesses alleging unfair competition from more and more prison-made goods finding their way to the marketplace. In 1928, the committee issued its report to Congress.

The eventual legislative response to the committee's report led to some very important federal laws regulating the manufacture, sale and distribution of prison-made products. Congress enacted the Hawes-Cooper Act in 1929, the Ashurst-Sumners Act in 1935 (now known as 18 U.S.C. § 1761(a)), and the Walsh-Healey Act in 1936. Walsh controlled the production of prison-made goods while Ashurst prohibited the distribution of such products in interstate transportation or commerce. Both statutes authorized federal criminal prosecutions for violations of state laws enacted pursuant to the Hawes-Cooper Act.

The pertinent language of these statutes, as amended, now provides:

“Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.”

Thus, for several decades to come, the manufacture of prisoner-made products for public or private sale and distribution was prohibited. Certain prison industry products were exempted by statute from the Ashurst-Sumners Act, including “agricultural commodities or parts for the repair of farm machinery.”

Codified at 18 U.S.C. § 1761, the Prison Industries Enhancement Certification Program (PIECP, or “PIE” as it is commonly called) was implemented in 1979. PIECP relaxed the restrictions imposed under the Ashurst-Sumners and Walsh-Healey Acts, and allowed for the manufacture, sale and distribution of prisoner-made products across state lines. However, PIECP limited participation in the program to 38 jurisdictions (later increased to 50), and required each to apply to the U.S. Department of Justice for certification.

PIECP includes mandatory requirements that must be met prior to receiving certification to participate in such prison industry programs. Eligible jurisdictions that apply to take part in PIECP must

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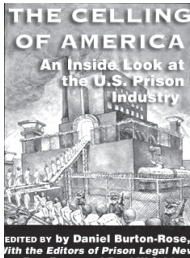
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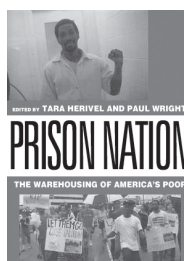
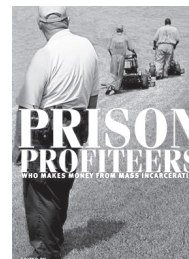
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PIECP (cont.)

meet all nine of the following criteria:

1. Legislative authority to involve the private sector in the production and sale of prison-made goods, and administrative authority to ensure that mandatory program criteria will be met through internal policies and procedures.

2. Legislative authority to pay wages at a rate not less than that paid for similar work in the same locality's private sector (termed "prevailing wages").

3. Written assurances that the PIECP program will not result in the displacement of free-world workers already employed before the program is implemented.

4. Authority to provide worker benefits, including workers' compensation or its equivalent.

5. Legislative or administrative authority to take deductions not to exceed 80 percent of prisoners' gross wages for room and board; federal, state and local taxes; allocations for family support pursuant to state statute, court order or agreement of the offender; and contributions of not more than 20 percent but not less than 5 percent of gross wages to any fund established by law to compensate victims of crime.

6. Written assurances that participation by prisoner workers will be voluntary.

7. Written proof of consultation with related organized labor groups before startup of the PIECP program.

8. Written proof of consultation with related local private industry before startup of the PIECP program.

9. Compliance with the National Environmental Policy Act and related federal environmental review requirements.

The reasoning behind these stipulations, as mandated by Congress in 18 U.S.C. § 1761, was to allow competition between prison industries and private sector manufacturers. The nine restrictions listed above were intended to "level the playing field." By making the requirements mandatory, Congress believed they could ensure that prison industries were competitive with free-world businesses without giving either an unfair advantage.

But PIECP goes even further, by allowing private sector businesses to "partner" with prison industries through joint venture programs to manufacture products or provide services to the general public. These partnerships are also

required to abide by the mandatory requirements.

In 1999, the U.S. Department of Justice's Bureau of Justice Assistance (BJA) issued final guidelines for PIECP programs after allowing all participants to discuss and argue for or against the provisions to be contained within the guidelines. The mandatory requirements were included in the guidelines and are now the "law of the land" with regard to prison industries and their private-sector business partners.

The Fox Guarding the Prison Industry Henhouse

PIECP programs include safeguards to ensure that Congress' intent regarding the mandatory requirements are followed by all participants, with private sector companies and prison industries competing on an equal footing.

However, as with any situation where free enterprise and capitalism flourish, the pursuit of profits often outstrips rules and regulations designed to prevent abuses. There have been many examples of profiteering at the expense of regulatory compliance – such as with the current meltdown on Wall Street, the Enron and WorldCom scandals, and ponzi schemes like that of Bernie Madoff (which brought down the JEHT Foundation, a major funder of criminal justice programs) [See: *PLN*, June 2009, p.34]. Both individuals and businesses in pursuit of profit either ignore controlling laws or find loopholes.

PIECP is no different. In addition to the usual practice of exploiting free-world workers, corporations now exploit prisoner labor through PIECP programs. In the beginning, small businesses that had trouble hiring or retaining employees due to low wages or fluctuating work schedules solicited partnerships with prison industries. This changed dramatically by the 1990s, when companies such as Wal-Mart, Victoria's Secret, Boeing, Microsoft, Starbucks and dozens of others joined the ranks of U.S. businesses that benefited from PIECP programs, usually through subcontractors. [See: *PLN*, April 2009, p.32; March 1997, p.1].

Prisoners are now making more than just license plates and road signs. Oregon's prison factories are perhaps best known for the "Prison Blues" line of blue jeans and other clothing sold on the open market. Tennessee prisoners have manufactured clothes for Kmart and JC Penney,

PIECP (cont.)

as well as wooden rocking ponies for Ed-die Bauer and, more recently, hardwood flooring. Prisoners in Ohio produced car parts for Honda until the United Auto Workers intervened. Prisoners have been employed in data entry and computer circuit board assembly programs, and have even worked in a TWA call center. Incarcerated workers in Utah make cold-weather clothing for Northern Outfitters, while Arkansas prisoners produce cable assemblies and wire harnesses used in medical equipment.

Once private sector companies were allowed to partner with PIECP prison industries to manufacture products and make them available to the general public, they began seeking ways around the program's mandatory requirements, which were interfering with the corporate goal of generating more profit.

In 1995, the BJA outsourced oversight and management of PIECP programs to a non-profit group, the National Correctional Industries Association (NCIA). The PIECP guidelines are available on NCIA's website: www.nationalcia.org.

The government's decision to use NCIA to fulfill its oversight responsibilities appeared to be a natural choice. The association was experienced and knowledgeable about prison industry operations, and was already established. The DOJ and BJA issued a handsome

government grant to the NCIA to oversee PIECP programs. In the end, however, this proved to be a poor choice that has led to significant abuses.

Most of the NCIA's members are administrators and employees of state prison industry programs and their PIECP private sector partners, vendors and suppliers. The association's board of directors is almost exclusively composed of prison industry officials. Thus, the NCIA includes the very PIECP participants that it is charged with monitoring; in effect, it is overseeing itself.

The BJA requires PIECP partners to be reviewed for compliance with the mandatory requirements prior to starting any new industry program. Following issuance of a certificate allowing a prison industry to begin operations, the program must be reviewed for continuing compliance. These reviews – initial and annual – are to check the wages being paid to prisoner workers, to ensure deductions from those wages are used for the purposes permitted under 18 U.S.C. § 1761(c), and to verify that benefits are being provided and local unions and competing free-world businesses are being consulted.

Additionally, the NCIA handles complaints related to participating prison industries and their private sector partners. The association is supposed to investigate complaints, determine whether or not the prison industry program is in compliance, and if not, take steps to bring it into compliance.

Those are the responsibilities delegated to the NCIA. However, since the association's board of directors is largely comprised of individuals deeply involved in prison industries, if an allegation of non-compliance is made against a PIECP program, the chances are high that the industry has an employee or administrator sitting on the NCIA's board who can influence any investigation.

Over the past several years the NCIA has stopped performing annual reviews. Instead it reviews participating prison industries on a 24-month cycle, and only about 30% of the industries are reviewed during each cycle. Further, the NCIA has adopted the practice of conducting "desk assessments," which are reviews of previously-filed documents from PIECP programs by NCIA staff. Unless there are problems noted or unresolved issues from previous reviews, a cursory desk assessment is all that is done to check such programs for compliance.

PIECP Prison Industry Violations & Abuses

Virtually all of the mandatory requirements for PIECP programs are being ignored or openly violated nationwide. One example involves the use of training periods to circumvent the requirement that prisoners be paid prevailing wages.

Of the 32 jurisdictions currently operating PIE programs, most have reduced "prevailing wages" for incarcerated workers to the state or federal minimum wage. In Florida, for example, Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) uses a "training program" to limit the wages paid to PIECP workers.

PRIDE requires prisoners to complete a 480-hour training course (Level I), which pays minimum wage. Following this training period, the prisoner advances – with small pay increases – through three more levels until reaching Level IV after two years, where he or she "has the potential of making the prevailing wage." At any time during the four-tiered training program the prisoner can be moved to another job position to begin training on different equipment, further extending the training period and keeping wages depressed.

This practice allows PRIDE, and other prison industries that follow a similar practice, to use prisoners to manufacture goods at reduced pay for years before they qualify to receive the prevailing wages to which they are entitled.

Consultation with Labor Groups

PIECP participants are required to consult with local organized labor groups prior to starting a prison industry program, to determine if the program will interfere with free-world employment. PRIDE and other prison industries routinely fail to comply with this requirement; instead, they sometimes advertise their intent to start or operate prison industry programs in classified ads in local newspapers.

The requirement to consult with competing private sector businesses is handled in a similar manner. PRIDE notifies the local Chamber of Commerce instead of contacting local competing businesses to get them to sign off on prison industry programs. This puts the responsibility for such contacts and obtaining authorization on the Chamber of Commerce instead of on the prison industry, where it belongs.

PIECP requires any business that

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partners with a prison industry to maintain its free-world operations in addition to its prison-based program. This is to ensure that employees of the private sector PIECP partner are not replaced by prison labor. The PIECP partners are also required to maintain benefits and wages for non-prisoner workers at the same level as before their participation in the prison industry program. In several cases, however, companies have violated this provision without being sanctioned.

The requirements for private sector PIECP partners to consult with labor unions and competitors and to maintain their non-prison operations are important issues, as demonstrated by the 2008 closure of Lufkin Industries' trailer division in Lufkin, Texas and the loss of 150 free-world jobs in Austin, Texas due to prison industry programs, among other examples.

Free-world Job Losses

In the mid-1990s, Lockhart Technologies, Inc. partnered with Wackenhut Corrections (now known as GEO Group) to operate an industry program at a Wackenhut prison in Lockhart, Texas, assembling computer and electronic components. Wackenhut built an industrial workspace at the facility and agreed to lease the 25,000 sq. ft. space to Lockhart for \$1.00 a year. Once the program was up and running, Lockhart closed its business operation located in nearby Austin, resulting in the termination of 150 em-

ployees. [See: *PLN*, June 1997, p.1; April 1996, p.1].

Lockhart owner Leonard Hill was candid about his use of prison labor. "Normally when you work in the free world, you have people call in sick, they have car problems, they have family problems. We don't have that [in prison]," he stated.

"The incentive for companies to go into the prisons is pretty clear in some cases," said Edward Sills, a spokesman for the Texas chapter of the AFL-CIO. "They don't have to pay all the benefits, in some cases they pay very few of the benefits, that an outside company has to pay in the regular marketplace."

In 2006, Texas Correctional Industries partnered with a private company in a prison industry program that manufactured flatbed trailers at the Michael Unit in Tennessee Colony. The private sector PIECP partner was Direct Trailer and Equipment Company (DTEC), owned by a former Texas prison employee. The Texas Private Sector Prison Industries Oversight Authority had failed to contact local organized labor groups prior to authorizing the operation. They also failed to contact Lufkin Industries or Bright Coop – Texas-based companies that manufactured the same type of trailers as DTEC.

Due to those failures, Lufkin and Bright were unaware that they faced a new

competitor that was using cut-rate prison labor. With sales falling, Lufkin attributed the loss in business to the bad economy. The company decided to close its trailer division in January 2008; 90 employees were transferred and 60 were let go.

An investigation by Lufkin officials exposed the competition from DTEC's prison industry program. It was further revealed that the trailers manufactured using prison labor were similar to Lufkin's trailers but were being sold for as much as \$2,000 less, due to DTEC's reduced operating costs through the PIE program. [See: *PLN*, April 2009, p.25; Nov. 2008, p.12].

Texas lawmakers, concerned over the loss of jobs in Lufkin's trailer division, quickly got involved. They discovered that failures by the state's Private Sector Prison Industries Oversight Authority had led to unfair competition – including prisoners being paid minimum wage with no employee benefits, and DTEC being allowed to lease the industry facility at the Michael Unit for \$1.00 a year.

Following the Lufkin debacle, Texas legislators passed a bill to address problems in the state's PIECP programs (HB1914 / SB1169). Under the new law, the Private Sector Prison Industries Oversight Authority was disbanded and oversight was transferred to the Texas Department of Criminal Justice. The law, which was enacted in 2009, prohibits any PIECP program that would result in

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the loss of free-world jobs due to prison labor.

The PIE program with DTEC was discontinued after the company's contract expired on March 1, 2009 and was not renewed. Texas still operates four PIECP programs, including the manufacture of aluminum windows and AC parts and heating valves.

Another PIECP program that resulted in the loss of free-world jobs involved Omega Pacific, a company located in Washington state that produced carabiners and other climbing equipment. In December 1995, Omega Pacific fired 30 employees and moved its operations to the Airway Heights Corrections Center near Spokane. Company owner Bert Atwater lauded the rent-free workspace at the facility and the use of low-cost prison labor, where "the workers are delighted with the pay; [there are] no workers who don't come in because of rush hour traffic or sick children at home; [and] workers ... don't take vacations. Where would these guys go on vacation anyway?" [See: *PLN*, Feb. 2000, p.12; March 1997, p.1].

Also in Washington state, Talon Industries, a company that used water jet technology, was forced out of business in 1999 and had to lay off 23 employees due to competition from MicroJet, a private sector PIECP partner at the Monroe Corrections Center. MicroJet was a contractor for Boeing that produced airplane parts.

Talon and an industry association sued Washington officials over the illegal use of prison labor under the state constitution, which led to a Washington Supreme Court ruling prohibiting the use of prisoners in private sector industries. However, no damages were awarded and

the state constitution was amended by referendum in 2007 to allow prisoners to participate in such programs. [See: *PLN*, Feb. 2009, p.20, 30; Dec. 2004, p.22; Feb. 2000, p.13].

Wanting a Bigger Piece of the PIE

From 2002 to 2005, PRIDE operated a food processing industry program (Union Foods) at the Union Correctional Institution in Raiford, Florida. PRIDE partnered with ATL Industries, an Atlanta company. ATL eventually accused PRIDE of improper accounting during a financial dispute; PRIDE countered that ATL owed them money, seized all of the proprietary technology, equipment and products owned by the company, and forced ATL off prison property.

The son-in-law of PRIDE's president then formed two separate companies (Century Meats and Circle A Brands), which took the place of ATL in the prison industry program, using ATL's equipment and customer contacts. PRIDE and ATL have counter-sued each other, and the cases are still pending. See: *ATL Industries v. PRIDE*, Pinellas County Circuit Court (FL), Case Nos. 05-000696-CI-07 and 05-000797-CI-15.

It was later discovered that PRIDE had performed the same type of takeover of three other private sector businesses through PIECP partnerships prior to taking over ATL. In each case, PRIDE assumed control over joint venture prison industry programs and put the former partners out of business. The other companies that were taken over by PRIDE included Custom Converter Sales, Value Line Converters and Fresh Nectars, Inc. PRIDE attempted a similar takeover of a fourth PIECP partner, Man-Trans, LLC, but reportedly settled with the company and returned its equipment as part of a settlement agreement.

The Florida Attorney General's office held that several spin-off companies created by PRIDE, and owned or operated by PRIDE executives or board members, were in violation of state law. One of those companies, Industries Training Corp. (ITC), which ran PRIDES' office and administrative operations, received millions of dollars in loans from the agency. In 2004, PRIDE CEO Pamela Jo Davis and president John Bruels were asked to resign, and PRIDE was told to sever its ties with the spin-off companies. Davis also served as president of ITC, which among other businesses owned Northern

Outfitters, a company that manufactures extreme-weather clothing using prison labor in Utah.

Job Training for Lifers?

Prison industry programs often employ prisoners serving life or other long-term sentences. This disregards the fact that PIECP is intended to be a "vocational training program" for the purpose of training offenders and making them more employable upon their release. Providing job training to prisoners who have little or no opportunity for parole or release denies such training to other prisoners who will be released and can use the job skills they learn.

Another important and serious aspect of using lifers in PIECP or other prison industry programs is the access they have to dangerous tools and materials. Putting offenders with the least to lose in close proximity to saws, knives and other items that could be used as weapons places other prisoners and staff at risk.

This was dramatically demonstrated in Florida on June 25, 2008, when a PRIDE prison industry worker attacked and killed Donna Fitzgerald, 50, a guard at the Tomoka Correctional Institution. The weapon used was a "shank" made from sheet metal by prisoner Enoch Hall, who stabbed Fitzgerald repeatedly. He was charged with first-degree murder. [See: *PLN*, Nov. 2008, p.50]. Murders, escapes and serious assaults are all too common among the nation's prison industry programs yet for legislators and prison officials this human toll is simply "the cost of doing business."

An investigation revealed that Hall, who worked as a welder in a PRIDE program, was already serving two life sentences. He had received at least four disciplinary reports for problem behavior prior to Fitzgerald's murder, but PRIDE pressured the institution to keep him on the job because the agency needed welders. A report by the Critical Incident Response Team found that the prison classification panel that placed prisoners in job positions had been "inappropriately influenced by PRIDE and their production priorities" in retaining Hall as a PRIDE worker. Hall was later found guilty of Fitzgerald's murder; he was sentenced to death on January 15, 2010.

Prison industry programs have a motivation to employ offenders with life sentences or other lengthy prison terms, because keeping such prisoners in the same job for years results in quicker pro-

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duction by experienced workers, and thus more profit. However, as demonstrated by Donna Fitzgerald's death, this practice is also dangerous. According to Florida law, 40 percent of prisoners who work in PRIDE programs must be serving sentences of ten years or more.

Deductions from Prisoners' Pay

In terms of prisoner pay, PIECP guidelines allow prison industry programs to take four authorized deductions from the wages of incarcerated workers, up to a maximum of 80% of their total earnings, as follows:

"(A) Deductions from gross wages, if made, may be withheld only for the following authorized purposes:

"(1) taxes (federal, state, local); (2) in the case of a state prisoner, reasonable charges for room and board as determined by regulations issued by the Chief State Correctional Officer; (3) allocations for support of family pursuant to state statute, court order, or agreement by the offender; and (4) contributions of not more than 20 percent, but not less than 5 percent of gross wages to any fund established by law to compensate the victims of crime."

The BJA says that it maintains jurisdiction and authority over wage deductions to ensure that participating prison industries use the deductions for the purposes stated in the guidelines. In the case of room and board deductions, funds withheld from prisoners' wages are intended to offset taxpayer expenditures for the cost of incarceration.

In Florida, PRIDE decided to take allowable deductions from the wages of PIECP workers. However, the agency diverted more than \$3 million in "room and board" deductions to offset PIECP operations and program costs – not to reimburse the state or the Florida Dept. of Corrections for costs of incarceration.

A similar situation was recently reported in Iowa, involving wages for prisoners in a private sector industry program at the North Central Correctional Facility in Rockwell City. According to a November 7, 2009 news report, "Inmates were paid less than people in similar jobs that are from outside the correctional institution." The industry program involved work at local grain elevators.

Free-world employees received \$10.00 per hour; however, prisoners who performed similar job duties were paid \$6.15 an hour. The \$3.85 wage difference was due to an "up-front deduction" for

transportation, supervision costs and work-related materials such as work clothes. This was permissible according to North Central Correctional Facility Warden Jim McKinney, who said the problem was one of "misinterpretation, or difference of interpretation." A report by the state auditor found that the wage deductions were not being placed in the state's general fund as required by law, but were being retained by the prison.

What Is a Prevailing Wage?

Although PIECP workers are supposed to receive prevailing wages for work comparable to that of free-world employees, this is rarely the case. In fact, the BJA determined in 2006 that wages for prisoners in PIECP programs "must be set at or above the 10th percentile as defined by the State Department of Economic Security agency." The 10th percentile is the point at which 10% of workers earned below that amount and 90% earned more. In other words, starting wages for prisoners in PIE programs begin at an amount earned by the lowest-paid 10% of comparable free-world workers, but not less than minimum wage.

Further, prisoners who participate in

PIE programs are only entitled to receive minimum or prevailing wages if they are engaged in production work. In some cases, PIECP programs have classified prison industry jobs as "service" rather than production positions, which means minimum wage is not required. For example, a PIE program at the South Central Correctional Facility in Tennessee produced T-shirts for Taco Bell, among other customers. Prisoners who printed the T-shirts received minimum wage while those who packaged the shirts for shipping – labor classified as service rather than production work – were paid \$.50 per hour.

According to an October 2008 NCIA report on PIECP compliance assessments, "wages were the single most difficult requirement for PIECP Certificate Holders to implement." The report noted that six of the 28 jurisdictions assessed had "wage issues of some kind," though that was "considerably less than in the previous assessment cycle." Most of those wage-related issues were considered significant; three were "serious enough to involve the potential payment of back wages."

The report stated that "PIECP managers tend to try to hold wages at or near the minimum wage, sometimes for very

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PIECP (cont.)

long periods of time. They argue that their ability to attract PIECP partners depends upon keeping wages low. ... The result is that many PIECP inmate workers never achieve wage levels significantly above the minimum wage, despite the 10th percentile requirement."

Additionally, "two jurisdictions were found to be deducting from the inmates' gross pay for items other than the four deductions allowed under the PIECP statute." The report concluded that assessors had discovered "instances of major non-compliance in eight jurisdictions, which is roughly 25% of the jurisdictions assessed."

These findings are likely optimistic, as the NCIA report frankly acknowledged that "no independent observers were used" in the assessments, "no assessor training was provided," a majority of the findings relied on "desk assessments" rather than "on-site assessments where an assessor ... observed the operation first-hand," and much of the information relied upon by NICA assessors was provided by the PIECP program members themselves.

PIECP Private Sector Corporate Abuses

In the 1990s, a Delaware corporation, U.S. Technologies, Inc., decided to capitalize on PIE programs by using prison labor to create products for various businesses and manufacturers nationwide. According to its SEC filings, "Historically, the Company has been engaged, directly and through its wholly owned subsidiary UST Industries, Inc. ("UST"), in the operation of industrial facilities located within both private and state prisons, which are staffed principally with prison labor. UST's prison-based operations are conducted under the guidelines of the 1979 Prison Industry Enhancement ('PIE') program."

As described above, U.S. Technologies, through its subsidiary UST – previously known as Lockhart Technologies – partnered with Wackenhut Corrections to operate a prison industry program at a Wackenhut facility in Lockhart, Texas, resulting in the loss of 150 free-world jobs.

In 2004, the SEC charged U.S. Technologies' chairman, C. Gregory Earls, with securities and wire fraud and misappropriation of investors' funds totaling \$13.8 million. He was convicted and sentenced in 2005 to 125 months in federal prison.

U.S. Technologies was de-registered as a publicly traded firm as part of a settlement with the SEC; the company's subsidiary, UST, went out of business as a result of tax forfeiture.

Once the UST / Lockhart Technologies industry program shut down at the Wackenhut facility in Texas, another operation moved in: OnShore Resources, Inc. OnShore apparently took over where UST left off, even using the same address. The company partnered with Wackenhut to use prison labor to manufacture wiring harnesses and related products – the same type of goods that UST had produced. OnShore advertises itself as a minority-owned company that operates as a "PIECP participant." See: www.onshore-resources.com.

OnShore uses its PIECP program as a tool to attract other businesses. The company's "product" is basically prisoner labor, and it provides that labor source to other manufacturers regardless of the goods being produced. This is nothing less than a thinly-veiled prison labor brokerage service that offers the benefits of PIECP programs to other companies that want to reduce costs by using incarcerated workers.

As previously reported in *PLN*, in 2002 the California Dept. of Corrections and Rehabilitation (CDCR) and CMT Blues, a CDCR joint venture industry partner, were sued for underpaying prisoner workers. Prisoners at the R.J. Donovan Correctional Facility who made T-shirts for CMT filed a class-action suit, claiming they were not paid during a 30-day training period, did not receive overtime pay and were not paid prevailing wages, in violation of state labor laws. They received the California minimum wage of \$6.75 per hour, while prevailing free-world wages were \$8.37 to \$13.55 an hour. CMT Blues was further accused of "directing inmates to remove and replace 'Made in Honduras' labels [on T-shirts] with others reading 'Made in the USA.'" [See: *PLN*, July 1998, p.17].

The prisoners' lawsuit was later joined by a private citizen, Cristina Vasquez, vice-president of UNITE, an organized labor group. CMT counter-sued the CDCR, complaining that it had been misled by the department's promises of cheap prison labor. Two other CDCR joint venture industry partners, Western Manufacturing and Pub Brewing, also were accused of shorting the wages of PIECP workers.

The Superior Court found that

CMT Blues had engaged in unlawful and unfair business practices, and awarded \$841,188.44 in back pay and damages to 167 prisoners plus \$435,000 in attorney fees and \$65,000 in costs. [See: *PLN*, Dec. 2004, p.16; Oct. 2003, p.26; Dec. 2002, p.16]. Vasquez's claim resulted in a stipulated injunction with the CDCR, and the court awarded her \$1.25 million in attorney fees.

The injunction required the state to obtain wage plans and duty statements from each joint venture partner, to comply with all record-keeping requirements, to provide payroll data to

Vasquez's attorneys, to identify comparable private sector wages, to require joint venture employers to notify prisoners of their rights under state labor laws, to establish wage-related grievance procedures for prisoners, to require joint venture partners to post bonds to secure

payment of wages, to notify the court and Vasquez's counsel of defaults in wage payments, and to take reasonable steps to collect overdue wages. However, the CDCR repeatedly failed to comply with the injunction and appealed the fee award. [See: *PLN*, March 2008, p.18].

On November 20, 2008, the California Supreme Court upheld the award of attorney fees under the state's private attorney general statute (Code Civ. Proc. § 1021.5), rejecting the state's argument that plaintiffs must first attempt to settle "before resorting to litigation" under § 1021.5. See: *Vasquez v. State of California*, 195 P.3d 1049, 45 Cal. 4th 243 (Cal. 2008), modified with no change in judgment, 2008 Cal. LEXIS 13923.

While the California Prison Industry Authority still operates private sector joint venture programs, CMT Blues, Western Manufacturing and Pub Brewing are no longer partners.

Why Everyone Should Be Concerned

There is no question that products manufactured using prison labor cost less to make than comparable products produced by private sector businesses. But at what cost to consumers and to free-world competitors and their employees?

This involves considerations beyond what is fair for incarcerated workers, and weighs the benefits of employing prisoners in PIECP programs, ostensibly as a means of job training, against the impact on free-world businesses and the loss of private sector jobs. Since 1999, PIE programs have expanded considerably; there are now 42

participating state or county agencies. In Florida alone, PRIDE currently operates eleven PIECP industries.

Companies that seek profits at any cost have adopted prison industry programs as a way to fight economic downturns, staffing problems and competitor pricing. By partnering with PIE programs to use inexpensive prison labor, they can significantly boost their bottom lines. Many prison industries offer the use of prison-based workspace at nominal cost, plus incarcerated workers receive no employee benefits such as vacations or health insurance.

This clearly gives prison industries and their PIECP partners a considerable advantage over free-world competitors. Most private sector businesses have to provide prevailing wages, vacations, insurance and other benefits to their employees. They must pay to lease or buy manufacturing space, and have to deal with employee turnover or transient workforces.

The evolution of PIECP from 1979 to the present has changed the program entirely, allowing it to be corrupted to a point where it is hardly recognizable as the beneficial program that was originally intended by Congress.

PIECP participants now look not to prisoner job training as a goal, but rather profit. The merger of private sector enterprise with prison labor has resulted in higher profit margins for a select few companies and businesses. Prison-made goods are routinely being sold to the general public on the open market, where such products were previously prohibited.

There have been repeated examples of

free-world job losses due to prison industry programs. Although PIECP requires that no private sector jobs be sacrificed as a result of prison labor, that restriction is limited to the immediate locality and in any event is not enforced by the BJA or NCIA.

There are no statistics that clearly show the number of free-world jobs lost to PIECP programs. The BJA does not keep or provide such statistics. The NCIA has no idea, and prison industry operators will only claim that no jobs have been lost in their "locality" due to prison labor. Although only a small number of prisoners are involved in PIECP industry programs – approximately 4,700 nationwide – the impact on free-world businesses in terms of competition, lost or foregone private sector jobs, and depressed wages can be significant.

"Prison labor is one thing," said Phil Neuenfeldt, secretary-treasurer for the Wisconsin State AFL-CIO. "But prison labor that provides unfair labor to the outside world and keeps pressure on wages downward is not a good thing."

The solution to safeguarding private sector jobs while keeping PIECP programs from unfairly competing with free-world businesses is simple. Start by firmly enforcing the existing mandatory requirements of 18 U.S.C. § 1761 and the PIECP guidelines. The laws are in place and need only be applied. Abiding by these requirements would reduce the possibility of prison industry unfairly competing with private manufacturers or businesses. This includes ensuring that prisoners in PIECP programs are paid

true prevailing wages.

The most important part of any solution would be the removal of oversight and review responsibilities from the NCIA. The NCIA has repeatedly shown that its agenda is at odds with the legal requirements and statutory intent of the PIECP. Continuing to allow prison industry administrators and employees, and their private sector partners, vendors and suppliers to be the only regulatory authority over PIE programs is ineffective and insufficient, and reeks of conflict of interest.

The Department of Justice's BJA needs to resume its responsibility to oversee PIECP programs. Enforcement and regulation at the federal level is not only needed but should be required. Until such solutions are adopted, PIECP industry programs will continue to operate with impunity and to the detriment of everyone involved and affected – except, of course, the companies that are raking in money hand over fist as they exploit cheap prisoner labor. 🗞

Bob Sloan is an independent Prison Industries Consultant dedicated to reducing the number of private sector jobs lost to prison industries. He has worked with state and federal authorities for seven years to enforce PIECP requirements regarding prevailing wages and to identify improper sales of prison-made goods. A former prisoner who worked in a PIE program in Florida, he has been instrumental in bringing about investigations into PIECP abuses nationwide. For more information: www.piecp-violations.com.



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From the Editor

by Paul Wright

The big news this month is that Prison Legal News is closing its Seattle office and consolidating its operations on the east coast in Vermont. We have had our Seattle office in 1996 and since 2004 have maintained offices in both Seattle and Vermont. The consolidation comes as part of an effort to reduce costs and overhead associated with having two offices on separate costs.

The physical move will take place during the first two weeks of March. *PLN* magazine and website subscribers will not see any disruption of service as we will continue doing data entry and processing our mail as it arrives in our Seattle office. Book orders will be delayed for a two week period while the office is physically in transit but that will be a one time delay. Our new office is liter-

ally upstairs from the local post office so we expect to provide our readers and customers with even faster and better service.

Please note our new mailing address and office phone number effective immediately are:

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Mail to our Seattle office will be forwarded for several years so anything sent to that address will eventually reach us.

This May will mark our 20th anniversary of publishing *PLN*. If you would like to advertise in our 20th anniversary issue please contact our advertising director Susan Schwartzkopf at the above address or at ads@prisonlegalnews.org.

As I previously noted in the December, 2009, issue of *PLN*, Bobby Posey the editor of *Florida Prison Legal Perspectives* died and with him so did *FPLP*. To ensure that all the work he put into *FPLP* is not lost we are putting all the back issues of *FPLP* on the Prison Legal News website in our publication library. We have already posted a fair number of issues thanks to a collection donated to us by Adele Potter in Florida. But we have none of the issues before 1998. If you have any issues of *FPLP* prior to 1998 that are in good condition (not disfigured, marked up or written on), please send them to *PLN* so we can place them online where they will be available as an ongoing resource for others.

Enjoy this issue of *PLN* and please encourage others to subscribe. 📖

First Circuit Upholds \$101,750,000 in Damage Awards in FBI Misconduct Case

by Matt Clarke

On August 27, 2009, the First Circuit Court of Appeals upheld an almost \$102 million judgment in a lawsuit filed against the federal government after the FBI helped an informant secure the convictions of four men for a murder they didn't commit.

In March 1965, Edward "Teddy" Deegan's body was discovered in Chelsea, Massachusetts. Local police believed that mafia members Joseph Barboza, Jimmy Flemmi, Roy French, Joseph Martin and Ronald Cassesso were involved in the murder, but were unable to obtain sufficient evidence to charge them.

Two years later, FBI agents H. Paul Rico and Dennis Condon approached Barboza, a known mafia killer who was facing a lengthy prison term, hoping to "flip" him. Barboza became an important FBI snitch, but said he would never incriminate his friend Flemmi – a condition tacitly accepted by FBI agents.

Among other information that he provided to the FBI, Barboza claimed that Peter Limone, Sr., Enrico Tameleo, Louis Greco, Sr. and Joseph Salvati had murdered Deegan. Rico and Condon notified local law enforcement officials and allowed them supervised interviews with Barboza, vouching for the "clean" quality of his information.

The four men identified by Barboza were indicted, tried and convicted in state court for Deegan's murder. Barboza testified against them at trial, and Condon vouched for the "purity" of the information supplied by Barboza. Salvati received a life sentence while Limone, Tameleo and Greco were sentenced to death.

In 1961, the FBI had initiated the Top Echelon Criminal Informant Program, which was designed to "flip" and obtain long-term intelligence from high-ranking mafia members. Top Echelon informants told the FBI that Barboza, Flemmi, French, Martin and Cassesso had killed Deegan. No informant indicated that any other people were involved in that murder.

Additionally, in early 1962 the FBI had placed an illegal electronic surveillance device in the Providence, Rhode Island office of Raymond L. S. Patriarca, the alleged head of the area's mafia family. The bug yielded a wealth of information, including the fact that Barboza and Flemmi had obtained Patriarca's permission for the hit on Deegan and that they, along with French, Martin and Cassesso, had committed the murder.

Despite having this information, the FBI not only failed to inform the state prosecutor but Condon and Rico told

him that Barboza's information "checked out." The FBI continued to withhold the exculpatory evidence while Limone, Tameleo, Greco and Salvati tried to obtain post-conviction relief. The FBI also interfered with attempts by the four men to obtain parole, by directly contacting parole officials. The death sentences of Limone, Tameleo and Greco were later commuted to life imprisonment as a result of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

In December 2000, Special Assistant U.S. Attorney John Durham turned over five memos – several of which were authored or read by Rico and Condon – in response to a request by Limone. The memos revealed much of the exculpatory evidence that the FBI had been keeping secret for decades. Based upon this information, the state prosecutor moved to vacate Limone and Salvati's convictions.

They were granted new trials, but the district attorney's office abandoned the prosecution. Limone was released from prison. Salvati had already been released in 1997 after the governor commuted his sentence. Tameleo died in prison in 1985, and Greco died in 1995 while still incarcerated. Prosecutors arranged for their convictions to be vacated posthumously.

Limone and Salvati, the estates of Tameleo and Greco, and members of their families filed a lawsuit in federal court against the United States under the Federal Tort Claims Act (FTCA). Following a 22-day bench trial, district court judge Nancy Gertner found in favor of the plaintiffs on their claims of malicious prosecution, intentional infliction of emotional distress and other causes of action, and awarded a total of \$101,750,000 in damages. [See: *PLN*, Oct. 2007, p.10]. The government appealed.

The First Circuit upheld the district court's judgment and award of damages with one modification. It found the evidence did not support the lower court's finding that the FBI had controlled the state actors, making the state prosecution the functional equivalent of a federal prosecution. This meant the evidence did not support the tort of malicious prosecution. However, because the district court had found the government liable on other theories and the evidence supported the tort of intentional infliction of emotional distress, the judgment was upheld on that basis.

The Court of Appeals rejected the government's assertion that there was an exception to the FTCA for "intentional torts," holding that the only torts exempted are those specifically enumerated in 28 U.S.C. § 2680(h) and torts arising out of those enumerated torts. In this case, intentional infliction of emotional distress is not enumerated and cannot be said to have arisen out of the enumerated tort of malicious prosecution, because the plaintiffs failed to prove the FBI had engaged in malicious prosecution.

The First Circuit also rejected the government's claim that the tort fell within the discretionary function exception to the FTCA, holding that that exception does not immunize unconstitutional actions or those proscribed by federal statute or regulation. In this case, the FBI's actions violated both the Constitution and U.S. Department of Justice guidelines.

The appellate court reviewed the damage awards for clear error. None was found. The awards were calculated based on the district court's use of \$1,000,000 per year of wrongful incarceration as a baseline. It derived this baseline from other lawsuits raising wrongful incarceration claims. The First Circuit found that the awards were "high enough to be troubling"; however, they were not grossly disproportionate to the emotional suffering of the wrongly convicted men and did not shock the judicial conscience.

The appellate court made a concluding, sober observation, stating, "This case exemplifies a situation in which the end did not justify the government's use of very unattractive means. In its zeal to accomplish a worthwhile objective (stamping out organized crime), the FBI stooped too low. Its misconduct was not only outrageous but also tortious. That misconduct resulted in severe harm to the persons wrongfully convicted and to their families. Under these unfortunate circumstances, the large damage awards mark the last word of a sad chapter in the annals of federal law enforcement."

The First Circuit upheld the district court's judgment and award of \$28 million to Greco's estate; \$26 million to Limone;

\$29 million to Salvati; \$13 million to Tameleo's estate; \$1,050,000 each to the wives of Limone and Salvati and the estate of Tameleo's deceased wife; \$250,000 each to the ten minor children of the wrongly convicted men, including the estate of one who had died; and \$50,000 each to Greco's ex-wife and Tameleo's adult son. The total award was \$101,750,000. Additionally, the plaintiffs are seeking approximately \$7.4 million in attorney fees and costs. The district court has not yet ruled on that motion. The Obama administration refuses to settle the case to date. See: *Limone v. United States*, 579 F.3d 79 (1st Cir. 2009). 📰



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Less Than Equal: State officials, including prejudiced human-rights commissioners, block Prisoner complaints

by Lance Tapley

This story has a bias. It's in favor of human rights for all people.

So if you think it's proper for prison guards to call African-American prisoners "niggers" and gay prisoners "fags," then this story may not be for you. If, however, you think that prisoners deserve to be treated as human beings while they pay what the old movies call "their debt to society" — that they still have some rights despite being deprived of their freedom — then please read on.

Complaints about harassment on racial and sexual-orientation grounds within Maine's public institutions would normally get a hearing before the Maine Human Rights Commission. A prisoner at the Maine State Prison, Jonathan Dix, recently made such a complaint. He accused guards of allowing him to be called a "monkey" and "dirty nigger."

Commission executive director Patricia Ryan and chief attorney John Gause wanted to accept Dix's case and others like it. But for six years their gubernatorially appointed citizen commissioners, including a former prison warden, Paul Vestal — who is now the commission chairman — have blocked all prisoner harassment complaints from being heard. In doing so, they have lessened prisoners' remedies against a variety of crimes such as demands for sexual favors or threats of racial violence or gay-bashing. Such misdeeds are not unknown in prison settings.

At their August 10, 2009 meeting, rejecting Ryan's and Gause's argument, the commissioners voted to continue to block prisoner complaints. In their discussion, Vestal and Commissioner Kenneth Fredette overtly expressed prejudice against prisoners. Vestal dismissed their complaints wholesale because, he suggested, as a class of people prisoners are too untrustworthy for their claims to be taken seriously.

Before 2003, prisoner human-rights complaints had been treated like those coming from any other government agency or business in Maine. But that year the commissioners accepted an argument from the attorney general's office, then headed by Steve Rowe — who is now running for governor — that they should take away this human-rights-law avenue

of redress from both state prisoners and county-jail prisoners (though many of the latter haven't even been convicted of a crime and, while awaiting trial, are presumed innocent).

Rowe's office relied mainly on a 2002 opinion by a now-retired Maine Superior Court judge, John Atwood, a former district attorney, state commissioner of public safety, and current member of the state prison's secretive Board of Visitors, whose chairman recently admitted the board had not been living up to its mandate to report on prison conditions.

This year Ryan and Gause's pitch to their commissioners was that other court decisions, including those of Maine's and Vermont's highest courts, had trumped Atwood's ruling. Their argument, if successful, would have restored a hearing before the commission to a broad swath of people — gays, African Americans, women, Native Americans, and other often-discriminated-against people who happen to be prisoners. The complaints had kept coming in. "We were getting concerned about some of these prison and jail cases stacking up," Ryan said in an interview.

But at the August meeting it was a representative of the new AG, Janet Mills — a Democrat like Rowe — who won the day with a memo that prisoners should not be able to file harassment complaints, citing, once again, Atwood's decision. Both the AG's and Atwood's view of why prisoners don't qualify for a hearing rely on a technical point: that a prison is not the type of building in which the law prohibits such persecution. But, politically, Mills's argument had the practical effect of supporting Vestal's and Fredette's bias.

Given their clearly expressed prejudice, it would be hard to see how the commissioners, who are supposed to play a judge-like role in discrimination cases, could give a prisoner a fair hearing anyway.

'Hostile environments'

Under the Maine Human Rights Act, discrimination on grounds of race, gender, sexual orientation, religion, physical or mental disability, color,

national origin, or ancestry is illegal in Maine's government (and many other) buildings because, in the law's language, they are "public accommodations," and racial or sexual slurs, for example, may create an illegal "hostile environment" in such places. (Under a separate provision of the law, disabled people are protected in all "public entities" including prisons and jails.) The commission works to resolve discrimination complaints involving — besides public accommodations — employment, education, housing, credit, and place-name issues. If a resolution to a valid complaint isn't reached, the commission or the complainant may sue the perpetrators in court. The commission usually initiates between five and ten lawsuits a year.

Minority-group prisoners and their advocates for years have protested bias by guards and corrections administrators. The National Association for the Advancement of Colored People, for example, has had a long-running battle with the state Department of Corrections over alleged racial slurs by prison guards and the ability of the Maine State Prison NAACP chapter to have meetings and raise money. Recently a bisexual prisoner at the Warren prison complained to the *Phoenix* about guards using words like "fag" — a slur that, by identifying a prisoner as gay, he said, could prove dangerous in a maximum-security prison. In the past, Indians had complained of various expressions of prejudice including being forbidden to have sweat lodges, smudging ceremonies, and other religious practices.

(After much effort on the part of Native Americans and their advocates — including a lawsuit and legislative action — the prison in recent years has allowed sweat lodges and other ceremonies. And very recently, after removing Warden Jeffrey Merrill and taking the reins of the prison, state Corrections commissioner Martin Magnusson says he's allowing prisoner organizations to become more active, including the NAACP chapter.)

Prisoners may still go to the Maine Human Rights Commission to complain about prison or jail employment, education, and disability discrimination, and they have the option of directly filing lawsuits opposing harassment and other civil-rights

violations under the Maine Human Rights Act. But doing this or filing federal civil-rights lawsuits can be costly, lengthy, and require legal expertise that many prisoners don't have (because of lack of funds most prisoners have to represent themselves). In federal lawsuits, prisoners also have to overcome many procedural hurdles as a result of the Prison Litigation Reform Act, a mid-1990s law signed by President Bill Clinton that was designed to make it harder for them to go to court.

AG versus commission staff

Mills herself would not directly say why she sent Martha Hallisey-Swift, an assistant AG, to make the argument she did, only tersely stating in an e-mail that "a prison is not a place of 'public accommodation' under the law." Rowe, who was AG from 2001 to 2008, when Mills succeeded him, said in a statement issued by his campaign, "Any change recommended by the Office of the Attorney General in 2003 would have been a direct result of the Superior Court decision of November 2002 and not as a result of some sort of policy change in the office" — though the statement also said Rowe didn't recollect the issue.

The late-2002 court decision to which Rowe referred was *Napier v. Department of Corrections*, in which Justice Atwood dismissed part of a discrimination claim by Maine State Prison prisoners Philip Napier and David Mason against the prison because "a prison is not fully open to the public" and it "offers no services to the general public" and so isn't a public accommodation.

But the human rights commission attorney, Gause — who had represented Napier and Mason while in private practice — argued that Atwood's decision no longer had to be followed. He wrote a memo to executive director Ryan citing different precedents from those cited by Hallisey-Swift, including a 2007 decision by the Maine Supreme Judicial Court and a 2006 Vermont Supreme Court decision. Gause also used different logic from Atwood's to arrive at the conclusion that government buildings like jails and prisons could be considered places of public accommodation even if all the public couldn't circulate everywhere in them — as the public couldn't, for example, in a courthouse, which in the law is given as an example of a place of public accommodation. And Gause noted that places of public accommodation are not limited to buildings where services are given to the general public. He cited country

clubs as an example.

But in their brief discussion before their three-to-two decision, the commissioners didn't deal much with legal arguments.

The dominating figure in the vote was the chairman, Vestal, of Plymouth, a 19-year commission veteran. He waved away "jailhouse lawyer" prisoner complaints with "It used to be they'd use cigarettes to buy testimony. I don't know what they're using now."

Also thinking little of prisoner human-rights complaints in general was Commissioner Fredette, a Newport lawyer, who observed, "Once they get into jail they have not a lot to do," so they file frivolous complaints. "If you don't like a particular person, you can file a complaint."

Two commissioners, Sallie Chandler, of Lebanon, and Joseph Perry, of Searsport, supported the staff's position, but said little at the meeting. Commissioner A. Mavourneen Thompson, of Peaks Island, cast the deciding vote, saying she would defer to Vestal's "personal expertise."

Thus, the majority of the commissioners — all of them appointed by Democratic Governor John Baldacci — simply didn't think prisoners deserved the human-rights protections the commission could have offered them.

"It's inconceivable to me that the State of Maine can say to businesses that discrimination is illegal and then discriminate itself in its own operation," comments Zachary Heiden, staff attorney for the Maine Civil Liberties Union. "I hope that's not the law, but if it is, then that needs to be changed." ■

This article originally appeared in the Portland Phoenix. It is reprinted here with the author's permission.

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Prison Labor Bails Out State and County Budgets

by Gary Hunter

Across the nation, state and local governments are facing gaping holes in their budgets. As a result many are turning to cheap or free prison labor, and in some cases prisoners have taken the place of free-world citizens laid off due to budget cuts. State and local agencies have increasingly come to benefit from – and rely upon – low or no-cost prison workers.

Unlike the PIECP programs discussed in this issue's cover story, the prison labor programs described below produce goods or provide services for government agencies through state-run prison industries, work release programs or community corrections, not in conjunction with private-sector businesses.

For fiscal year 2009, the state of Ohio cut its budget by \$1.9 billion. Statehouse operations at the Capitol were slashed \$310,000; consequently, 17 employees were laid off. To fill that void, the state has proposed using seven prisoners – five as janitors and two as groundskeepers.

The Ohio Civil Service Employees Association filed a grievance in an effort to stop the plan, but some state officials feel there's no other alternative. "Get the money reinstated, and we'll bring the employees back," said William Carleton, executive director of the Capitol Square Review and Advisory Board. "I'm not the one who cut the budget."

The use of prison labor to support government facilities and services is nothing new. For example, prisoners in Iowa have found themselves building prison cells. When the demand for prison industry-made furniture declined, between 50 and 100 prisoner workers found themselves out of a job. But the public's persistent lock 'em up mentality created a demand for steel jail cells.

"Over time you can pick through a concrete wall ... but it's virtually impossible to pick through a gauge steel wall," said Roger Baysden, director of Iowa Prison Industries. Each cell costs about \$15,000 to manufacture and requires welding training for about 30 prisoners. The cells will eventually be sent to Oklahoma.

Kansas is profiting from cabins built by prisoners for use in state parks. According to the Kansas Department of Wildlife and Parks, cabin rental has increased over 150 percent in the past year.

"The public is demonstrating the

demand for these," said Mike Hayden, Secretary of the Department of Wildlife and Parks. "With the economy, more people are staying closer to home. A lot of people want to go camping, but they don't want to sleep in a tent, don't want to sleep on the ground, don't have an RV, and this is a great option for them to be at the lake."

Prisoners build about a dozen cabins a year as part of a vocational program at the Hutchinson Correctional Facility. Each cabin costs about \$40,000 to construct.

"It was the perfect fit," said Mark Stock, who coordinates the cabin-building project. "From a correctional standpoint, it is educational. They are trying to teach these people a skill and the cabin is a by-product of the education."

Hawaii prisoners are being put to work making playground equipment for the state's Department of Education. "Just with the inmate labor alone, this is a huge cost savings," stated Matthew Kaneshiro, administrator for Hawaii Correctional Industries.

Kaneshiro said he expected an influx of requests for prison work projects due to the state's budget gap. "We know, whenever the economy goes down, our program goes up." Therefore, prison officials are trying to move more prisoners into the industry work programs, which pay \$.50 an hour.

In some cases the desire for prison labor takes on a personal tone that is measured in more than just money. The prisoner cleaning crew for the town hall in Charleston, Maine enjoys a variety of snacks while they work, courtesy of Selectwoman Terri-Lynn Hall. "I also make 'em turkeys, bake 'em hams, and serve spaghetti with homemade sauce," she said.

Maine is one of several states where communities have fought to keep prisons open. In December 2008, Governor John Baldacci proposed closing one of two housing units at the Charleston Correctional Facility due to budget cuts, a move that would have cost the town many of its work-release prisoners.

As part of their institutional jobs, state prisoners maintain Charleston's five cemeteries, break apart beaver dams, hang holiday decorations and perform a variety of other tasks.

"Oh my goodness, gracious, they are

such an asset – they are our public-works department," said Selectwoman Hall. In 2008, Charleston's prisoners performed 39,337 hours of community work. [See: *PLN*, April 2009, p.1].

After lobbying by local residents, Maine officials managed to substitute savings from other areas to avoid closing the unit at Charleston, thereby preserving the town's free prison labor source.

In Madison County, New York, prisoners from the minimum-security Camp Georgetown, a state facility, generate \$200,000 a year for the county by searching through the local landfill looking for recyclable materials. Jim Zecca, director of the county's solid waste department, expressed sadness when he learned the Governor had proposed closing Camp Georgetown in 2009 due to the state's budget shortfall. "I just hate to see it go," he said, noting that putting prisoners to work for the county was better than having them "just sitting and rotting in a jail."

As in Charleston, supporters of the prison rallied to save Camp Georgetown; they argued that the facility assisted the local community by providing thousands of hours of prisoner labor. Their efforts were successful and the prison was spared the budget axe. It will cost the state \$4.3 million to keep Camp Georgetown open, but at least the county will continue to get a free labor source.

Residents of Medical Lake in Washington state also fought to prevent the closure of a nearby prison, the Pine Lodge Corrections Center for Women. The facility provides the town with a valuable resource: Prisoner workers.

"We use the inmates to run our recycling center – four women five days a week, seven hours a day," said city administrator Doug Ross. "I don't exactly know how we're going to run it without the [prison] crew." Medical Lake saves around \$150,000 a year due to reduced labor costs.

Thus far, as of February 2010, Pine Lodge has remained open; however, it is slated for closure later this year. Town residents still might be in luck, though, as both Spokane County and the city of Spokane have expressed interest in acquiring the prison for use as a jail, work release program or community corrections center.

Butler County, Kansas lost its source

of prison labor when budget cuts resulted in the closure of a minimum-security unit at the El Dorado Correctional Facility in February 2009. It would have cost the county about \$1 million a year to replace the prisoners, who were paid \$1.05 per day. Instead, county officials have proposed creating a bus line to transport up to 40 workers from the nearby Winfield Correctional Facility, so they can continue to provide work for the county and city.

"All the [local government] parties are extremely happy we're not going to lose that labor force," said Butler County Commissioner Randy Waldorg. "It would have been a huge hit for us." Prisoners work at the El Dorado State Park, where they mow, weed and repair equipment; they also perform landfill, maintenance and landscaping work for the city of El Dorado. "That's basically how we can keep our parks up is because of the labor from the prison system," explained Mayor Tom McKibban.

Other towns have not been as fortunate. In the beginning, the idea of bringing a minimum-security Discipline and Rehabilitation Center (DRC) to downtown Wooster, Ohio was not popular with everyone. "[W]e took a lot of heat" from people against the idea, said Sheriff's Capt. Charlie Hardeman.

But after the facility had been operating for almost ten years, it had become more appreciated. With budget reductions looming in 2009 there was talk of closing the 74-bed facility, and people were concerned. "Who is going to pick up the litter?" Hardeman asked.

Wooster resident Sandra Hull was one of those originally against the DRC who had changed her mind. "I didn't really want them there," she said, but eventually called the prisoners "wonderful neighbors." They shoveled snow from storefronts in the winter and helped move furniture for the

local Habitat for Humanity.

However, the DRC was forced to shut down on March 1, 2009, resulting in a loss of the facility's largely free labor source. DRC prisoners had performed 214,153 hours of community service work over nearly a decade while the program was in operation.

The closure of the Union Correctional Center in North Carolina also cost the local community inexpensive prison labor. Union operated a work release program in which prisoners were employed at local businesses, and provided work crews for the towns of Monroe and Indian Trail, where prisoners would clean parks, mow grass and pick up trash. But the facility fell victim to the state's economic crisis, and was forced to shut its doors in October 2009.

North Carolina's Haywood County Correctional Center, however, was spared. Although also slated for closure, Haywood was located in the district of state Senator John Snow, who co-chairs the Senate Appropriations Committee on Justice and Public Safety. Senator Snow argued against closing the prison, noting that it provided work crews for roads, schools and local governments.

Further, the Haywood County Commission passed a resolution stating prisoners had provided 12,248 man-hours of labor, which would have cost the county over \$80,000 at minimum wage. "Who's going to keep the highways clean if Haywood Correctional Center closes?"

the commissioners asked. The prison remained open, in large part due to its ability to provide a cheap labor source.

It is apparent that prison labor has become an acceptable alternative for state and local governments that want to save money, even when that option may be detrimental to non-incarcerated workers. After all, every job that's performed by a prisoner, at little or no cost, is a job that's not available to a free-world employee. Also, sadly, communities and public agencies have become so dependent on incarcerated workers that they lobby against prison closures to preserve their cheap labor pool.

PLN supports fair wages for prisoners, or other benefits such as early release, but has consistently warned that the erosion of everyone's rights almost always begins with the exploitation of people in prison, who have no political lobby or influence.

Thus, it should come as no surprise that the lock 'em up policies that the U.S. has pursued for decades has come to cost members of the public first their freedom through mass incarceration, then their tax dollars for maintaining our nation's multi-billion dollar prison industrial complex, and – finally – their jobs. 🗞

Sources: *Associated Press*, *Gatehouse News Service*, www.radioiowa.com, *Wall Street Journal*, *Wichita Eagle*, www.syracuse.com, <http://behavioralhealthcentral.com>, *Honolulu Advertiser*, www.kansas.com

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All Eyes On the Court: An Interview with Attorney and Federal Court Monitor Fred Cohen

by Todd Matthews

Most people familiar with prisoners' rights issues know attorney Fred Cohen as an advocate for juvenile prisoners and prisoners with mental health issues. They have also seen his byline in the *Correctional Law Reporter*, which he co-founded more than 20 years ago, and followed his work as a Federal Court Monitor in Ohio. But they may not know this about Cohen: He once dominated the boards in college basketball. Indeed, Cohen, as a starter for Temple University in 1956, set the record for most rebounds in an NCAA Tournament game by collecting 34 boards against the University of Connecticut. More than a half-century later, the record still stands.

As promising an athlete he was, Cohen was more interested in a different kind of court.

"When it became clear that I was not National Basketball Association material, I was looking at either being drafted to serve in Korea or going to law school," says Cohen. He arrived at the latter, and went on to teach law at Denver University and the University of Texas. He also helped found a graduate school in criminal justice at SUNY-Albany, and published, edited and wrote articles on prisoners' rights.

"I was motivated by a powerful belief that there were too many people in penal facilities, usually for far too long, often for the wrong reasons," Cohen explains. "People who left worse -- more criminally inclined -- than when they went in. This, of course, is no grand discovery but it was my motivating force."

PLN recently spoke with Cohen about his interest and work in prisoners rights issues.

PRISON LEGAL NEWS: You graduated from Temple Law then Yale Law School, taught at a number of law schools, and went on to co-found the Graduate School of Criminal Justice at the State University of New York (SUNY) in Albany. How and why did you become interested in pursuing a career in law? What circumstances led you to SUNY, where you are now Professor Emeritus, and what was the motivation for helping to start the university's Graduate School

of Criminal Justice?

FRED COHEN: I received my first law degree at Temple and a graduate law degree in 1961 from Yale. From Yale, I went into teaching law, beginning at Denver University, and then to the University of Texas, a great law school. I left Texas, after much cajoling, to help found the first "real" graduate school in criminal justice. A law component I developed would help distinguish SUNY at Albany from a "mere" criminology program. The prospect of melding legal studies into a study of the causes and responses to crime is what motivated me. Sadly, SUNY School of Criminal Justice has just about eviscerated the law component and the "planned change" component, becoming just another good program, it seems, in criminology.

PLN: Much of your work has focused on juvenile inmates and inmates who have mental health issues. You have been publisher and editor of the *Juvenile Correctional Mental Health Report*, and wrote a two-volume treatise entitled *The Mentally Disordered Inmate and the Law*. How and why did you become interested in those areas? Has your work affected change in the way juvenile inmates and inmates who have mental health issues are treated in jails and prisons? If so, in what ways? What other work needs to be done, or issues need to be addressed, in these areas?

COHEN: Well, I was always interested in deviance and the law generally and studied Psychiatry and Law with Joe Goldstein and Jay Katz at Yale. Criminal law courses in law school were essentially formal, substantive law courses and I wanted to expand my knowledge into sentencing, probation, parole, jail, prisons, and the like. I wanted to know more about the "why" of crime and not just the "what." In the 1960s, correctional law as a subject area was invented by National Council on Crime and Delinquency's Sol Rubin and was just emerging. So, my interest in mental illness, criminal law, and correctional law combined and I taught courses in those areas, created internships, and consulted with all the Presidential Commissions of the 1970s. It took awhile for me to find a way to move

from teaching, consulting, research and writing to real world advocacy and system change. I don't mean to say I did not visit jails and prisons as a way to inform my research and teaching. I did. But only later as a consultant to activist attorneys, several correctional agencies, and then as a federal court monitor, beginning in 1994 in Ohio, was I able to help create change on the ground.

PLN: You were, then, a court-appointed monitor for mental health services in Ohio's prisons. What was the scene like for Ohio prisoners with mental health issues when you started in that position? How were conditions improved when you left five years later?

COHEN: As Federal Court Monitor, 1995-2000, in *Dunn v. Voinovich*, I helped dramatically change mental health care in Ohio's prisons. Access to care was revolutionized, the officer culture and understanding of mental illness changed, prisoners became people with a constitutional right to care for their serious illness. Prior to *Dunn*, prisoners with mental illness wasted away in segregation. Their illness led to misconduct that led to segregation and further deterioration. We got them out, into residential treatment units, hospital settings -- we got them decent care. Obviously, one does not do this alone. We had Reggie Wilkinson as director, Sharon Aungst as Ohio's health director, Kathy Burns, M.D. as Ohio's psychiatric director, Jeff Metzner as my psychiatric expert, and other terrific people. I developed what came to be called "collaborative monitoring." Monitoring for me became both oversight and consulting. It was -- and is -- not simply "gotcha -- go fix it." I do not just do, "This is not in compliance or this is not proper." In my monitoring, we say we will work with you to help fix a problem. From 1995-2000, *Dunn* drove reform in Ohio but now with no Court Order and a terrible economy, I hear that prison mental health care there is slipping.

PLN: What kind of monitoring work do you do today?

COHEN: I am now the Federal Court Monitor in *S.H. v. Stickrath*, an Ohio case involving all of their juvenile facilities. It is perhaps the most ambi-

tious, litigation-driven, juvenile reform effort in the nation. Our mandate is to greatly enhance safety, rehabilitation programs, and treatment for delinquent youth while steadily reducing institutional size in favor of community corrections and more sophisticated aftercare. The S.H. Stipulation has insulated Department of Youth Services from budget cuts. Two facilities have been or soon will be closed. The youth population is down from about 1,800 to some 1,200. Services are expanding, mental health care is increasing -- over half the DYS youth are on the mental health caseload, with the girls at around 80 per cent. This is a very damaged, very needy, very difficult to work with population. But change is beginning to take hold. I am very proud of this and my terrific team of experts. We have had to deal with obstructionist tactics from the Department of Justice, who has a separate agreement covering only a single facility and the federal interest apparently is to monitor me and ignore the youth. They squander precious resources with at times four lawyers growling at me for what I supposedly haven't done. State and DYS officials and class counsel, especially civil rights

attorney Al Gerhardstein of Cincinnati, on the other hand, have been great.

PLN: What is the *Correctional Law Reporter* and how has it affected conditions in prisons and jails? How does the *Correctional Law Reporter* compare to *Prison Legal News*?

COHEN: The *Correctional Law Reporter* (CLR) is over 20 years old now. Bill Collins and I started this newsletter as a vehicle to report on correctional law in a way that is accessible to non-lawyers while also being useful to lawyers. Our subscribers tend to be corrections professionals who have a budget allowing them to subscribe, advocacy organizations, Attorneys General, criminal justice practitioners, and academics. Sadly, the cost of CLR prohibits a broader prisoner readership, although we do publish articles written by prisoners. Neither Bill nor I control costs or prices. *Prison Legal News* (PLN) is much more widely distributed and presumably read, certainly in penal facilities, and its writers do a terrific job with legal material, particularly since they tend not to be trained in law. I have used some PLN authors in the newsletters I edit. I write, in part, to alert the field to legal developments

that impose more duties on corrections officials and give more rights to the confined. I know that some of our articles have caused jails, for example, to rethink uniform strip search practices; prisons to do better suicide screening and prevention; rethink Supermax conditions and the mentally ill; and so on. 📖

Todd Matthews is a journalist based in Seattle Washington. This interview is part of PLN's ongoing series of interviews with the lawyers who have dedicated their careers to representing prisoners.

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Cook County Strip, Body Cavity Searches Held Unconstitutional; Other Suits Pending

by *Brandon Sample*

On February 23, 2009, U.S. District Court Judge Matthew F. Kennelly granted partial summary judgment to the plaintiffs in a class action lawsuit challenging certain strip and visual body cavity searches conducted at Illinois' Cook County Jail (CCJ).

The plaintiffs were separated into two classes. The Class I members comprised "all males who were subjected to strip search and/or visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004."

The Class I members alleged that their Fourth Amendment, due process and equal protection rights were violated when they were strip searched in groups of 75-100 men without partitions to prevent other detainees from seeing their naked bodies.

During the searches, the Class I members complained they were exposed to "strong, foul odors," "vomit, diarrhea, and blood," "insults [by guards] about body odor, anatomy, sexual orientation, and race," and that dogs were used to humiliate and intimidate them. Privacy screens were later installed at CCJ, but the Class I members alleged they were forced to continue strip searching in front of other detainees at times. Similarly situated female detainees were treated differently. Female detainees were not strip searched in groups, and were allowed to undergo body scans in lieu of extremely humiliating visual body cavity searches. Conversely, male detainees were required to "bend over, spread their cheeks, and cough."

The Class II members were composed of detainees arrested for misdemeanor offenses that did not involve drugs or weapons. Those members alleged that their Fourth Amendment rights were violated when CCJ staff strip searched them without reasonable, individualized suspicion that they possessed contraband.

Turning first to the Class II members' claims, Judge Kennelly concluded that CCJ's practice of conducting strip and body cavity searches of misdemeanants arrested for non-drug or weapon offenses violated the Fourth Amendment. Comparing the case to *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983),

Judge Kennelly held that individualized, reasonable suspicion was required before searching the Class II members.

The district court recognized CCJ's interest in preventing the introduction of contraband into the facility, but held the defendants had failed to present "any evidence that blanket strip searches are necessary with respect to the members of Class II generally."

The searches of the Class I members also were held unconstitutional. The Class I members "were herded together with dozens of other men and forced to strip and bend over or squat in front of a large group with less than a foot between them," the court observed. "No reasonable jury could find that ... group strip searches ... prior to the installation of the privacy screens complied with the requirements of the Fourth Amendment."

Judge Kennelly reached a similar conclusion on the Class I members' equal protection and due process challenges. "The undisputed facts show," he wrote, "that the strip searches of the Class I members prior to the installation of privacy screens ... violated the Equal Protection Clause of the Fourteenth Amendment." Likewise, the searches of the Class I members violated due process because the searches constituted "unreasonably harsh treatment meted out to inmates who have not yet been convicted of a crime."

The Class I members' remaining Fourth Amendment, equal protection and due process claims concerning searches conducted after the installation of the privacy screens were bound over for trial. See: *Gorman v. Dart*, 598 F.Supp.2d 854 (N.D. Ill. 2009), *revised at* 616 F.Supp.2d 834 (N.D. Ill. 2009).

On August 13, 2009, a federal jury returned a unanimous verdict in favor of the Class I members on all of their remaining claims, which included: 1) whether different treatment between male and female detainees violated the equal protection clause, 2) whether the searches were improper punishment in violation of the Eighth Amendment and due process clause, and 3) whether the searches violated the Fourth Amendment. The verdict was for liability only; a damages trial is scheduled for March 29, 2010.

The potential class members in the suit number more than 500,000 current and former detainees, which may subject Cook County to millions or tens of millions of dollars in damages.

"We believe the jail's correctional officers and staff acted appropriately and did not violate anyone's constitutional rights in conducting searches for weapons or contraband before placing them into jail custody," said CCJ spokesman Steve Patterson. The plaintiffs' attorney, Mike Kanovitz, defended the verdict, citing the "disgusting and cruel ways that these strip searches were done."

The defendants appealed the district court's denial of their motion for judgment as a matter of law under Fed.R.Civ.P. 50, and asked the court to stay the proceedings pending resolution of the appeal. In a September 15, 2009 order, the district court found the defendants' interlocutory appeal to be frivolous, and therefore denied the motion to stay. See: *Gorman v. Dart*, U.S.D.C. (N.D. Ill.), Case No. 1:06-cv-00552.

Several other strip search-related lawsuits have been filed against Cook County. In a class action case brought by pre-trial jail detainees who were strip searched upon being returned to the CCJ after court hearings, the district court denied the defendants' motion to dismiss. See: *Streeter v. Sheriff of Cook County*, 576 F.Supp.2d 913 (N.D. Ill. 2008). The court subsequently granted the plaintiffs' motion for class certification on April 7, 2009. The case remains pending. See: *Streeter v. Sheriff of Cook County*, 256 F.R.D. 609 (N.D. Ill. 2009).

In a separate federal suit, also filed as a class action, the plaintiffs sued over the CCJ's policy of strip searching detainees who returned to the facility from court after they had been ordered released. On July 30, 2008, the district court granted the plaintiffs' summary judgment motion "with respect to all claims except the unreasonable delay claim," and denied the defendants' cross-motion for summary judgment. See: *Bullock v. Dart*, 568 F.Supp.2d 965 (N.D. Ill. 2008).

However, on February 27, 2009, the court granted the defendants' motion for

reconsideration under Fed.R.Civ.P. Rule 54(b), and vacated its previous order. The district court then denied both parties' motions for summary judgment and de-

nied the defendants' defense of Eleventh Amendment immunity. The defendants have since filed an appeal, which is pending. See: *Bullock v. Dart*, 599 F.Supp.2d

947 (N.D. Ill. 2009). ■

Additional sources: *Chicago Sun Times*, www.chicago.indymedia.org

California Cuts Funding for Prop 36 Drug Treatment Programs

by Michael Brodheim

In an effort to trim a \$26.3 billion budget deficit, California Governor Arnold Schwarzenegger slashed \$90 million from a diversion program designed to offer certain non-violent drug offenders the opportunity to participate in substance abuse treatment instead of going to prison.

In 2000, in a rare show of rationality by members of the public relative to criminal justice issues, California voters approved Proposition 36. For those who meet specific eligibility requirements, Prop 36 mandates drug treatment at state expense in lieu of incarceration.

While such treatment programs require funding, studies have repeatedly shown that the costs of drug treatment are dwarfed by the alternative expense of imprisonment, and that treatment is more cost-effective and socially beneficial.

Such net savings, along with a potential reduction in criminal activity associated with illegal drug use through lower recidivism rates, have garnered favor with California voters – and with public officials. “This has been a very successful program; we should be spending more, not less on these people,” remarked Dan Nelson, a deputy district attorney.

Schwarzenegger's budget cuts, an-

nounced last August and approved by the state legislature in January 2010, eliminated almost all funding for Prop 36 drug treatment programs. As a result, California counties – the principal recipients of the funding – are scrambling to find ways to keep their programs afloat.

Santa Anita Family Service, which provided drug treatment to around 75 patients, had to abruptly close. “I was absolutely shocked,” said Fred Loya, the program's director. “Having to close a program so quickly is just not ethical but when our funding source cuts the water off we have no choice.” In addition to the loss of future funding, the state is not paying for services already provided by Prop 36 treatment programs from October to December 2009.

Numerous other Prop 36-funded programs have closed, leaving people who have court-ordered treatment requirements with few choices. “We have no options – there are no treatment programs available,” said L.A. Superior Court Judge Peter Espinoza. “It's not the ideal, but we're working within the confines of our current reality which is there isn't money for anything.”

In Butte County, where not enough funding remains to provide treatment

services for more than about a quarter of the 200 people in the county's Prop 36 program, many of those who can't afford to pay for their own treatment will end up going to prison.

Even with financial assistance from family members, some offenders don't have enough money to pay for drug treatment. This reality threatens to make the Governor's budget cuts counterproductive, as offenders unable to afford treatment are more likely to be incarcerated, at much higher cost to taxpayers, and will eventually return to their communities with little or no treatment, where they are more likely to re-offend.

“You're certainly going to shoot yourself in the foot on any success that we've had in getting people into drug-free lives and being productive citizens again,” observed Kelly Brooks, with the California State Association of Counties.

By placing funding for Prop 36 on the fiscal chopping block, whatever money that Schwarzenegger hopes to save in the short run to help balance the state's budget will be far exceeded by monetary – and societal – losses over the long term. ■

Sources: *Chico Enterprise-Record*, *Pasadena Star-News*

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Conviction of CIA Contractor Who Fatally Beat Afghan Detainee Upheld on Appeal

On August 10, 2009, the Fourth Circuit Court of Appeals upheld the conviction of a CIA contractor who beat to death a detainee at a U.S. military outpost in Afghanistan. The contractor's sentence was reversed due to an error in the enhancement level.

In 2001, the U.S. military forcibly took control of an old fortress at Asadabad, Afghanistan, and established a permanent military presence at the fort called Asadabad Firebase. The fortress had 350-yard-long, ten-foot-high mud walls surrounding about 25 acres with a few internal walls and several rooms in the outer walls. By 2003, the U.S. had made significant improvements, including the addition of a dozen buildings for offices, living quarters and detention facilities, plus electric generators, above-ground plumbing and multi-layered security fortifications.

When David A. Passaro, a former Army Special Forces medic working as a CIA civilian contractor, arrived at the firebase in May 2003, it had been coming under regular rocket attack. Military officials suspected a local Afghan, Abdul Wali, of organizing the attacks. A plan was developed to bring him in for questioning; however, Wali surrendered himself to U.S. authorities before they could implement the plan.

Wali was detained in a cell with his wrists bound, ankles shackled and a hood over his head. Two armed guards watched him 24/7. The following day, Passaro began interrogating Wali. For the next two days Passaro tortured him, throwing him to the ground, hitting him with his open hand and a heavy flashlight, and kicking him with combat boots hard enough to lift Wali's body off the ground.

Wali's physical and mental condition deteriorated while he was being tortured. He asked guards to shoot him, and tried to force one to do so. Finally he collapsed and died. A North Carolina federal grand jury indicted Passaro on two counts each of assault with a dangerous weapon with intent to do bodily harm and assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(3) and 113(a)(6).

Following an eight-day trial, a jury convicted him of one count of felony assault resulting in serious bodily harm and

one count of misdemeanor simple assault, a lesser-included offense. Applying several sentencing enhancements – including two three-level enhancements for threatening the use of a deadly weapon and for an unusually heinous, cruel, brutal or degrading crime – the district court departed six levels upward, sentencing Passaro to 100 months in prison. He appealed.

The Fourth Circuit upheld his conviction. The appellate court found that the military's lengthy presence and improvements at Asadabad made the firebase "premises of a military mission," and thus under the jurisdiction of the U.S. pursuant to 18 U.S.C. § 7(9)(A). The Court of Appeals overruled Passaro's claims that his prosecution violated the separation-of-powers doctrine or was selective; that § 113 was unconstitutionally vague or provided him no notice that his actions

were criminal; that the government used the Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16, to deny him a fair trial; and that the district court erred in rejecting his jury instructions.

The Fourth Circuit found the government had produced evidence that Passaro was not authorized to assault prisoners. However, the district court erred in imposing the enhancement for threatened use of a deadly weapon; it should have found a level-four enhancement for use of a deadly weapon, or no enhancement. The unusually heinous, cruel, brutal or degrading crime enhancement also was erroneous, in that it was insufficiently explained by the trial court. Therefore, the Court of Appeals upheld Passaro's conviction but remanded his case for resentencing. See: *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009). ■

Michigan Study Shows Incarceration Can Cause Illness in Loved Ones

by Gary Hunter

A study, sponsored by the Centers for Disease Control and Prevention and released in December 2008, concludes that "Incarceration may not only affect those individuals incarcerated, but also those family members and friends left behind in the community."

In a unique approach to the study of the disparity of physical illness between blacks and whites, Daniel J. Kruger PhD and E. Hill DeLoney, MA attempted to establish a correlation between the higher incidence of physical illness in the black community and the higher rate of incarceration within the same group.

In their own words, "We hypothesized that the incarceration of individuals close to survey respondents would correspond with greater adversity in physical and mental health outcomes. Differential incarceration rates for Blacks and Whites may be a contributing factor to health disparities."

The study consisted of a telephone survey in Genesee County, Michigan. The urban hub of Genesee County is the city of Flint. For years General Motors (GM) had been the major employer in Flint, Michigan. Over the last decade the auto industry has been in serious decline and

the main auto producer, GM, has closed many of its plants and laid off hundreds of workers. This economic decline led to an increase in crime and a climbing incarceration rate. The city's parole rate for 2003 was 37 percent higher than the statewide average and figures for 2006 showed that Genesee County incarcerated its citizens at a rate significantly higher than the national average.

Research was conducted by use of phone surveys. Health questions were constructed through the collaborative efforts of seven groups including the University of Michigan's School of Public Health, the Genesee County Health Department, the Greater Flint Health Coalition, University of Michigan--Flint, Faith Access to Community Economic Development, Genesee County Community Action Resource Department and the Flint Odyssey House--Health Awareness Center. Survey questions were created by the above groups and approved by the Institutional Review Board--Health Sciences at the University of Michigan and also the Institutional Review Board at the Michigan Public Health Institute.

The sample survey consisted of adults

over the age of 18 selected at random and in proportion to Census Tracts for the city of Flint. Respondents were categorized by race, marital status, gender and education level. Results of the study are based only on the responses of those who identified themselves as black or white because of insufficient input (6%) of other racial groups.

Itemized behavior within the survey included eating, drinking, smoking and exercise habits. Questions also included in the survey categorized chronic mood and perceived stress levels of those surveyed.

Survey questions then compared the perceived closeness of those surveyed to an incarcerated person who may have held some significance in their lives. The reasoning was that incarceration leads to a decline in the presence of a potential "financial provider, nurturer, physical caregiver, disciplinarian, general companion, and contributor to the routine needs of family life."

Specific questions were, "Within the last 5 years, have you had a relative or friend in prison?" and "How close is this person to you?" The answer to this second question was rated by the respondent on a scale of 1-to-4 of not close at all to very close.

Total sample size was 1,748 respondents. Of those, 1,288 fell into the category

of White (67%) or Black (26%). Women constituted 71% of the sample and men, 29%. Age of respondents ranged from 18 to 93. Education levels broke down as follows: less than high school - 10%, high school - 31%, technical school - 2%, college (no degree) - 27%, Associates degree - 10%, Bachelor's degree - 13%, Master's degree or higher - 8%

Of those surveyed, Blacks (49%) were more likely than Whites (20%) to have a relative or friend in prison within the last five years. A comparison of responses showed that Blacks also tended to be closer to the incarcerated individual than Whites.

Controlling for the range of health behavior patterns mentioned earlier and accounting for known health predictors, those who admitted to having close relationships with incarcerated individuals reported poorer mental, physical and emotional health. They also reported a higher average number of days per month "where poor physical, mental and emotional health interfered with their usual activities."

Noting that the United States incarcerates "more than 1 in every 100 adults" and that there are about three times as many Blacks and Latinos behind bars as there

are in college these statistics could correlate to a significant loss of worker productivity within the non-incarcerated population.

Researchers admitted to several limitations with their research methods. They recognized that their survey included only those individuals who could be reached by land-line telephones and with the increased use of cell phones an important population demographic may have been missed. Surveyors also concluded that, when compared to the data provided by the U.S. Census, their sample population under-represents those who are less educated.

However, the study supports the supposition that incarceration can have direct and adverse physical and emotional effects on those close to a person in prison. Also, "Institutions of incarceration may serve as a vector for infectious diseases."

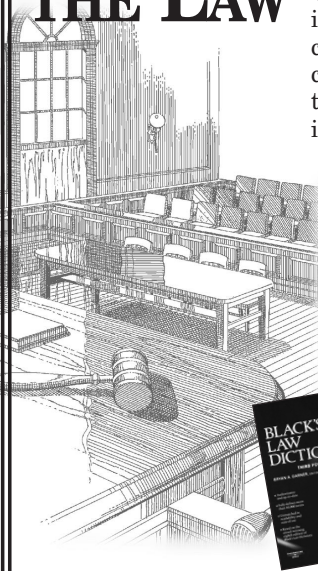
Based on the uniqueness of their study and the data collected to support their hypothesis researchers recommend more rigorous testing of their hypothesis that incarceration can directly and adversely affect the health of the general population. The report, *The Association of Incarceration with Community Health and Racial Health Disparities*, is available on PLN's website. ■

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Sexual Victimization Widespread in U.S. Correctional Facilities

by *Brandon Sample*

In a culture where it is socially acceptable for celebrities, advertisers and even movies to joke about the unfunny fact of prison rape, it should come as no surprise that almost 4% of prisoners in the United States have reported being sexually victimized while incarcerated.

As part of the Prison Rape Elimination Act of 2003 (PREA), Congress directed the Bureau of Justice Statistics (BJS) to conduct an annual statistical review and analysis of sexual abuse in U.S. correctional facilities. In response, the BJS created the National Inmate Survey (NIS).

Through the use of computerized media that protects the anonymity of survey participants, the NIS was used to ask about 63,800 prisoners in 146 state and federal prisons and 282 local jails to self-report whether they had been sexually victimized by staff members or other offenders. This data sample was then used to extrapolate national estimates.

The survey results were troubling. During 2007, an estimated 4.5% of state and federal prisoners and 3.2% of offenders in local jails reported being sexually victimized by other prisoners or correctional employees. This represented about 85,200 prisoners nationwide, or 3.7% of the nation's combined 2.3 million prison and jail population.

State and federal offenders who participated in the NIS reported more sexual victimization by prison staff members (38,600 incidents) than by other prisoners (27,500 incidents). Similarly, offenders in local jails reported more incidents involving employees (15,200) than other prisoners (12,100).^{*} These reports included both non-consensual and willing incidents of sexual abuse.

Among the prison systems that were surveyed, Texas had the dubious honor of the greatest number of facilities with high rates of sexual victimization. Five Texas prisons – Estelle, Clements, Allred, Mountain View and Coffield – were among the top ten facilities with the highest rates of abuse. The worst was Estelle, with 15.7% of prisoners reporting sexual abuse. Nebraska's Tecumseh State Correctional Institution, Florida's Charlotte Correctional Institution, New York's Great Meadow Correctional Facility, the Rockville Correctional Facility

in Indiana, and California's Valley State Prison for Women rounded out the rest of the top ten.

The incidence rate of sexual victimization in federal prisons was generally much lower than in state facilities, but there were some notable exceptions. For example, 6.2% of the population at the Federal Correctional Institution (FCI) in Pekin, Illinois reported some form of sexual victimization. Other federal prisons with elevated rates of abuse included FCI Victorville, FCI Yazoo City, U.S. Penitentiary Big Sandy and the Federal Medical Facility Lexington.

At the local level, 18 jails reported sexual victimization rates that were at least twice the national jail average. The CCA-operated Torrance County Detention Facility in New Mexico had the highest rate, with 13.4% of the jail's population reporting sexual abuse. [See: *PLN*, May 2009, p.1].

Washington's Clark County Jail ranked second with 9.1%, followed by New Mexico's Bernalillo County Metro Detention Center, Florida's Brevard County Detention Center, the Southeastern Ohio Regional Jail, Indiana's Wayne County Jail, New York's Franklin County Jail and New York City Rose M. Singer Center, and the Atlanta City Jail and Fulton County Jail in Georgia. Other jails in the top 18 included facilities in Louisiana, Pennsylvania, Illinois, Maine and California.

The BJS survey of local jails also revealed some interesting trends. Women, for example, were more likely to report having been sexually victimized while incarcerated. Significantly, survey data indicated that prisoners who identified as homosexual or bisexual were three to six times more likely to have experienced sexual abuse.

In January 2010, the BJS released a report on sexual victimization in juvenile prisons. The report was based on a survey of 9,198 juvenile offenders at 195 state, local and privately-operated facilities. An estimated 12.1 percent of juveniles reported some type of sexual abuse while incarcerated, totaling 3,220 incidents nationwide. There were far more reports of victimization involving staff members (2,730) than other juvenile offenders (700). Interestingly, in regard

to incidents involving staff, 95% of the reported sexual victimizations involved female employees.

The juvenile facilities with the highest reported rates of sexual abuse included the Backbone Mt. Youth Center in Maryland, the Pendleton Juvenile Correctional Facility in Indiana, North Carolina's Smarckand Youth Development Center, the Corsicana Residential Treatment Center in Texas, and Pennsylvania's Cresson Secure Treatment Unit. More than 30% of the juvenile offender population at each of those facilities reported some form of sexual victimization.

The data collected by the BJS through the above surveys was used by the National Prison Rape Elimination Commission (NPREC) to draft national standards for reporting, preventing and addressing the problem of sexual abuse in prisons, jails, juvenile facilities, immigration detention centers and community corrections facilities. The NPREC's proposed standards were released in June 2009; having fulfilled its purpose, the Commission was then disbanded. Since much of the data is self-reported by the agencies with no independent verification it is of questionable reliability.

The U.S. Attorney General's office must now promulgate national standards for reporting, responding to and reducing sexual abuse in correctional facilities based on the NPREC's recommendations. An alliance of advocacy organizations, the Raising the Bar for Justice and Safety Coalition, launched a campaign on February 18, 2010 to urge the Attorney General to act quickly to implement the standards. Part of the problem is with the PREA itself. It gives sexual assault victims no rights and has no enforcement mechanism, no independent verification mechanism and as has been demonstrated, is readily susceptible to political pressure by prison industry lobbyists.

The Attorney General has until June 2010 to issue national standards; however, it appears that deadline will not be met and there are concerns that the NPREC's proposed standards may be diminished or circumvented. Already after producing a first draft the proposed standards, which were weak to begin with, were watered down even further after prison and jail officials complained. The Raising the

Bar coalition is headed by Just Detention International (formerly known as Stop Prisoner Rape). Other members include the California Coalition Against Sexual Assault, the Campaign for Youth Justice, First Focus, the National Gay and Lesbian Task Force, Prison Fellowship Ministries and the United Methodist Church's Gen-

eral Board of Church and Society.

PLN has extensively covered the issue of sexual abuse in prisons and jails. [See: *PLN*, May 2009, p.1; Aug. 2006, p.1]. We will continue reporting on this topic, as it has proven to be such a pervasive and persistent problem that it constitutes a de facto policy. ■

* The numbers in each category do not add up to the reported totals, as some prisoners reported multiple incidents in one or more categories.

Sources: *Bureau of Justice Statistics reports (NCJ 228416, NCJ 221946, NCJ 219414)*; www.justdetention.org

Certificate of Merit in Medical Malpractice Suits Unconstitutional in Washington State

by Jimmy Franks

In 2007, Kimme Putman, a Washington state resident, filed suit against the Wenatchee Valley Medical Center and a number of its employees. Putnam's lawsuit alleged negligence by medical personnel when they failed to properly diagnose her ovarian cancer in 2001 and 2002, while it was still in the early stages. However, her suit was dismissed because she failed to file a certificate of merit from a medical expert as required in many states, including Washington. Putnam appealed.

Washington state's medical malpractice litigation statute, RCW 7.70.150, requires plaintiffs in such cases to submit a certificate of merit prior to discovery that includes evidence supporting their claims. Putman argued that this requirement violated the separation of powers doctrine by usurping the judiciary's power to set court rules. She also claimed that her right of access to the courts was hindered by her effectively being barred from the discovery process, which is intended to uncover the evidence that is required to be included in the certificate of merit.

On September 17, 2009, the Washington Supreme Court held that the statutory requirement for plaintiffs to file certificates of merit was "unconstitutional because it unduly burdens the right of access to courts and violates the separation of powers."

The Court determined that RCW 7.70.150 was in direct conflict with existing court rules, and, as the court rules in conflict were procedural in nature, they prevailed over the statute, which could only prevail in substantive matters. Otherwise, the judiciary would be required to relinquish part of its inherent power to promulgate rules for court practices. The Court also agreed with Putman's argument that the certificate of merit requirement placed an undue burden on her right to conduct

discovery, and, therefore, was a violation of her right of access to the courts. The trial court's dismissal was reversed and the case remanded for further proceedings.

In a concurring opinion, Justice Barbara Madsen observed that while the separation of powers violation was sufficient reason for reversal in Putnam's case, she felt the majority unnecessarily included the right of access to courts in their decision. She was unconvinced that the statute violated the right to access, and expressed concern that its inclusion in the Court's ruling would result in an "excessively broad interpretation of the right in

the future." See: *Putnam v. Wenatchee Valley Med. Center*, 216 P.3d 374, 166 Wn.2d 974 (Wash. 2009).

This is an important ruling for Washington prisoners raising medical malpractice claims, as the statutory requirement for plaintiffs to file certificates of merit from medical experts has been a significant impediment to incarcerated litigants who lacked the ability to obtain such certificates. However, without expert medical testimony to show causation and damages it is extremely rare for anyone, prisoner or not, to win a medical malpractice claim. ■

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A Tight Leash: Judges Micromanage Federal Offenders After Release

by *Brandon Sample*

The number of people serving terms of supervised release after leaving federal prison is creeping ever closer to 100,000. As judges and probation officers attempt to manage their growing caseloads, more and more judges are imposing supervised release conditions that unfairly restrict ex-prisoners from successful reentry.

The advent of supervised release, a form of supervision for federal offenders after their release from prison, occurred with the passage of the Sentencing Reform Act of 1984 (SRA). The SRA abolished indeterminate sentencing in the federal system, taking with it parole and increased good time opportunities for early release. Mandatory federal sentencing guidelines were instituted, along with a good time statute that requires federal prisoners to serve 87.2% of their sentences.

Judges can impose “standard” and “special” conditions of supervised release in addition to three mandatory conditions required of all offenders: 1) do not commit another crime; 2) submit to at least one drug test; and 3) submit to DNA collection if you were convicted of a felony.

So-called “standard” conditions of supervised release typically require released prisoners to hold a job, not associate with other felons and meet with their probation officer once a month. For offenders who are doing what they are supposed to do, most “standard” conditions are not problematic – it is the “special” ones that cause the headaches.

Judges can impose “special” conditions of supervised release provided that the conditions do not cause “unnecessary deprivations” of liberty. And that is where a big controversy is brewing.

Under the auspices of attempting to keep federal offenders from returning to prison, judges have been imposing arbitrary restrictions. Take the case of Briane Nicole Woods, a single mother from Odessa, Texas.

Woods was sentenced to ten years in federal prison for distributing crack cocaine. At her sentencing, U.S. District Court Judge Robert Junell imposed a “special” condition of supervised release that prohibited Woods from living with anyone other than her spouse or a relative. Judge Junell said the restriction was necessary to ensure “stability” in Woods’ home.

The U.S. Court of Appeals for the Fifth Circuit vacated that restriction as an infringement on Woods’ “constitutional right to liberty,” but not before Judge Junell had imposed similar restrictions on other released prisoners. See: *United States v. Woods*, 547 F.3d 515 (5th Cir. 2008).

Federal judges have barred offenders from using the Internet, driving a car or

even visiting a library. While many of those restrictions have been struck down, they represent an alarming and increasing intrusion by judges into the everyday aspects of parolees’ lives. Prisoners on supervised release need support and assistance to aid in their return to society, not arbitrary intrusions and barriers. ■

Source: *Wall Street Journal*

Illinois Prisoners Bilked Out of Millions Through DOC Commissary Surcharges

by *Joseph R. Dole*

Few prisoners would be shocked to learn that they are paying too much for items sold in prison commissaries or canteens. The Illinois Dept. of Corrections (IDOC), however, has taken commissary price-gouging to an extreme level.

In order to generate more revenue to help fund an over-capacity prison system, the Illinois General Assembly passed Senate Bill 0629 in 2004. The bill, which became Public Act 93-0607, granted the IDOC authority to add up to a 25% surcharge on all non-tobacco products and up to 35% on all tobacco products sold at prison commissaries. Prior to this amendment the surcharge was capped at 10%.

Illinois prisoners groaned as commissary prices rose. As captive consumers who rely on meager prison wages, the price increase meant a drastic reduction in what they were able to purchase.

Ironically, it wasn’t prisoners who cried the loudest about the price increase but rather prison guards. Their union, the American Federation of State, County and Municipal Employees (AFSCME), was able to convince state lawmakers to sponsor a bill to exempt IDOC employees from most of the price increase by capping commissary surcharges at 10% for prison staff. The bill passed and became Public Act 94-0913, effective June 23, 2006.

Further, beginning November 1, 2005, the IDOC began imposing an additional surcharge of 3% on commissary items beyond the statutorily-permitted 25% and 35% mark-ups. Two months later the IDOC increased the additional surcharge to 7%, where it remains today.

Those may seem like small amounts, but consider there are around 45,000 IDOC prisoners who purchase commissary items on a regular basis. In a July 20, 2009 report, the Illinois Auditor General concluded that the IDOC had received additional revenue from the 3%-7% surcharges in the amounts of \$1,266,911 for fiscal year 2006, \$2,259,760 in fiscal year 2007, and \$2,339,244 in fiscal year 2008. Thus, over that three-year period the IDOC had reaped \$5.8 million from the additional commissary mark-ups.

The unlawful nature of the 3%-7% surcharges was first pointed out to the IDOC by the Auditor General’s Office in a 2007 report, which noted they were “duplicative and exceed the statutorily allowed mark-up.” The report recommended that the IDOC “revise its methodology” and “comply with the statute and only mark-up goods for resale in the inmate commissary the allowable amounts.”

IDOC officials tried to justify their actions with a self-serving interpretation of the statute (730 ILCS 5/3-7-2a), which they claimed allowed “additional charges” to pay the wages and benefits of commissary employees. The Auditor General recommended that the IDOC “seek a formal written Attorney General opinion on this matter.”

During an April 1, 2008 hearing before the Legislative Audit Commission, then-IDOC Director Roger E. Walker, Jr. said the department would continue imposing the 7% surcharge until they received a response from the Attorney General’s office. However, when the Auditor General asked for a copy of the IDOC’s letter requesting

an opinion from the Attorney General, the IDOC revealed that it had never sought a formal opinion.

This was not the only devious tactic employed by the IDOC. Instead of applying the 3%-7% surcharges to the cost of commissary items sold, the IDOC was applying the increase to the selling price of items after the authorized 25% and 35%

mark-ups were added. Thus, instead of a 3%-7% surcharge, prisoners were paying an effective 9% increase.

The IDOC was largely unapologetic, despite having bilked Illinois prisoners out of almost \$6 million between fiscal years 2006 and 2008. Prison officials stated they would "once again try to get permission to seek an opinion from the

Attorney General," and optimistically said there was "every expectation permission will be granted." In the meantime, Illinois prisoners continue to pay the legally-questionable 7% surcharge on prison commissary sales. ■

Sources: *Illinois Auditor General reports*, www.ilga.gov

Texas Counties Give Up on Probationer Restitution Centers

by Matt Clarke

In the 1980s, faced with overcrowded prisons and probationers who often failed to pay their court-ordered fees and fines, some Texas counties came up with what sounded like a good idea: the Probationer Restitution Center (PRC). A PRC is essentially a group of dedicated jail beds used to incarcerate probationers on nights and weekends.

The idea was that a judge would order night-and-weekend incarceration until the probationer got caught up on their delinquent fines and fees. That way the courts could get their money without having to violate the probationer, which would keep them out of the state's overcrowded prison system.

Collin County, Texas closed its PRC in November 2009. Although the program had a capacity of ten beds, soon before it shut down it held only four probationers. Bob Hughes, director of Collin County's probation department, said they had rarely used all available beds, which were located in the county jail.

This inefficiency partially explains the demise of the PRCs. There were once fourteen Probationer Restitution Centers in Texas. After the Collin County PRC closed, only seven remain. They are located in Cameron, Cass, El Paso, Hildago, San Patricio and Taylor Counties. Tarrant County opened a PRC in 1983 but closed it in 2001. Dallas County operated one from 1985 until 2004.

How do counties without a PRC deal with delinquent probationers? "We set up a whole collections department, and we work with our clients to put payment plans together," stated Michael Noyes, director of Dallas County's probation department.

Neighboring Denton County never set up a PRC. "It takes a lot of money to run one of those," said Mitch Liles, the county's adult probation director. "I can

remember when they started. They sprang up with good intentions. But when you factor in all the overhead costs ... it never added up to me."

Indeed, Collin County expects collections from delinquent probationers to increase after their PRC closed. Why? Probationers in the PRC were required to pay \$18 per day for housing and food costs. That money could otherwise be applied toward the fines and fees they owe. Furthermore, some probationers had a hard time getting a ride to work from the PRC where they were jailed at night.

"We're going to try this and see if it's more effective ... and saves a little bit of money for the county," said state District Judge Chris Oldner.

The whole PRC concept is part of a mean-spirited philosophy that pervades Texas' criminal justice system. The very idea of taking people too poor to pay

their fees and fines and locking them up – and charging them for their incarceration – shows a lack of perspective. It also smacks of a return to the days of debtors' prisons. Such coercive measures might work on rich or middle-class probationers who could pay up to avoid spending nights and weekends in a PRC; however, such people aren't likely to risk going to jail by becoming delinquent in their payments to begin with.

The people who came up with this idea – prosecutors and judges – simply cannot imagine what it is like to be poor and unable (not unwilling) to pay fines and fees. Thus, PRCs have become an additional punishment laid on the already overburdened backs of impoverished probationers. The sooner the last PRC in Texas closes, the better. ■

Sources: *Dallas Morning News*, *Collin County Probation Dept.*

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Prisoner Transport Guards Accused of Forcing Prisoner to Perform Sex Acts

by Michael Brodheim

In June 2009, the District Attorney's Office in Santa Barbara, California filed charges against Roland Ygelsias and Miguel Jacobo, former employees of U.S. Extradition Services, a company that contracts with law enforcement agencies to transport prisoners to and from prisons and jails.

Ygelsias and Jacobo were accused of engaging in illegal sexual activity in October 2008 with a female prisoner they were transporting from Chowchilla State Prison to the Santa Barbara County Jail. Ygelsias, 29, was charged with one count of forcible oral copulation, which is classified as both a violent and serious felony under California law, and a misdemeanor count of sexual activity with a prisoner in a detention facility. Jacobo, 28, was accused of only the misdemeanor violation.

Ygelsias was terminated after being charged, while Jacobo resigned. They had worked for the company for less than six months.

The few details that emerged were sordid. Ygelsias reportedly received oral sex from a female prisoner he had picked up at Chowchilla; the sex act occurred in a van that was transporting seven offenders, some male and some female. The victim alleged that Ygelsias sat next to her in the front bench seat of the van. He then unzipped his pants, felt her legs, digitally penetrated her vagina, pushed her head down onto his lap, violently pulled on her hair, and forced his penis into her mouth until he ejaculated. The victim spit the semen onto the gown she was wearing, thereby presumably preserving evidence of the crime.

For his part, Ygelsias claimed that he took four sleeping pills and when he awoke he found the victim performing oral sex on him. Overcome by the sleeping pills, he was powerless, he told investigators, to stop what was happening.

As for Jacobo, he denied having physical contact with any of the prisoners, though he reportedly told one person he had received a hand-job. The victim claimed that Jacobo forced her to masturbate him. Other prisoners in the transport van reported they didn't see anything, or said the sex act with Ygelsias seemed to be consensual.

On September 4, 2009, Ygelsias pleaded no contest to one count of oral copulation in a detention facility and one count of sexual activity in a detention facility. The same day, Jacobo pleaded no contest to a single charge of sexual activity in a detention facility. Ygelsias received a 270-day jail sentence and must register as a sex offender; Jacobo was sentenced to 75 days. The Santa Barbara County Sheriff's

Department no longer contracts with U.S. Extradition.

PLN has previously reported on the abysmal track record of private prisoner transport companies, including a disturbing number of cases involving rape and sexual abuse by transportation guards. [See: PLN, Sept. 2006, p.1].

Source: *Santa Barbara Independent*

Call Your Attorney from Jail, Go to Prison

by John E. Dannenberg

Jail prisoners in California, Florida, Michigan and Texas have unknowingly had their phone calls to defense attorneys secretly recorded and handed over to prosecutors. The recordings surfaced before trial, when prosecutors were required to divulge all the evidence they possessed to the prisoners' lawyers.

Highly indignant San Diego defense attorney Jim McMahon, whose calls with a client were recorded, complained, "We aren't talking about cursory stuff [like] what kind of clothes to wear. We were talking trial strategy."

"There's no question that these calls are privileged, and we rely on that because the criminal justice system would come to a screeching halt if we had to drive to the jail every time we had to talk to our clients," he added.

After McMahon's complaint, San Diego jail staff temporarily suspended the phone recording system to allow the addition of "safeguards," which consisted of software to automatically stop taping calls made to pre-approved attorney phone numbers.

The system was already using a database of 5,000 phone numbers for local lawyers, but it had serious deficiencies. "We thought we had a better database," said Sanford Toyen, a legal advisor to the county. The jail's phone system was originally provided by AT&T but is now operated by Public Communications Services Corp. (PCS). PCS provides phone systems at more than 100 prisons and jails nationwide.

Breaches of jail prisoners' attorney-client phone calls are not only blatantly unconstitutional, they are also a felony in California that carries penalties of

up to \$5,000 per incident. Nonetheless, "privileged" calls to attorneys, doctors, psychologists and clergy have been recorded in Alameda, Santa Clara and Riverside County jails in California, plus facilities in Michigan, Minnesota, Texas and Broward County, Florida over the past several years. [See: PLN, April 2009, p.48; Aug. 2008, p.32].

Such violations are challengeable even if discovered after the fact. In 2006, gun charges against a defendant were dropped after a prosecutor admitted he had listened to only 35 seconds of a recorded attorney-client call made at an Oakland, California jail. In Broward County, the sheriff settled a class-action suit that was filed after two prisoners learned their supposedly "privileged" attorney calls were not so privileged after all. [See: PLN, Aug. 2008, p.32; June 2007, p.12].

Adding attorney phone numbers to a jail's privileged call database is weak medicine, as most attorneys have multiple extensions and cell phone numbers. Further, little effort has been made to protect privileged calls from jail prisoners to doctors or clergy; such calls are also supposed to be confidential under California law.

San Diego prosecutors filed affidavits swearing they had no idea that phone calls with defense counsel had been taped. But they had the tapes, and admittedly handed them over to McMahon before trial. Recorded phone conversations from the San Diego jail were stored in electronic format on a server that was easily accessible by prosecutors from their office computers.

The company that operates the jail's phone system was quick to shift the blame

from itself and jail staff to defense attorneys. “The first thing you hear when you pick up the phone is that your call [from a prisoner] can be recorded,” said Rudy Zaragoza, a spokesman for PCS. “If you didn’t register your phone number with the [pre-approved attorney] list, then you

didn’t do your job. The onus is on you.”

To be safe, prisoners should demand that their attorneys – including public defenders – verify that privileged phone calls are not being recorded or monitored by jail staff. Otherwise, by using the jail’s phone system to discuss their criminal

cases with defense counsel, prisoners may unwittingly share information, evidence or trial strategy that guarantees their conviction followed by a bus ride to prison. ■

Sources: *Associated Press, San Diego Union-Tribune*

Washington Sex Offender Relieved of Obligation to Register

On September 9, 2008, following more than ten years of compliance with Special Sex Offender Sentencing Alternative (SSOSA) restrictions and guidelines, a Washington state trial court relieved Brian A. McMillan of his duty to register as a sex offender. The State of Washington appealed the court’s decision, arguing that “clear and convincing” evidence was not presented to show the purposes of the registration statute were no longer being served by McMillan’s continued registration, as required by law. Further, the state argued that the trial court had not made written findings.

After pleading guilty to two counts of second-degree rape of a child in January 1998, McMillan received a suspended sentence of 131 months pursuant to the

SSOSA. His sentence was later reduced to 89 months. Clinical psychologist Dr. Clark Ashworth, who counseled McMillan and was apparently familiar with his state of mind, offered his expert opinion that McMillan posed no “significant risk of sexual re-offending.”

On appeal, as at the trial court level, Dr. Ashworth’s opinion carried significant weight in the judges’ deliberations. RCW 9A.44.140, the Washington state law that governs such petitions filed by sex offenders like McMillan, clearly grants the trial court discretionary power in determining if the available evidence meets the “clear and convincing” standard set forth by the statute.

RCW 9A.44.140 provides that the trial court “shall consider the nature of the registrable offense committed, and

the criminal and relevant noncriminal behavior of the petitioner both before and after conviction.” The court may grant the petition “only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes” of the state’s sex offender registry law.

On September 17, 2009, the Court of Appeals found that the trial court in this case had sufficiently weighed the evidence in deciding to relieve McMillan of his duty to register as a sex offender. Further, there was no requirement for the trial court to make written findings that the petitioner had met his burden under the statute. Therefore, the lower court’s judgment was affirmed. See: *Washington v. McMillan*, 217 P.3d 374, 152 Wn.App. 423 (Wash.Ct.App. 2009). ■

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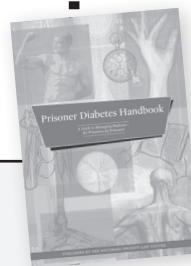
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Ninth Circuit Strikes Down BOP Rule Limiting Early Release for RDAP Participants

by *Brandon Sample*

Following its recent decision in *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008) [*PLN*, June 2009, p.44], the U.S. Court of Appeals for the Ninth Circuit struck down another federal Bureau of Prisons (BOP) rule that limits early release for certain prisoners who participate in the BOP's Residential Drug Abuse Program (RDAP).

Federal prisoner Jerry Crickon filed a habeas petition challenging 28 C.F.R. § 550.58(a)(1)(iv), which prohibits prisoners who have "a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses" from obtaining early release.

Such offenders could participate in RDAP but were ineligible to receive the one-year sentence reduction that could be earned by completing the program. Crickon was ineligible for an RDAP sentence reduction because he had a 38-year-old voluntary manslaughter conviction.

Crickon argued that the regulation, like the regulation struck down by the Ninth Circuit in *Arrington*, was promulgated in violation of the Administrative Procedure Act (APA) because the BOP had failed to articulate why it chose to exclude prisoners with prior convictions for homicide, forcible rape, robbery, aggravated assault or child sexual abuse from early release. The district court dismissed his petition and he appealed.

The Court of Appeals agreed with Crickon. In promulgating § 550.58(a)(1)(iv), the appellate court wrote, "[t]he BOP offered no rationale for its decision to use the inmate's criminal history category as a surrogate for early release ineligibility."

The BOP attempted to defend the rule, arguing that its categorical exclusion was consistent with Congressional intent. The Ninth Circuit concluded, however, that it was difficult to reconcile this claimed justification with Congress's expressed intention.

Congress had created the early release incentive for RDAP in order to "draw into treatment" prisoners "otherwise reluctant to go through the 'difficult and painful treatment program,'" the appellate court noted. A rule that denies sentence reductions to certain offenders would be

inconsistent with "Congress's expressed intent to provide an incentive to encourage maximum participation in the BOP's substance abuse treatment programs."

The BOP was required to identify and analyze the factors "it considered in crafting the categorical exclusion" of certain prisoners from RDAP sentence reductions, the Court of Appeals explained. Because the BOP had "failed to

do so," the rule violated the APA and was therefore invalid.

In striking down the rule, though, the Ninth Circuit was careful to make clear that the BOP retained its authority to restrict early release to certain offenders through future rulemaking; it simply needed to adequately explain its reasons for doing so. See: *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009). ■

Texas Youth Commission Causes Consternation, Conflict in State Legislature

by *Gary Hunter*

Last year, honoring the request of state Senator Juan "Chuy" Hinojosa, the Office of the Independent Ombudsman (OIO) of the Texas Youth Commission investigated the reason for the "alarming trend regarding adult certifications" of youthful offenders in Texas. What the OIO reported was a 31 percent increase, between 2007 and 2008, in the number of youths certified as adults by juvenile courts.

Additionally, the OIO found enough problems with the Texas Youth Commission (TYC) to lead the Senate to propose closing both TYC and the Texas Juvenile Probation Commission (TJPC) and combining them into a single entity. The merger of the two agencies, which was estimated to save the state \$27 million, had been recommended by the Texas Sunset Advisory Commission.

The OIO's investigation also revealed that the number of juveniles sent to prison with some form of gang affiliation (40%) doubled by the time they were released from custody (80%).

According to the OIO, TYC facilities provided an unbalanced amount of Christian volunteer services while neglecting "minority faiths." Other concerns expressed by the OIO included TYC's handling of suicide prevention, discharges of mentally ill offenders, educational services and the agency's classification process.

A separate report by the State Auditor's Office, released in May 2009, revealed that between 2007 and 2008, TYC failed

to submit almost \$20 million worth of contracts for competitive bidding. The agency also failed to honor its agreement to hire additional sex offender counselors for juvenile offenders, and could not justify staffing projections for the 2008-2009 fiscal year.

Further, TYC spent \$21.8 million to continue operating two facilities it had agreed to close under a 2007 proposal, and failed to comply with a policy requiring the agency's Office of Inspector General to investigate reports of abuse within 30 days. During FY 2008, it took an average of 100 days to complete such investigations.

In spite of these many problems, both the OIO and the House of Representatives rejected the Senate's proposal to combine TYC and TJPC into a single, more accountable state agency.

Following a widely-publicized 2007 sex scandal that exposed extensive abuse of juveniles by top-ranking TYC officials, the agency made numerous reforms and reduced its population by almost 50 percent, from 4,809 to 2,419 as of April 2009. [See: *PLN*, May 2009, p.24; Feb. 2008, p.1].

Despite its findings, the State Auditor's Office concluded that TYC executive director Cherie Townsend had implemented about 72% of the recommendations in an earlier audit and was doing an effective job. The OIO reached the same conclusion.

"We also believe there could hardly be anyone more capable than Cherie Townsend to lead the transformation

of TYC, if she is given the chance and is provided the support she needs from the legislature, TYC staff and the community,” the OIO report stated.

Therefore, while state Representatives Jerry Madden and Sylvester Turner vocally addressed concerns raised by the OIO report, on May 4, 2009 the House voted to retain both TYC and TJPC as separate agencies by passing HB 3689. That bill also created a Juvenile Justice Policy Coordinating Council, which will make recommendations to TJPC and TYC on ways the agencies can improve their operations.

In addition to the problems cited in the state audit and by the OIO, Townsend will have to deal with other recent issues involving the TYC. One of those issues is an April 29, 2009 report by the U.S. Dept. of Justice (DOJ) that found continuing problems at the Evins Regional Juvenile Facility. The Evins facility was placed under federal monitoring for three years as part of a settlement agreement after the DOJ filed suit in January 2008, citing civil rights violations. [See: *PLN*, Oct. 2008, p.50].

In its April 2009 report, the BOP found the facility still had problems with drugs and other contraband, and with prisoners extorting other prisoners. Further, there were unacceptable delays in investigations into allegations of abuse at the prison. “We’re not there yet, but we’re a lot closer than we were,” said TYC director of public affairs Jim Hurley. “We’re making good progress.”

Someone who isn’t making good progress is the TYC’s recently-appointed ombudsman, Catherine S. Evans, who was indicted in November 2009 on a felony charge of smuggling a prohibited item into a correctional facility.

Evans, a former state district judge

who was appointed to the ombudsman’s office by Governor Rick Perry, was accused of bringing a Swiss Army knife into the Crockett State School. Evans said whatever she might have carried with her when she visited the facility was unintentional and “a regrettable mistake.” She was also investigated for bringing contraband into another TYC facility, including a cell phone, prescription medication and money.

Evans resigned after she was charged,

on November 30, 2009. “What this indictment shows me is that we have a broken system over there – once again,” said state Senator John Whitmire, who chairs the Senate Criminal Justice Committee. ■

Sources: *Associated Press*; *First Quarter Report FY2009, Office of the Independent Ombudsman for the Texas Youth Commission*; www.kwtx.com; *Houston Chronicle*; *The Enterprise*; *Star-Telegram*; *The Monitor*; *Austin American-Statesman*

California Prisoner Settles Medical Suit for \$35,000

Eighteen months after surviving a motion for summary judgment, California prisoner William Milton agreed to a settlement of \$35,000 in a case involving denial and delay of medical treatment. Though unpublished, the district court’s March 2007 order denying defendants’ motion for summary judgment includes an insightful discussion of why, despite the general bar against supervisory liability in § 1983 suits, a supervisor may be directly liable for executing a policy that clearly disregards a plaintiff’s rights.

In 2003, Milton filed a pro se civil rights complaint alleging that his constitutional rights were violated when a prison doctor initially ignored his pleas for treatment of a painful ear infection, then belatedly referred him to an ear specialist; before he could be seen by the specialist, he was transferred, over his objections, to a different prison.

On summary judgment, the court utilized the now-standard analysis, articulated in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) whereby “deliberate indifference” to a prisoner’s serious medical needs constitutes cruel and unusual punishment

prohibited by the Eighth Amendment. Citing *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988), it noted that improper denial or delay of treatment, without justification, can constitute deliberate indifference.

Particularly noteworthy here is the court’s resounding rejection of the defense of the treating physician’s supervisor that he could not be held liable for the fact that, despite being referred to a specialist in January 2003, Milton was not actually seen by one until after he was transferred. Citing *Redman v. County of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991) (en banc), the court held that where no one is responsible because the system is set up to provide for no accountability, the system’s supervisor may be held liable for managing a system that clearly does not work.

After surviving summary judgment, Milton was ably represented, pro bono, by attorneys Samantha Grant and Kimberly Talley of Mitchell Silberberg & Knupp, LLP, in Los Angeles. See: *Milton v. Alameida*, No. CV 03-7731-RGH (PJW) (C.D. Cal.), docs. 138 and 231. ■

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California Enacts Non-Revocable Parole And Increased Credits To Reduce Prison Population

by John E. Dannenberg

In what appears to be the first attempt to comply with federal court orders to reduce California's prison population, the State Legislature enacted Senate Bill 18, which, effective January 25, 2010, places over 20% of the parole population on a new non-revocable parole (Penal Code (PC) § 3000.03) and gives "half-time" credits to disciplinary-free prisoners who were otherwise eligible for "one-third-time" credits. Additionally, it makes prisoner fire-fighters who are assigned to a prison, rather than just to a camp, eligible for the "two-thirds" credit rule. The new law also requires the California Department of Corrections and Rehabilitation (CDCR) to promulgate new regulations for eligible prisoners, granting up to six weeks additional credit for successful completion of approved rehabilitation programs, including academic, vocational and substance abuse programs.

The intent of the new rules is to incentivize good behavior and rehabilitation among those incarcerated for minor, non-violent, non-"serious" crimes. But the law goes a great step further, by eliminating the discretion of parole agents to violate certain paroled offenders solely for "technical" violations. While such non-revocable parolees are still subject to warrantless searches and may be held without bail if arrested on a new offense, they are no longer subject to being indiscriminately swept up for the purpose of filling empty beds in the state prisons.

CDCR estimates that of a base parole population of 111,000, approximately 24,000 will qualify for the new non-revocable status. The new credits (which are also to be applied to time spent in county jail awaiting prison), are *not* available to those with a registrable sex offense, those currently (or previously) sentenced for a serious felony (PC § 1192.7) or anyone with a prior conviction for a violent felony (PC § 667.5). Those who otherwise were only eligible for 15% credits (e.g., violent felonies), 20% credits (e.g., "Two-strikers"), or none at all (e.g., murderers and certain parole violators), are not affected by the new rules. There is also no relief for Three-Strikes prisoners.

One category of prisoners will see a *reduction* of credits: the bar on credit-

earning status that already applies to those in "the hole" (Administrative Segregation or Security Housing Unit programs) for gang-related misconduct now also applies to those placed in Psychiatric Services Units or Behavioral Management Units for such behavior. As of yet, CDCR has not passed new regulations to comport with any of Senate Bill 18's provisions.

The law became effective January 25, 2010 for anyone *sentenced* after that time. Also possibly eligible are those whose appeals of their underlying convictions were not final as of that date. Less likely to gain relief under the new rules are those whose convictions were already final as of then. The latter two groups will probably have to take their claims to court. ■

New Orleans Jail Conditions Found Unconstitutional

by Jimmy Franks

In June, August and November 2008, the Orleans Parish Prison (OPP) in New Orleans, Louisiana was the target of a U.S. Department of Justice investigation conducted by the agency's Civil Rights Division.

Under the auspices of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, federal investigators were charged with determining if conditions at OPP evidenced a "pattern or practice of conduct that violates the constitutional rights of inmates" at the facility.

Utilizing expert consultants in the areas of corrections, use of force, custodial medical and mental health care and sanitation, the investigators conducted extensive interviews with OPP staff and prisoners. Additionally, a wide range of documents were examined – including policies and procedures, prisoner grievances, medical records, incident reports and training materials.

The results of the investigation were delivered in a "finding letter" on September 11, 2009, addressed to Orleans Parish Criminal Sheriff Marlin N. Gusman. The letter informed Sheriff Gusman of the numerous procedural and substantive rights violations uncovered by CRIPA investigators.

For example, the investigators determined that OPP failed in its duty to provide "humane conditions" of confinement in the area of prisoner safety, as mandated by the U.S. Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994). Numerous cases of unnecessary and inappropriate uses of force by OPP guards

formed what inspectors called a "pattern and practice" of improper conduct, which often resulted in serious injury to prisoners. The abusive and retaliatory conduct of OPP guards easily surpassed the level necessary to constitute Eighth and Fourteenth Amendment violations.

Inadequate reporting of use of force incidents also was in evidence, as was a lack of proper management review of the incidents that were reported. Problems such as these were found to be perpetuated by inadequate policies and procedures governing employee conduct.

The high number of prisoner-on-prisoner assaults at OPP further evidenced the facility's failure to provide a reasonably safe environment. This problem was exacerbated by a faulty classification system used when prisoners went through the initial intake process. Inadequate staffing and supervision of prisoners also contributed to deficient levels of security at OPP.

In the areas of mental health care and medical care, significant problems were noted in terms of suicide prevention, intake classification and referral, assessment and treatment, and medication management. As with many of the other areas of concern cited in the letter to Sheriff Gusman, inadequate staffing played a role in the insufficient mental health and medical care at OPP.

In point of fact, investigators noted that during their visits there were no licensed drug counselors or social workers on staff. Furthermore, the crisis unit that serves all mentally ill prisoners at OPP had

only one full-time psychiatrist and one part-time psychiatrist. Unfortunately, due to the lack of a proper quality assurance review process, these and other violations were allowed to persist and worsen.

The overall environmental health and sanitation at OPP also were found to be grievously lacking. From inadequate pest control and poor housekeeping to hazardous structural deficiencies and substandard maintenance, the CRIPA investigators considered the obvious state of disrepair and generally unsanitary conditions at the facility to be at unacceptable levels. Broken toilets, mice and cockroaches, and "obvious electrical hazards" were several items that were specifically mentioned.

Even accepting the challenges placed on OPP by Hurricane Katrina and the widespread destruction that was caused by that storm [See: *PLN*, April 2007, p.1], it was determined that to avoid unnecessary risks to prisoners and staff, all efforts must be made to ensure that sufficient water, heat, lighting and ventilation were provided in a timely manner.

Upon identifying the myriad violations and deficiencies at OPP, the CRIPA investigators and consultants offered a list of measures that could be taken by state

and OPP officials to remediate the various problems. Most basic among those measures was the need for the establishment of "comprehensive and contemporary" policies and procedures at the facility.

Although the findings letter addressed to Sheriff Gusman by Acting Assistant Attorney General Loretta King sought an amicable and cooperative means of resolving the issues uncovered in the CRIPA investigation, it also served to notify the Sheriff of the lawsuit the Department of Justice would file if appropriate actions to remedy the deficiencies enumerated in the letter were not taken.

Sheriff Gusman referred to the Department of Justice's investigation as "replete with inaccuracies and half truths," and "terribly dated [and] fundamentally flawed...." However, judging from the plethora of problems revealed by federal investigators and detailed in the letter from Acting Assistant Attorney General King, the only thing that appears "terribly dated and fundamentally flawed" is OPP itself. ■

Sources: *U.S. Dept. of Justice letter from AAAG Loretta King to Criminal Sheriff Marlin Gusman, Sept. 11, 2009; Times-Picayune; Associated Press*

Jury Awards \$80,001 to New Hampshire Prisoner for Guard Beating

On September 18, 2009, a federal jury awarded a New Hampshire state prisoner \$80,000 in punitive damages for a violation of his Eighth Amendment rights, plus \$1 in nominal damages.

While incarcerated at the New Hampshire State Prison for Men on December 20, 2003, Shawn Cheever was transferred to the facility's Special Housing Unit (SHU). Upon his arrival at the SHU, Cheever could not stop crying.

In response to Cheever's emotional state, two SHU guards, Michael Edmark and Kevin Valenti, taunted, harassed and psychologically abused him. Cheever also alleged that Edmark and Valenti assaulted him while he was handcuffed by repeatedly striking him "in the torso and ribs, slamming his head against the wall," which caused him to lose consciousness. Cheever further said he was strapped naked to a "flat chair."

In his federal complaint, Cheever argued that Edmark and Valenti's actions were done "intentionally, maliciously, and

sadistically" in violation of his Eighth and Fourteenth Amendment rights.

Following a jury trial, a verdict was returned in favor of Cheever on his Eighth Amendment claim. The jury, however, concluded that no assault or battery had occurred. Cheever was awarded one dollar in nominal damages against both defendants, nothing in compensatory damages and \$40,000 in punitive damages against each defendant, for a total award of \$80,001.

On October 27, 2009, the district court awarded attorney fees in the amount of \$27,340 plus \$1,120 for paralegal fees and \$1,177 in costs. Because Cheever was not incarcerated at the time the lawsuit was filed, the PLRA's cap on attorney fees did not apply.

Cheever was represented by attorneys Lawrence A. Vogelmann of Nixon, Raiche, Vogelmann, Barry & Slawsky, P.A. and Michael J. Sheehan. See: *Cheever v. Edmark*, U.S.D.C. (D. NH), Case No. 1:06-cv-00351-JM. ■

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In Support of Ending Prosecutorial Misconduct

by Jimmy Franks

The Justice Project recently published its policy review concerning prosecutorial accountability in our nation's criminal justice system. Entitled, *Improving Prosecutorial Accountability*, the report was prepared by the president of The Justice Project, John F. Terzano, Esq., along with Executive Director Joyce A. McGee, Esq. and Policy Coordinator Alanna Holt.

The report offers a comprehensive examination of the problems caused by and reasons behind prosecutorial misconduct. It goes on to provide workable recommendations geared toward resolving the problems in the most beneficial yet cost effective ways.

The first recommendation involves the need for prosecutor's offices to adopt and enforce clearly defined policies and procedures in order to create a guide for prosecutors to refer to in their decision-making processes. The manual would remove much of the arbitrary nature currently found in the exercise of discretion, and eliminate the racial and economic bias that appears in so many criminal prosecutions today.

The next recommendation regards the need for open-file discovery in criminal cases in order to insure full disclosure of all relevant evidence by the prosecutor's office. The most common form of prosecutorial misconduct is the suppression of exculpatory evidence, and enacting laws requiring open-file discovery, with sanctions for non-compliance, would effectively end that particular type of violation.

Third, prosecutors should be required to document all agreements with witnesses and jailhouse informants. Jailhouse informants are often given incentives for their testimony in the form of reduced charges in their own case, or immunity from prosecution entirely. Such practices invite perjured testimony that current "safeguards" fail to prevent. Requiring documentation of these agreements, which would then be subject to discovery by defense counsel, would enable an accurate accounting of witness credibility by juries.

The next two recommendations are related to the need for judges to report ALL cases of prosecutorial misconduct, even if it is ruled "harmless error," and the further need for the establishment

of a specialized review board to investigate such reports and impose sanctions when necessary. Currently, all attorney misconduct is to be reported to state bar disciplinary authorities, which does little in the enforcement of prosecutorial accountability.

The final recommendation in the report, one also espoused by the ABA, calls for training programs to be established "within the prosecutor's office for new personnel and for continuing education of the staff." Such programs would help prosecutors and their staffs to maintain the necessary skill levels to insure they are equipped to do their jobs in an efficient and ethical manner. Since every prosecutor's office already has a train-

ing program for its employees the issue may be what is being taught rather than the training itself. *PLN* has previously reported on prosecutor's offices training their employees on how to ensure black jurors are not seated on juries while providing a "race neutral explanation" to bar appellate reversal.

The authors of this policy review did an outstanding job of providing a systematic evaluation of past and current trends in the area of prosecutorial misconduct. Also, the recommendations for improvement are well thought out and relatively cost effective. The report, *The Justice Project, Improving Prosecutorial Accountability: A policy review*, is available on *PLN's* website. ■

California Prison Erupts, Hundreds Hurt in Riot, Multiple Causes Cited

On August 8, 2009, just days after a three-judge federal panel ruled that California's prison system was dangerously overcrowded, a major riot erupted at the California Institution for Men at Chino, a prison about 40 miles east of Los Angeles.

The riot began in a 200-bed dorm and eventually engulfed seven of eight housing units in an area at Chino known as Reception Center West. More than 1,000 prisoners were involved in the melee, some using improvised weapons; 240 were injured, with 55 requiring hospitalization for such serious injuries as stab wounds and head trauma.

One of the units was completely destroyed by fire while the others were so badly damaged that they were left uninhabitable. The riot began on a Saturday evening at about 8:20 p.m. and raged for four hours, but California Dept. of Corrections and Rehabilitation (CDCR) officials, aided by local law enforcement agencies, did not regain control until approximately 7:00 a.m. the next morning. Batons, tear gas and pepper spray were used. In an effort to prevent the unrest from spreading, ten of the state's 33 prisons (all located in Southern California) were placed on lockdown in the wake of the disturbance. Afterwards, almost 1,300 prisoners were transferred from Chino to different facilities; others were temporar-

ily held in tents. The damaged housing units will cost an estimated \$5.2 million to rebuild.

Built in 1941, Chino was designed to hold 3,000 prisoners. At the time of the riot it housed about 5,900. The facility had been the site of previous violent incidents – including a major fight in May 2009, another in April 2008 [See: *PLN*, Oct. 2008, p.50], and one in December 2006. Further, prison guard Manuel A. Gonzalez, Jr. was murdered at Chino on January 10, 2005. [See: *PLN*, Nov. 2006, p.18].

The facility's well-documented history of problems was specifically cited by the three-judge federal panel which, on August 4, 2009, ordered California officials to come up with a plan to reduce the state's prison population – currently standing at 167,000 – by more than 40,000 prisoners within two years. The panel, which based its decision on unconstitutional medical and mental health care in California's prison system, found that overcrowding was the primary cause of those deficiencies. [See: *PLN*, Sept. 2009, p.36].

Governor Arnold Schwarzenegger used the Chino riot as an opportunity to promote his proposal to cut the prison population by 27,000 in the current fiscal year and 10,000 during the next fiscal year. While falling short of compliance with the three-judge panel's order, Schwarzenegger's plan was designed, ostensibly, to

address a different problem – the state's \$26 billion budget deficit. To save money, Schwarzenegger had suggested slashing the prison system's budget by \$1.2 billion. The state legislature approved his proposed budget but ultimately watered down the plan to cut CDCR's population, instead endorsing a proposal to reduce it by only 16,000.

Senate Minority Leader Dennis Hollingsworth disagreed that the Chino riot was evidence of a need to decrease the state's prison population. "The message I get," he said, "is that these are dangerous people who should not be roaming the streets." Echoing those sentiments, CDCR spokeswoman Terry Thornton stated, "I kind of chuckle when I hear people say, 'Well, overcrowding caused this.' No, misbehaving caused it and they didn't get into prison for behaving in the first place."

Chino had been on modified lockdown for several days prior to the August 8 riot, as rumors had circulated that trouble was brewing between Hispanic and black prisoners. The *New York Times* reported that the riot "broke down along racial lines, with black prison gangs fighting Latino gangs in hand-to-hand combat."

CDCR officials eventually confirmed that assessment, saying the incident was caused by an "ongoing racial street war" that extended into the prison system. "When they come to prison, they bring their animosity with them," said Thornton.

California's efforts to implement a 2005 U.S. Supreme Court decision prohibiting racial segregation in housing units also may have increased racial tensions in the prison system and contributed to the riot at Chino. [See: *PLN*, April 2006, p.20]. The CDCR has continued to racially integrate facilities; as of February 1, 2010, race is no longer a factor in how prisoners are celled at Folsom State Prison.

"We never had a policy on segregating inmates," said Thornton, but "as a mechanism to keep people from killing each other, sometimes those [racial segregation] decisions were made." Other CDCR facilities that have been integrated include the Sierra Conservation Center, Mule Creek State Prison and the California Medical Center in Vacaville.

Prison staff at Chino further claimed that a failure by CDCR administrators to follow proper procedures for classifying dangerous prisoners may have contributed to the riot. Current and former employees

said they complained about classification mistakes and had filed union grievances prior to the uprising. A report by the Office of the Inspector General, released in November 2008, cited problems with the placement of high-risk prisoners at Chino. "Staff members improperly placed some unsuitable inmates in crowded dormitories that are supervised by only two correctional officers," the report stated, noting that this caused security problems.

Other issues mentioned by the Inspector General included no fire protection systems in the housing units, guards allowed to work in armed posts even though they had failed to attend mandatory firearms training, and insufficient fire and emergency drills.

No prisoners escaped during the August 8 riot at Chino and no staff injuries were reported as a result of that incident. The facility was taken off lockdown in December 2009. More than 220 prisoners have been charged with disciplinary offenses; 25 may face criminal charges ranging from battery to attempted murder. ■

Sources: *Associated Press*, *CNN*, *New York Times*, *Los Angeles Times*, *Folsom Telegraph*, <http://corspecops.com>

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South Carolina Prisoner Does Easy Time

by Gary Hunter

South Carolina state prisoner Kevin Bell, 42, breezed through the last six years of his sentence with the help of local law enforcement officials. In 1996, Bell began serving a 13-year prison term for cocaine trafficking. Six years later he was sent to the Cherokee County Detention Center, at the request of county officials, to serve the remainder of his sentence.

The transfer of prisoners from state prisons to county facilities is common in South Carolina, as it relieves the burden on the prison system and places prisoners closer to their families. What is uncommon is the amount of privileges that Bell received once he arrived at the county jail, where he worked as a trustee.

Bell was able to basically leave the detention center at will. At one point he left the jail long enough to have sex and father a daughter. The two celebrated her third birthday at a Chuck E. Cheese restaurant in 2006, along with the guard who drove him there and the guard's wife and two children.

Occasionally Bell would enjoy dinner at his parents' home in the next county. He did his own shopping at Wal-Mart, and at times was even allowed to go unescorted to the bank. In fairness, Bell had legitimate reasons to go to the bank. His two businesses – washing cars for the county and selling goods for deputies and jailers on eBay – netted him too much money to keep in his jail commissary account. At one point he had earned over \$20,000.

Bell also needed some freedom so he could pay his cell phone bill and prepare for his upcoming wedding to an unidentified jail employee, whom he was having sex with. He planned to marry her the day after his release. The guest list for the couple's wedding included deputies, police officers and other law enforcement officials.

Several people admitted they were aware that Bell and his jailer fiancé were having sex. "Everyone at the jail knew of Kevin's relationship and other activities. It was overlooked," said jail employee Robin Murphy.

A subsequent report issued by the South Carolina Dept. of Corrections (DOC) verified the unprecedented privileges that Bell received at the jail. Bell and two other state prisoners were removed

from the Cherokee County Detention Center during the DOC investigation; he later completed his sentence at a state facility.

Since his release, Bell has been working at a body shop owned by Gaffney County councilman Tim Spencer. Spencer said Bell was a model employee and that it was the lenient treatment in jail that aided with his successful rehabilitation.

County residents, however, were not pleased to learn about the liberties that Bell was afforded while serving time. "I pay my taxes to keep them behind bars,

and that's where they should stay," said Will Cote, a resident of Blacksburg.

Bell broke off his wedding with the jail employee he had intended to marry, and she was fired for having an illegal relationship with a prisoner. "We've made changes and are in the process of doing things," said Cherokee County Sheriff Bill Blanton. The DOC has since canceled its agreement to house state prisoners at the county's jail. ■

Sources: *Associated Press, Gaffney Ledger*

GEO Group Prison Squalor Drives Idaho Prisoner to Suicide: \$100,000 Settlement

On September 13, 2009, the Idaho Department of Corrections (IDOC) reached a settlement with the parents of an Idaho state prisoner who was driven to suicide by squalid conditions at a GEO Group-run private prison in Texas, where he had been transferred. The IDOC agreed to pay the prisoner's estate \$100,000.

In August 2006, Idaho prisoner Scott Noble Payne arrived at the Dickenson County Correctional Center (DCCC) in Spur, Texas, along with 125 other prisoners who had been shipped to the GEO Group prison by the IDOC. Dismayed by the deplorable conditions at DCCC, Payne escaped but was recaptured a week later and returned to the facility. Placed in solitary confinement under suicide watch, Payne languished in filthy conditions until he committed suicide on March 4, 2007.

In letters to his family Payne had repeatedly cited the squalid conditions at DCCC, which he said were making his life unbearable and driving him to kill himself. [See: *PLN*, Dec. 2007, p.23].

As representatives of his estate, Payne's parents filed a civil rights action pursuant to 42 U.S.C. § 1983 in Idaho federal court. They alleged that Idaho officials had violated Payne's Fourteenth Amendment due process rights and subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The lawsuit also raised tort claims under state law.

The complaint quoted Don Stockman, the IDOC's Health Care Director,

who had performed an on-site evaluation at DCCC after Payne's death. Stockman said the prison was "the worst correctional facility I have ever visited. The physical plant is filthy, and does not provide a safe and secure setting for either inmates or staff. Custody staff appear to possess only the basic knowledge required to work in a prison setting. The administration and custody staff, from the Warden on down, project an open contempt for inmates and express little concern for the dire living conditions of the inmates."

Stockman concluded that "Based on a verbal statement made by Warden Alford it is clear that his management style is based on verbal and physical [intimidation] of the inmates he is mandated to provide protective custodial care. It is difficult to comprehend how the contract provider, 'GEO, Inc.,' could not have been aware of the deplorable conditions that exist at DCCC or the behavior of Warden Alford and his staff. Warden Alford has created a negative prison culture that is deeply ingrained and will remain long after he no longer is Warden. Basically, DCCC is a facility that is beyond repair or correction."

Faced with this damning statement by an IDOC official and similar evaluations by their own experts, Idaho opted to settle the lawsuit for \$100,000, including attorney fees. Payne's estate was represented by Boise attorney William Breck Seiniger, Jr. Details of the settlement other than the amount were confidential. See: *Payne v. Sandy*, U.S.D.C. (D. Idaho), Case No. 4:09-cv-00089-BLW. ■

\$750,000 Settlement in Alabama Prisoner's Heat Death

A \$750,000 settlement was paid to the mother of an Alabama mentally ill prisoner who died as the result of exposure to extreme heat while on psychotropic medication.

Just four days after his admission to Kilby Correctional Facility (KCF), prisoner Farron Barksdale, 32, was found unconscious in his segregation cell. Two days prior to his August 8, 2007 arrival at KCF, Barksdale was sentenced to life without parole for killing two police officers. He had schizophrenia and had been repeatedly hospitalized before his arrest.

While in the Limestone County Jail, Barksdale's mental illness was managed without psychotropic medication. That immediately changed upon intake at KCF. Dr. Joseph McGinn, an employee of MHM Correctional Services, who provided mental health services for KCF prisoners, prescribed several medications.

He prescribed Navane, Cogentin, Seroquel and Triavil. The first three medications warn they can cause problems when the patient is exposed to extreme heat. The Alabama Department of Corrections (ADOC) was aware of this danger, providing in policy that prisoners on psychotropic medication be provided ice, increased fluids, allowed extra showers or placed in an air conditioned unit.

KCF has an air conditioned mental health unit. Barksdale, however, was not placed in the unit and was housed in a regular segregation cell. From August 8 to August 11, the outdoor temperature around KCF ranged from 103 degrees to 106 degrees.

It was 106 degrees on the day Barksdale was found unresponsive in his cell. Upon his arrival at the infirmary on the afternoon of August 11, Barksdale was "snoring and moaning." He had a temperature of 103.1 degrees.

Despite that condition, it took another 30 minutes for Dr. Michael Robbins to authorize taking Barksdale to a hospital. He never regained consciousness and died on August 20.

The estate for Barksdale agreed to

the settlement on January 15, 2009. The settlement requires various payments from the defendant: Prison Health Services/Dr. Robbins \$80,000; MHM Correctional Services/Dr. McGinn \$370,000; former KCF Warden Arnold Holt \$300,000. The estate was represented by Southern Center for Human Rights attorney Sarah Geraghty and Huntsville attorneys Jake Watson and Herman Watson, Jr. See: *Barksdale v. Holt*, USDC, M.D. Alabama, Case No 2:08-cv-00441

\$100,000 Settlement in New York Prisoner's Slip and Fall Claim

The State of New York agreed to pay \$100,000 to settle a prisoner's slip and fall claim that occurred at the Groveland Correctional Facility.

The settlement comes in a claim filed by prisoner James Mahoney, who was assigned as a recreation aide between the hours of 7:00 p.m. and 10:00 p.m. daily. In that job assignment, Mahoney was responsible for the distribution and retrieval of various pieces of athletic equipment stored in an 8' x 10' x 12' shack.

The shack had a double or "Dutch" door that allowed the top half to be open while the bottom was closed. A prison employee removed the television set and interrupted all electrical service to the shack on June 22, 2001. Electrical service was not restored until sometime after Mahoney's July 31, 2001, slip and fall.

At sometime between 9:45 and 10:00 p.m., Mahoney left the dark shack to

retrieve a heavy punching bag, which weighed between 70 and 100 pounds. As Mahoney was entering the shack with the heavy bag on his right shoulder, he stepped on a baseball bat someone had set inside the shack since his departure.

The Court, in a January 23, 2008 order, found the State 100% liable. It held the lack of illumination in the shed, not the bat, was a dangerous condition that Mahoney was required to work within as part of his prison job assignment. Thus, the dark or insufficiently lighted area was a proximate cause of the accident. See: *Mahoney v. State of New York*, Court of Claims, #2008-013-501, Claim No. 108642.

The seriousness of Mahoney's injuries was not detailed in the liability finding order. The matter was subsequently settled on March 3, 2009. Mahoney was represented by attorney Robert W. Nishman.

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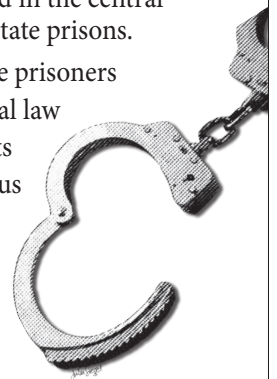
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Shrinking Budgets Force States to Cut Corrections Spending

by Bob Williams

In a July 2009 report funded by the Public Safety Performance Project of the Pew Center on the States, author Christine S. Scott-Hayward examines how shrinking budgets are impacting state corrections policies and practices.

The story is in the numbers, and the numbers are staggering. More than one out of every 100 adults in the United States is in prison or jail – 2.3 million in all. One out of every 31 adults is under correctional supervision of some kind – a total of 7.3 million people, including more than five million on probation and parole.

Between 1988 and 2008, state spending on corrections increased four-fold. With total corrections system expenditures exceeding \$50 billion nationally, one in every 15 state general fund dollars is now spent on corrections. However, with 43 states facing a combined budget shortfall of more than \$100 billion in fiscal year 2009, many are doing the unthinkable: making cuts to their corrections budgets.

Indeed, of the 33 states that responded to the Pew Center survey, at least 22 had made such cuts. The Pew Center report examined the nature of those budget reductions and divided them into three categories – decreases in operational costs, strategies for reducing recidivism, and reforms in release policies.

Efforts to reduce operational costs took various forms. Eight states targeted healthcare (medical, mental health or dental) for decreases. Five states reduced the food services provided to prisoners. The most common cost-cutting measures, however, were in the areas of personnel savings, downsizing or eliminating programs, and closing prisons or delaying in opening new ones.

For example, at least 28 states had reduced staff, instituted hiring freezes, cut salaries or benefits and/or eliminated pay increases. Readers should note that personnel includes security as well as administrative staff. In some cases, the former are protected from job losses while the latter are targeted for downsizing.

With more than five million people under some form of post-release supervision, many states are seeking ways to address the costs associated with high

rates of recidivism among this population. Significantly, more than one-third of prison admissions are the result of technical parole violations – such as failure to attend meetings with a parole officer or failing a drug test.

States are increasingly turning to graduated responses to such violations that include a set of options short of re-incarceration. State officials are also developing or expanding reentry planning and services, recognizing that by helping offenders deal with the challenges they will face upon release, such as housing and employment, such programs can help save money in the long run.

In the final analysis, because staffing typically accounts for 75-80% of prison budgets, real savings will only occur when states become willing to make policy changes that impact the number of people entering prison and how long they stay there, which in turn affects the number of people employed. Some states have already

begun doing this, increasing the amount of good time or earned time available to prisoners and expanding the availability of parole. The other alternative, which many states have also implemented, is closing smaller, less efficient prisons and instead warehousing prisoners in more modern prisons in larger numbers that require lower staffing levels.

The silver lining of the current economic crisis is that it has forced states, through financial necessity, to reexamine their correctional priorities and make changes that they otherwise would not have considered – such as prison closures, investments in reentry programs and reductions in their prison populations. Whether the prison population actually goes down nationally remains to be seen.

Source: *The Fiscal Crisis in Corrections: Rethinking Policies and Practices*, Vera Institute of Justice, 2009

Partial Summary Judgment Granted To PLN in FOIA Case against EOUSA

by Brandon Sample

On September 16, 2009, U.S. District Judge Marcia S. Krieger granted in part and denied in part a motion for summary judgment by Prison Legal News (PLN) in a Freedom of Information Act (FOIA) case wherein PLN sought the disclosure of a gruesome video and autopsy photos related to the death of a federal prisoner.

On October 10, 1999, Joey Estrella was brutally murdered by his two drunken cellmates, William and Rudy Sablan, while incarcerated in the segregation unit at the United States Penitentiary in Florence, Colorado.

In the immediate aftermath of Estrella's death, the Bureau of Prisons (BOP) videotaped William Sablan mutilating and handling Estrella's body and internal organs, and drinking Estrella's blood. The video also shows Estrella's numerous injuries, and the BOP's removal of the Sablans from the cell, along with their initial physical exams, and their placement in four-point restraints in different cells.

The United States Attorney's Office

(USAO) for the District of Colorado used the video and autopsy photos in prosecuting the Sablans and unsuccessfully seeking the death penalty. Following the Sablans' convictions, the video and autopsy photos were returned to the USAO where they remain.

On March 12, 2007, PLN submitted a FOIA request to the Executive Office for United States Attorneys (EOUSA) for a copy of the video and autopsy photos. The EOUSA denied the request, and following the denial of its administrative appeal, PLN filed suit in the U.S. District Court for the District of Colorado seeking an order compelling disclosure of the records.

On cross-motions for summary judgment, Judge Krieger decided that PLN was not entitled to disclosure of the autopsy photos, and that FOIA permitted only limited disclosure of the video by the BOP.

In rejecting PLN's request for the autopsy photos, the court concluded that the photos were protected from disclosure

by Exemption 6 and Exemption 7(c) of the FOIA, both of which preclude the production of records if doing so “would” or “could reasonably be expected” to constitute an invasion of privacy.

“Given the graphic nature of the photographs,” the court wrote, “public dissemination of these images could impede the [Estrella] family’s ability to mourn Mr. Estrella’s death in private and achieve emotional closure.”

PLN had argued that the photos would shed light on the USAO’s decision to seek the death penalty in prosecuting the Sablans, but since the jury declined to impose the death penalty, this justification for the photos did not outweigh the Estrella family’s privacy interests, the court

concluded.

Turning to the video recorded by the BOP, the court similarly decided that much of it was protected from disclosure. The court segregated the video into two parts, holding that the portions featuring Estrella’s body were not subject to disclosure for privacy reasons. The only part of the video the court held was releasable involved the BOP’s interactions with the Sablans, and the audio of BOP staff talking.

PLN tried to overcome the EOUSA’s use of Exemption 6 and 7 by invoking the so-called “public domain” doctrine, which holds that once a record becomes a permanent part of the public domain, such as when the government introduced the video and autopsy photos at trial,

\$60,000 Settlement for Washington Prisoner Injured by Chemical Spill

The State of Washington paid \$60,000 to settle a prisoner’s claim that he was injured due to a chemical spill.

While working in the kitchen at the McNeil Island Correction Center, prisoner George D. Douglas reached for a chemical bottle to clean stainless steel. The bottle was on a shelf above the sink area. It contained Hepastat 256 cleaner, a disinfectant, sanitizer, fungicide, virucide and deodorizer. In contradiction to proper use, it was full strength rather than diluted.

Douglas grabbed the bottle by the handle/sprayer attachment. Because the attachment had stripped threads, the bottle fell into the sink, causing the chemical to shoot up into Douglas’s eyes and nose.

With the assistance of other prisoners, he washed his eyes out from the sink top. It took a guard 10 to 15 minutes to arrive and take him to an eyewash.

Although Douglas received proper medical care, the chemical wrought permanent damage. He continues to suffer respiratory problems, especially upon being exposed to strong chemicals like bleach. His right eye suffered permanent vision loss, it waters and burns sporadically, and it requires eye drops. He requires glasses and has to avoid bright light.

Acting pro se, Douglas settled his claim for the damage done to him by the chemical spill on October 9, 2008. See: *Washington State Division of Risk Management*, Claim No. 31060420. 📄

GEO Group Buys Just Care For \$40 Million

Geo Group, Inc., one of the country’s largest private prison and detention operators, has agreed to acquire Just Care. Just Care operates a 354-bed medical and mental health care unit in Columbia, South Carolina.

In announcing the acquisition, GEO Group said it expected an additional \$30 million in annual revenue from the purchase, along with a four cent increase in its profit per share. The company said the acquisition is being financed with free cash flow and borrowings; GEO completed the acquisition of Just Care in October 2009.

Geo Group, like most other private prison operators, has been plagued with

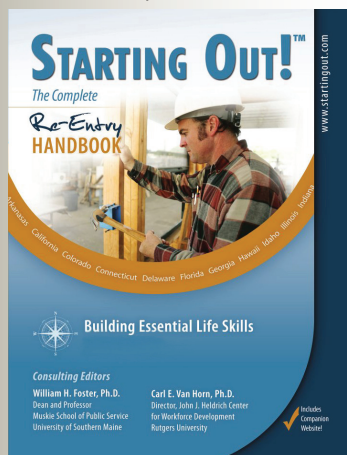
problems at its facilities. Inadequate medical care at a west Texas immigration facility led to riots by prisoners in 2008, for instance. But with profits as the bottom line, instead of the general welfare of prisoners, these kinds of problems are to be expected. Such a history does not bode well for the fate of Geo Group’s most recent acquisition. 📄

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no FOIA exemption may be asserted. The court concluded, however, that the doctrine could not be used to vitiate the significant privacy interests at stake in the case. Thus trials are “public” only to those who can physically attend them.

The parties’ motions for summary judgment were accordingly granted in part and denied in part. PLN has since appealed the decision to the Tenth Circuit. PLN is ably represented by Gail Johnson, Dan Manville and Ari Krichiver. See: *Prison Legal News v. Executive Office for United States Attorneys*, USDC, D CO, Case No. 08-CV-01055-MSK-KLM. 📄

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\$2.1 Million Awarded in New York Unjust Conviction Claim

On March 16, 2009, a New York Court of Claims awarded \$2,093,420 in damages to a man who was wrongfully convicted of sexually assaulting his 4-year-old child. He had spent more than two years in a maximum-security prison.

During “an extremely unpleasant and highly bitter divorce and custody battle,” Amine Baba-Ali’s estranged wife accused him of raping and sexually assaulting his 4-year-old daughter. Following a jury trial, Baba-Ali was convicted of two counts of first-degree rape, two counts of first-degree sodomy, four counts of first-degree sexual assault, two counts of incest and three counts of endangering the welfare of a child.

The most damning evidence against him was the testimony of Dr. Nadine Sabbagh, who examined his daughter and found that she had been sexually abused and was missing her hymen.

Baba-Ali was sentenced to 8 1/3 to 25 years in 1989, and spent most of his 783 days in prison at the maximum-security Sing Sing Correctional Facility. During his time at Sing Sing he witnessed stabbings and rapes of other prisoners, and lived in fear that he would be killed should the nature of his charges become known. In one incident he was knocked unconscious after being attacked without warning or provocation.

Baba-Ali’s conviction was reversed in January 1992 due to ineffective assistance of counsel and prosecutorial misconduct, which the court held was “tantamount to fraud” due to the state’s withholding of exculpatory evidence. When prosecutors prepared for a retrial they discovered that the only witness who offered credible evidence of a sexual assault – Dr. Sabbagh – had been discredited after Baba-Ali’s daughter was re-examined and found to still have an intact hymen. The charges were dismissed.

Baba-Ali filed an unjust conviction claim in 1993. The trial court denied his motion for summary judgment on liability, and he appealed. The Appellate Division reversed, granting the motion and finding the state liable. See: *Baba-Ali v. State of New York*, 20 A.D.3d 376 (2d Dept. 2005). That was the first time since the state’s unjust conviction statute was enacted in 1984 that the Appellate Division had granted summary judgment on liability based on a motion record. The case was

returned to the trial court for determination of damages.

Following four days of trial on damages that included the testimony of ten witnesses, including four experts, the Court of Claims awarded \$343,428 for earnings impairment. This included lost wages for the period of incarceration plus earnings impairment for eight years after Baba-Ali’s release from prison, during which time he suffered from depression, attributable to his wrongful imprisonment, that reduced his earnings capacity.

In determining non-pecuniary damages, the trial court considered the mental anguish and degradation that Baba-Ali

experienced, the irretrievable loss of his relationship with his daughter, “his loss of liberty into the most fearsome maximum security prison environment that an innocent man with no prior criminal history may be thrust” and the psychological damage he suffered both during and after his conviction. The Court of Claims found he was entitled to \$1.75 million in non-pecuniary damages. The total award was \$2,093,428. Baba-Ali was represented by attorneys Peter Wessel, Michael W. Harris and Carl Rosenbloom. See: *Baba-Ali v. New York*, New York Court of Claims (New York), Claim No. 087328, UID 2009-036-400. ■

Texas Religious Group Policies May Violate First Amendment and RLUIPA; TDCJ Changes Policy

The Fifth Circuit Court of Appeals held that Texas Department of Criminal Justice (TDCJ) policies that had the effect of prohibiting a prisoner from meeting with other members of his religion and possessing religious items may violate his rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5.

Darren L. Mayfield, a Texas state prisoner, filed a civil rights suit under 42 U.S.C. § 1983 and RLUIPA alleging that prison officials at the Hughes Unit had violated his rights when, pursuant to TDCJ policy, they refused to let his religious group meet without an outside sponsor being present, refused to allow him to possess runestones (small tiles made of antler, wood or stone with ancient runic alphabet carvings), and prohibited him from receiving rune-related literature.

Mayfield is a member of the Odinist/Asatru faith – an ancient, nature-based, polytheistic northern-European religion. He produced affidavits from free-world Odinist leaders who described Blotar, a worship meeting that should be conducted at least once a month which involves the use of runestones and other religious items, and stated that the study of runestones for the revelation of wisdom and truth is a core religious practice.

Mayfield alleged that the TDCJ’s outside volunteer policy was not being applied uniformly, as he submitted unsworn decla-

rations from Muslim and Native American prisoners stating they were allowed to meet without a volunteer being present. The trial court granted summary judgment to the defendants on all of Mayfield’s claims on the basis of Eleventh Amendment immunity. Mayfield appealed.

The Fifth Circuit held that whether RLUIPA constituted a waiver of Eleventh Amendment immunity was an open issue in that circuit, but had not been raised or briefed by the parties. The Eleventh Amendment barred Mayfield’s recovery of compensatory damages but did not bar nominal damages, prospective injunctive relief or declaratory relief. Mayfield had not requested nominal damages, but he did request injunctive and declaratory relief. Therefore, the trial court erred in dismissing all of his claims based on Eleventh Amendment immunity.

Summary judgment on Mayfield’s compensatory damages claims was upheld because the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), bars such damages for violations of federal law when no physical injury is alleged. The PLRA does not bar nominal or punitive damages, but Mayfield did not request them.

The district court did not err in holding that the ban on possession of runestones did not constitute a First Amendment violation, because the TDCJ alleged they could be used to gamble, secretly pass information or identify gang members. However, the district court

should not have granted summary judgment on Mayfield's First Amendment challenge to a ban on rune-related literature, which the TDCJ did not explain or justify.

Relying on *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), the district court had found that the TDCJ's outside volunteer policy did not violate Mayfield's First Amendment rights. The Fifth Circuit noted that a neutral application of the policy was central to the *Baranowski* decision, and Mayfield had presented evidence of a non-neutral application. Therefore, Mayfield raised a genuine issue of material fact that precluded summary judgment on that claim.

The district court had dismissed the RLUIPA challenge to the outside volunteer requirement based on *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). The Fifth Circuit held that *Adkins* did not establish a per se rule that the outside volunteer requirement would never place a substantial burden on the exercise of religion. In this case, the outside volunteer for the Odinist group had only been able to visit twice in three years, and there were disputed facts regarding the availability of alternate methods of worship for Odinist prisoners. Therefore, it was improper to grant summary judgment on that issue. Similarly, the record could support a finding that the ban on possession of runestones was a substantial burden on Mayfield's religious practices, precluding summary judgment on his RLUIPA claim. The district court also erred in not determining whether the TDCJ's policies were narrowly tailored to serve a compelling government interest.

Accordingly, summary judgment was granted to the defendants on Mayfield's claims for compensatory damages, non-damage claims against the TDCJ, and First Amendment claims regarding possession of runestones. The summary judgment order was reversed for declaratory and injunctive relief claims against prison officials on the outside volunteer policy and rune-related literature ban as First Amendment violations, and on the outside volunteer policy and ban on runestone possession as RLUIPA violations. Mayfield was represented on appeal by attorney Aditi Dravid of Houston. See: *Mayfield v. TDCJ*, 529 F.3d 599 (5th Cir. 2008).

Following remand, a bench trial was held on Oct. 27, 2008. The parties agreed to settle during the trial and entered

agreed findings of fact and conclusions of law. The parties agreed that Mayfield's "request to be able to possess both runestones and rune literature" were moot due to a change in TDCJ polity that now allows prisoners to possess such items. The revised TDCJ policy also permits prisoners to receive books and other literature that include "runes or symbol

translation." Further, storage space was made available at the Hughes Unit for "Odinist and Odinist Asatru religious materials, including blessing bowl, sprig, and horn or other suitable drinking vessel, subject to overall space considerations." See: *Mayfield v. Texas Dept. of Criminal Justice*, U.S.D.C. (W.D. Tex.), Case No. 6:04-cv-00181-JCM. ■

Washington DOC Ordered to Pay \$174,000 for False Imprisonment

A Washington state woman has been awarded \$174,000 in damages after the Washington Department of Corrections (DOC) miscalculated her sentence, causing her to stay in prison an extra 18 months.

Melanie Hinkle was convicted of conspiracy to commit murder in the second degree and was sentenced to 120 months in prison. The DOC calculated Hinkle's sentence as if it was for a Class A felony, which limited Hinkle's earned release time to a maximum of fifteen percent of her sentence.

Hinkle was not convicted of a Class A felony, though. The crime of conspiracy to commit murder in Washington is a Class B felony, which made Hinkle eligible for

earned release time not exceeding one-third of her total sentence. The DOC realized its error on or about January 1, 2006, some 18 months after Hinkle should have been released.

Hinkle brought suit against the DOC, asserting claims of negligence and false imprisonment surrounding the DOC's miscalculation of her sentence. On October 8, 2007, a jury returned a verdict in favor of Hinkle, awarding her \$174,000 in damages. A bill of costs for \$720 was also allowed.

Hinkle was represented by Bill Coats of Brett & Coats, a Bellingham, Washington firm. See: *Hinkle v. Department of Corrections*, Thurston County Superior Court, Case No. 06-2-01967-6. ■

Four-Year Statute of Limitations Applies to § 1983 Claims Filed in Florida

The Eleventh Circuit Court of Appeals has held that 42 U.S.C. § 1983 actions filed in Florida have a four-year statute of limitations. The appellate court's ruling reversed a Florida federal district court's dismissal of a civil rights complaint filed by a prisoner who alleged he had been assaulted by a jail guard.

According to a complaint filed by Pinellas County Jail prisoner Johnny E. Ellison, in March 2004 guard Jeremy Lester destroyed his legal mail and personal property, and assaulted him while he was handcuffed. The complaint also charged that other guards had failed to intervene.

Pursuant to 28 U.S.C. § 1915(e), the district court dismissed the complaint as untimely. The court found the statute of limitations was governed by Florida Statutes § 95.11(5)(g), which specifies a one-year time limit for "action[s] brought by or on behalf of a prisoner ... relating to the conditions of the prisoner's confinement."

The Eleventh Circuit, however, held

that federal courts apply a state's statute of limitations for personal injury actions to complaints brought under § 1983. Thus, the four-year limitations period in § 95.11(3) applies to § 1983 claims arising in Florida. See: *Ellison v. Lester*, 275 Fed. Appx. 900 (11th Cir. 2008) (unpublished). ■

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Canadian Appellate Court Affirms \$12,000 Judgment for Prisoner

On June 2, 2009, a Canadian appellate court affirmed a decision by Federal Court Prothonotary Martha Milczynski awarding \$12,000 to Barry Carr, a federal prisoner.

Carr had accused Correctional Service of Canada (CSC) of negligence and breaching its duty of care to him while he was housed at Millhaven Institution in Ontario in 2005. Carr's attorney, John L. Hill, argued that his client suffered from Post Traumatic Stress Disorder (PTSD) as the result of a violent assault by an unidentified prisoner, which CSC officers had failed to foresee or prevent.

Prothonotary Milczynski found that CSC's security measures where the verbal altercation and assault took place were inadequate, which amounted to a breach of care resulting in the attack on Carr. She highlighted various "pre-indicators of violence" that she determined should have alerted prison officers to the impending danger, but which apparently went unnoticed. As a result, another prisoner stabbed Carr in the buttocks with a plastic weapon. He required two stitches.

The defendants argued that CSC officers and officials had met their burden of supplying "reasonable and adequate [security] measures in the circumstances," and that the "lack of constant monitoring of inmates does not constitute a breach of the duty of care." Furthermore, the unforeseeable nature of the attack on Carr should preclude a finding of negligence.

As to Carr's PTSD claim, the defendants noted that two of the three doctors who examined him did not conclude with that diagnosis, and the doctor who diagnosed PTSD did so only after Carr had commenced litigation more than two years after the incident in question. The doctors also failed to examine Carr for malingering, which is important in cases where a patient is seeking monetary damages.

Those arguments were rejected by Ms. Milczynski due to the clinical findings of the doctors involved. She determined that the lack of a specific PTSD diagnosis did nothing to nullify the obvious symptoms of the disorder that Carr exhibited, such as flashbacks and nightmares. The defendants appealed.

The appellate court determined that in order to overturn Ms. Milczynski's decision, it must find that she had committed a "palpable and overriding error" in her deliberations. Although the appellate court found some of the evidence inconclusive,

and observed that one may "take exception" to Ms. Milczynski's assessments, her ruling did not rise to the level of "palpable and overriding error."

For that reason, her decision and the \$12,000 damages award were affirmed. See: *Carr v. Her Majesty the Queen*, 2009 FC 576 (Fed. Ct., Toronto, Ont. 2009). ■

Eleventh Circuit Finds Administrative Remedies Unavailable When Prison Official Threatens Retaliation

The Eleventh Circuit Court of Appeals has held that a prison official's threat to retaliate against a prisoner for use of the institutional grievance procedure made the prisoner's administrative remedies unavailable.

The appellate ruling came in a civil rights action filed by Georgia prisoner Willie Turner. He claimed that while working in the kitchen at the Men's State Prison, he was ordered to clean an oven despite protesting it was not safe to do so because the oven was sparking electricity and the floor was wet.

When he touched the oven, Turner received an electric shock that knocked him to the ground and injured his leg. Instead of turning off the power or providing medical assistance, Turner's supervisor joked about what happened, said he was stupid and filed a disciplinary report against him. Turner alleged that the supervisor later told him that exposing him to the risk of electrical shock was his way of getting back at him for being too fat. After being shocked, Turner was taken to the infirmary where he said he received inadequate medical care.

Turner timely filed an informal grievance with the grievance counselor, complaining that he had been shocked and received deficient treatment afterwards. Because Turner's grievance alleged physical abuse, it was supposed to be forwarded to the grievance coordinator, who was to issue him a formal grievance form and send a copy of the informal grievance to the Internal Investigations Unit of the Office of Professional Standards.

Eight days later the grievance counselor told Turner she did not know what happened to his informal grievance, so she gave him a formal grievance to fill out before the time limit expired. He completed the form and gave it to her that day. Up to this point, Turner was timely with exhausting his administrative remedies.

Two days after submitting the for-

mal grievance, Turner was called to see Warden Tydus Meadows. Turner alleged Meadows told him, "Oh, you're the one that got shocked." Turner claimed that Meadows then said "that if I didn't like the way they did things around here, he would put my ass in the van ... and transfer me so far south that I would never be able to see my family again till I got out of the Georgia Prison System." Upon tearing up Turner's grievance, Meadows stated he "had better not hear of another grievance or lawsuit pertaining to [Turner] getting shocked."

After Turner filed suit, the district court granted the defendants' motion to dismiss due to his failure to exhaust administrative remedies as required by the Prison Litigation Reform Act. On appeal, the Eleventh Circuit held that failure to exhaust available administrative remedies should be treated as a matter of abatement, and that the procedural defense is treated "like a defense for lack of jurisdiction," though it is not a jurisdictional matter.

The first step is to examine the facts, and if in conflict the plaintiff's facts must be accepted as true. If dismissal is not warranted at that point, the district court is to resolve any disputed factual issues related to exhaustion. In this case, the district court did not make any factual findings.

The Court of Appeals rejected the defendants' argument that Turner should have filed another grievance or sought an out-of-time grievance, as Georgia prison regulations do not require a prisoner to grieve a breakdown in the grievance process. Further, Turner could not file an emergency grievance because his claims did not "require prompt action to avoid irreparable harm."

Finally, the Eleventh Circuit held that Turner need not appeal the "implicit – albeit emphatic – denial of his formal grievance" by Meadows. Although Turner was required to appeal within five calendar

days after the thirty-day time limit for a response had passed, the Court found that Meadows' threats made further administrative remedies unavailable to Turner.

The purpose of administrative remedies, which is to give prisoners a way of attempting to improve prison conditions and resolve problems without having to file suit, is thwarted if the prisoner is told that filing a grievance will result in his overall condition becoming worse instead of better. Thus, such remedies are unavail-

able in cases where a prison official's threat actually deters a prisoner from filing a grievance and the threat is one that would deter a reasonable person of ordinary firmness and fortitude from filing a grievance. The district court's order was vacated and remanded. See: *Turner v. Burnside*, 541 F.3d 1077 (11th Cir. 2008).

On remand, the district court dismissed Turner's claims against two defendants but held that three other defendants, including Meadows, had "failed to

meet their burden of demonstrating that [he] failed to exhaust his available administrative remedies." The court wrote in a September 29, 2009 ruling that Turner's allegations were credible, that he had exhausted his administrative remedies, and that "further factual development" was necessary on his deliberate indifference claim. The defendants' motion to dismiss was therefore granted in part and denied in part. See: *Turner v. Burnside*, 2009 U.S. Dist. LEXIS 89488. ■

\$3.1 Million Settlement to Wrongly Convicted Massachusetts Prisoner

On July 28, 2009, within weeks of settling a similar wrongful conviction lawsuit that resulted in a \$3.4 million payment to the estate of Kenneth Waters, the town of Ayer, Massachusetts agreed to pay \$3.1 million to settle a federal complaint brought by former prisoner Dennis Maher. *PLN* previously reported the Waters case, which resulted in a total settlement of \$14.1 million. [See: *PLN*, Dec. 2009, p.42].

Like Waters, Maher was exonerated by DNA evidence following intervention by the Innocence Project. He was released in 2003 after serving 19 years in prison for two rapes and a sexual assault.

Maher was convicted of raping a woman who had been staying at an Ayer hotel in August 1983. He was also convicted of raping a woman in the city of Lowell, and sexually assaulting another Lowell woman who fought off her knife-wielding attacker.

Maher, a 23-year-old Army sergeant with no criminal record at the time, was arrested after he walked near the crime scene of the second Lowell assault. The victim said her attacker was wearing a red hooded sweatshirt, which is what Maher

happened to have on. He was charged in all three cases and convicted at two trials in 1984 based on eyewitness identifications. "I didn't do it," he said when he was sentenced.

In 2001, a law student working with the Innocence Project found evidence from Maher's case in a courthouse storage room. After DNA testing proved that Maher had not committed two of the crimes (DNA wasn't available in the third case), he was exonerated and released from prison on April 3, 2003. Since his release he has worked as a diesel mechanic and now lives with his wife and two children.

Maher settled his suit against the city of Lowell in December 2008 for \$160,000. One of the Lowell police officers he sued, Edward F. Davis, is now Boston's police commissioner. "I'm really glad that DNA was able to work that issue and prove that he wasn't responsible

for [the crimes]," Davis said. "But no system is perfect."

The \$3.1 million settlement with the town of Ayer was likely higher due to misconduct by an Ayer police official who was also involved in the Waters case. Maher's lawsuit had accused the police of "using improper eyewitness identification techniques, fudging chronologies, and failing to check [his] alibi." See: *Maher v. Town of Ayer*, U.S.D.C. (D. Mass.), Case No. 1:06-cv-10514-RGS. ■

Additional source: *Boston Globe*

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\$200,000 Settlement in Florida Prisoner's Suicide Death

Florida's Department of Corrections paid \$200,000 to settle a lawsuit involving a prisoner's suicide death. That settlement is the maximum allowed under law when suing a state agency.

Prior to his entry into prison, prisoner David Hansen had a history of mental illness, which included suicide attempts. His transition into prison was rough, and it became rougher when he became known as a "snitch."

Guards were aware of that label, which led to Hansen being severely beaten on January 18, 2005. While the beating was severe enough to result in hospitalization, the assailant was not prosecuted

despite the incident being caught on videotape.

Hansen's condition worsened after that incident, as the confines of disciplinary confinement affected him and resulted in placement on close management transfer to Florida State Prison (FSP). His mental health treatment became less intensive at FSP.

What became more intensive was the attitude others took towards Hansen. Guard Archie Crews told Sgt. Veal on August 20, 2006, that he had put a contract out on Hansen for another prisoner to "shank" him because he felt "Hansen should not be permitted to get out of prison."

Hansen did not reach his release date of December 19, 2006, for he was found hanging by a bed sheet in his cell on October 17, 2006. Shortly before his death, Hansen told guard Timothy Fowler and Sgt. Travis Baird that he felt like killing himself. They ignored him. At least one of the required 30 minute cell checks was not conducted; the record, however, was falsified by guard Dean Hardin to reflect it did occur.

The estate for Hansen settled the matter on February 5, 2009. It was represented by Gainesville attorney Terrence J. Kann. See: *Hansen v. Florida Department of Corrections*, USDC, M.D. Fla. Case No. 3:08-cv-1007. ■

Texas Prison Guard Gets 24 Months in Federal Prison

In August 2009, a former Texas Department of Criminal Justice (TDCJ) guard was sentenced to 24 months in federal prison in connection with a vicious assault on a handcuffed prisoner.

Eugene Morris, Jr., a TDCJ sergeant at the Ferguson Unit, was offended by prisoner Robert Tanzini's use of a racial slur to refer to another prison guard. He entered Tanzini's cell, handcuffed him behind his back and took him to an office. Behind closed doors, Morris angrily confronted Tanzini, knocked him to the floor and repeatedly kicked him in the head. According to Tanzini, Morris and another guard "stomped, kicked and punched"

him. Afterwards, Morris filled out a Use of Force report falsely saying that he had only used a bear hug on Tanzini to force him to the ground.

Tanzini suffered severe head trauma resulting in a week of unconsciousness, brain injuries, and skull and facial bone fractures. He said one of his eyes had been "kicked out of its socket." It took him months to relearn the use of his right arm and leg; he still has difficulty with balance and fine motor control.

Morris was fired after the incident and another guard resigned. Tanzini filed a lawsuit that was dismissed due to procedural reasons; however, federal

prosecutors used details in his complaint to eventually bring criminal charges against Morris. [See: *PLN*, Jan. 2009, p.26].

A federal jury convicted Morris of filing a false report but acquitted him of causing serious bodily injury and influencing other guards to file false reports. On August 26, 2009, U.S. District Court Judge Nancy Atlas sentenced him to 24 months in prison followed by two years of supervised release. See: *United States v. Morris*, U.S.D.C. (S.D. Tex.), Case No. 4:07-cr-00442. ■

Source: *Houston Press*

\$80,000 Award in NY Prisoner's Claim for Injuries Caused by Assault

A New York Court of Claims has awarded \$80,000 in damages to a prisoner at the Auburn Correctional Facility in connection with a prisoner-on-prisoner assault. Previously, in an October 1, 2007 order, the court found the State of New York 100% liable because the assault "was reasonably foreseeable and a direct result of the State's failure to take appropriate steps that could have prevented" the attack.

The claimant, prisoner Alexis Irizarry, was punched twice in the right eye by another prisoner named Hortas. The force of the blows knocked him into a soccer net, which entangled his left hand as he fell and caused a dislocation of his left ring finger, bending it into an "L" shape at the lowest joint.

At the damages trial, Dr. Jerome A.

Davis testified that Irizarry had suffered a permanent 50% loss of the proximal interphalangeal joint. The injury to the ring finger in conjunction with a prior injury left Irizarry with a combined 50% loss of functional use of his hands.

Dr. Davis further testified that Irizarry had suffered a vitreous hemorrhage and traumatic uveitis that left him with a permanent 50% vision loss in his right eye. Irizarry stated that although his eyesight eventually returned, he now has no peripheral vision in the right eye and his injuries prevent him from performing his prison job as a barber.

For the finger injury, the Court of Claims awarded Irizarry \$25,000 for past pain and suffering plus \$5,000 for future pain and suffering. It also awarded him \$50,000 for past pain and suffering

for his eye injury. In its March 24, 2009 order, the Court further awarded interest at the rate of 9% annually from the prior liability finding, plus recovery of any court filing fee.

Irizarry was represented by New York attorney Gary E. Divis. See: *Irizarry v. State of New York*, New York Court of Claims (Syracuse), Claim No. 108986, UID 2009-009-199. ■

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Fourth Circuit: *Heck* Bar Inapplicable to § 1983 False Imprisonment Suit

The Fourth Circuit Court of Appeals has joined five other circuits in holding that a former prisoner's § 1983 false imprisonment claim is not barred by the "favorable termination" requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994).

Lee O. Wilson, Jr. was arrested on March 24, 2005 in Virginia for grand larceny of a motor vehicle. He pleaded guilty on July 26, 2005 and was sentenced "to twelve months imprisonment, six months of which was suspended due to time served." The Virginia Department of Corrections initially calculated Wilson's release date as April 21, 2006, but later recalculated it as July 17, 2006.

After he was released and his sentence had expired, Wilson filed a § 1983 action seeking \$105,000 for false imprisonment. The district court dismissed his lawsuit *sua sponte*, "holding that *Heck*'s favorable termination requirement barred his § 1983 claim" and noting that he could resubmit his claim in a federal habeas corpus petition.

The Fourth Circuit weighed in on the sole issue of "whether Wilson's § 1983 claim for wrongful imprisonment, filed after his sentence expired, is cognizable." The appellate court suggested that while the Supreme Court had addressed "the convergence of habeas and § 1983 actions ... on several occasions, ... it has sent 'mixed signals' as to when" relief under § 1983 is available.

Discussing the evolution of the "favorable termination" doctrine that runs through *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Heck*, and *Spencer v. Kemna*, 523

U.S. 1 (1998), the Fourth Circuit noted that in *Spencer*, the Supreme Court had "found *Heck*'s 'favorable termination' requirement inapplicable to a released inmate's § 1983 claim, since this was the only avenue by which he could access a federal forum." However, the Court of Appeals also noted a significant circuit split on the impact of *Spencer*.

Four circuits – the First, Third, Fifth and Eighth – "regard the five justice plurality in *Spencer* as dicta, and continue to interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met." Five other circuits – the Second, Sixth, Seventh, Ninth and Eleventh – "have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a habeas action." The Supreme Court has not yet conclusively decided this issue, "as evidenced by the circuit split" and *Muhammad v. Close*, 540 U.S. 749, 752, n.2 (2004), the appellate court wrote.

Finding that Wilson's claims did "not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck* or *Spencer*," and that "dicta in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma," the Fourth Circuit determined that it was "left with no directly applicable precedent upon which to rely."

The Court thus adopted the majority view, finding "that the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where the individual would be left without any access to federal court if his § 1983 was barred." The appel-

late court further explained that "barring Wilson's claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment. Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right – freedom – should be left without access to a federal court."

One circuit judge dissented, arguing that "the *Heck* favorable termination requirement is more than dicta that we, as an inferior court, can choose to ignore." In his view, *Spencer* did not make "any exceptions to the favorable termination requirement," and the Court of Appeals was "bound to enforce the requirement where it applies." See: *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008).

On remand, the district court denied Wilson's repeated motions for appointment of counsel. On July 10, 2009, Wilson appealed the denial of his motions for counsel to the Fourth Circuit, where his appeal remains pending. ■

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Massachusetts GPS Program Upheld by State Supreme Court

by Mark Wilson

The Massachusetts Supreme Judicial Court vacated a lower court order which found that a sheriff had violated state law when he released sentenced prisoners on a GPS-monitoring program.

On March 8, 2007, Edward Donohue was convicted of his third drunk driving offense. Twelve days later, Middlesex Superior Court Judge Diane Kottmyer sentenced him to two-and-a-half years in jail, with a requirement that he serve at least 18 months of the sentence.

After Donohue had served 195 days, Middlesex County Sheriff James DiPaola transferred Donohue to a home GPS-monitoring program on September 17, 2007. Two days later Kottmyer learned that Donohue had been released on GPS monitoring, and ordered DiPaola to show cause why Donohue was no longer incarcerated.

On October 2, Judge Kottmyer issued an order concluding that the early release of prisoners onto the GPS program was in violation of state law. She ordered Donohue and eleven other prisoners back to jail. Sheriff DiPaola appealed.

The Supreme Judicial Court noted that “generally ... once a judge has sentenced a defendant, authority over the defendant passes from the judicial branch to the executive branch of government in that the defendant becomes subject to the sheriff’s control.” The Court found that DiPaola “did not impermissibly change the sentence imposed by the court,” and held his actions “were within his statutory powers.” One justice dissented, stating the majority’s ruling “only creates further evasion of responsibility and public confusion regarding the roles of the different branches of the government.” See: *Commonwealth v. Donohue*, 452 Mass. 256 (Mass. 2008).

DiPaola was pleased with the ruling, noting that it ensured the release program, which had existed for 20 years, would continue. “Any time a judge tells you that you’re doing something wrong and then you’re vindicated, it’s a good thing,” he stated. “We think that we had a wonderful program going [that will] reduce the cost of incarceration and help shift the cost of rehabilitation off the backs of the taxpayers.”

Massachusetts has “a couple hun-

dred” prisoners in the GPS-monitoring program, but none are sex offenders or other security threats, according to DiPaola. “I’m an elected official. I’m responsible to the citizens,” he said. “I’m not going to just throw hundreds of people serendipitously on a [GPS] bracelet.”

“The sheriffs would have had to bring back inside the walls a fairly large number of people who are now out on these programs,” noted James Pingeon, litigation director for Massachusetts Correctional Legal Services. “Since many of these facilities are extremely over-crowded already with people sleeping on the floor and in gymnasiums, it would have been a pretty devastating impact.”

Not everyone was happy with the rul-

ing, though. State Senator Bruce E. Tarr criticized the decision to allow a repeat drunk driver like Donohue into an early release program, suggesting that such decisions call the public safety benefit of GPS monitoring into question. “I’m very suspicious about this,” said Tarr. “This may be a situation that requires some legislative oversight and corrective action.” Further, some prosecutors suggested that early release programs conflicted with the expectations of crime victims, according to Jilene Williams, executive director of the Massachusetts District Attorneys Association. ■

Additional source: *State House News Service*

Failure to Raise Issue in Rule 50 Motion Prohibits Argument on Appeal; \$214,000 Verdict Upheld

The Sixth Circuit Court of Appeals has affirmed a jury’s verdict that found a municipality liable despite there being no finding of liability on the part of the individual defendants. The facts in this case involved a claim of deliberate indifference to a prisoner’s serious medical needs.

In January 2003, Amy Lynn Ford was arrested on a probation violation and booked into Michigan’s Grand Traverse County Jail. While being questioned during the intake process, Ford informed the guard that she was an epileptic who took Dilantin. The guard noted that Ford had not taken her medication that day, and placed the medical screening form in the nurse’s inbox.

As she was being escorted to her cell, Ford told the guards that she was epileptic, had not taken her seizure medication, and needed a bottom bunk. When another prisoner was ordered to make a bottom bunk available by moving to the top, Ford said, “[no], I’m fine,” and proceeded to sleep in the top bunk.

A few hours later Ford had a seizure and fell from the top bunk. She sustained significant injuries to her right hip and right clavicle. Ford then brought a civil rights action naming the four jail guards who were aware of her condition as well

as Grand Traverse County. She claimed the guards had violated her Eighth and Fourteenth Amendment rights to medical treatment by failing to ensure that she was given Dilantin or to otherwise protect her from injuries due to her epilepsy. Further, she alleged the county’s policy and custom of not having a nurse on duty at the jail on the weekend had caused her injuries, as it prevented her from timely receiving her medication.

The matter proceeded to a jury trial in May 2006. The jury found the individual defendants were not liable, but decided that the county’s policy and custom had caused Ford’s injuries. She was awarded \$214,000 in damages. [See: *PLN*, Jan. 2007, p.33]. Following the verdict, the county filed two motions for judgment as a matter of law. The district court denied the motions and the county appealed.

The county raised two issues on appeal. First, it argued that it could not be held liable under 42 U.S.C. § 1983 in the absence of a constitutional violation by any of the individual guards. Second, it contended there was insufficient evidence to establish a causal link between the county’s policy or custom and Ford’s injuries.

Ford argued that the first issue was barred because the county had not

included it in its Rule 50(a) motion. Her argument was based on the well-established proposition that a post-trial motion for judgment as a matter of law “is not available at anyone’s request on an issue not brought before the court prior to submission of the case to the jury.” The county contended its motion for a directed verdict was specific enough to preserve the objection raised in its post-trial motion for judgment as a matter of law.

The Sixth Circuit disagreed. The Court of Appeals said the only similarity between the county’s insufficiency-of-the-evidence motion during the trial and its post-verdict motion was to challenge

the liability of the county. In finding the county had waived its first argument on appeal, the appellate court held that if it were “to conclude that the County’s preverdict motion in this case constitutes the requisite ‘specific grounds’ for the issue raised in its post-verdict motion, that requirement would as a practical matter cease to provide any limitation at all.”

The Court of Appeals then turned to the county’s causation argument. The Court held that the evidence, when viewed in the light most favorable to Ford, could allow a jury to conclude there was a direct causal link between the county’s policy or custom and Ford’s injuries. While that link

existed, the Sixth Circuit was less certain as to whether the policy constituted deliberate indifference. However, the county had “abandoned its strongest argument – that the County’s policy did not constitute deliberate indifference to Ford’s serious medical needs,” instead deciding to challenge the causal link.

The Court of Appeals declined “to disrupt the jury’s verdict,” and the district court’s judgment was therefore affirmed. See: *Ford v. County of Grand Traverse*, 535 F.3d 483 (6th Cir. 2008); *rehearing and rehearing en banc denied*, 2008 U.S. App. LEXIS 27699 (6th Cir., Dec. 17, 2008). ■

Indiana DOC Directive Limiting Educational Credit to Only One Associate’s Degree Violates Ex Post Facto Clause

by *Brandon Sample*

A directive issued by the Indiana Department of Corrections (IDOC) that limits the award of educational sentence credit to only one Associate’s Degree cannot be applied retroactively without running afoul of the ex post facto clause of the U.S. and state Constitutions, the Indiana Court of Appeals decided on June 19, 2008.

Steven I. Paul was convicted of aggravated battery and sentenced to twenty years imprisonment following a fatal shooting incident in 2002. On July 23, 2007, he filed a motion with the sentencing court requesting educational sentence credit. Paul complained that he had been denied educational credit for a second Associate’s Degree that he earned while incarcerated in 2006. The court denied Paul’s motion, relying on IDOC directive 05-29, which limits the award of educational credit to only one Associate’s Degree. Paul appealed.

At the time of Paul’s offense of conviction, Indiana law allowed prisoners to earn one year of educational credit for completing an Associate’s Degree. Educational credit was capped at the lesser of four years or one-third of the prisoner’s

sentence, and could be achieved through the earning of multiple degrees.

In 2003, however, the state legislature changed the educational credit statute. Specifically, lawmakers authorized the IDOC to set guidelines for the award of educational credit for multiple Associate’s Degrees. In response the IDOC established directive 05-29, which took effect on January 1, 2006.

On appeal, Paul argued that the directive could not be applied to him without violating the ex post facto clause of both the U.S. and Indiana Constitutions. The

Court of Appeals agreed. The ex post facto clause prohibits retroactive application of laws that “disadvantage the offender,” the court wrote. Paul’s offense of conviction occurred in 2002, before the directive took effect. Consequently, the appellate court held, the directive could not be used to deny credit for his second Associate’s Degree.

In the same ruling, the court rejected Paul’s other challenges to his 20-year sentence. See: *Paul v. State of Indiana*, 888 N.E.2d 818 (Ind. Ct. App. 2008), *appeal denied*. ■

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Assessment of Prison Account Without Seizure of Funds Implicates Due Process in Third Circuit

by Mark Wilson

In an important case of first impression, the U.S. Court of Appeals for the Third Circuit held that an assessment of a prisoner's trust account without an actual seizure of funds implicates a property interest. On remand, however, the district court decided that the violation of that right resulted in a very limited remedy.

In February 2005, Pennsylvania prisoner Charles Mobley sustained minor burns to his face when someone threw scalding water on him. During the ensuing investigation prison officials received two calls to "a special phone line set up to allow trusted inmates to relay sensitive information." The anonymous callers claimed that prisoner Rodney Burns was Mobley's assailant.

That information was deemed credible because guards recognized the informants' voices and said they had provided reliable information before. A third prisoner sent an anonymous letter stating the "right guy" had been locked up, referring to Burns.

On March 7, 2005, Burns was charged with assaulting Mobley based primarily on the information provided by the informants. At a March 10, 2005 hearing, Burns denied the charges and requested that the hearing officer review the video tapes of the location where the incident occurred, but was informed the tapes did not exist.

The hearing officer failed to make an independent assessment of the informants' reliability. She asked Mobley to testify, but he refused. She then decided that Burns was guilty and ordered him to serve 180 days in segregation and forfeit his institutional job. She also assessed costs against Burns' account for Mobley's "medical or other expenses."

After unsuccessfully seeking administrative review of the disciplinary conviction, Burns filed suit in federal court alleging retaliation and due process violations. The parties filed cross-motions for summary judgment, and on February 6, 2007 the district court granted summary judgment to the defendant prison officials.

The court expressed "serious concerns that Defendants' actions would not satisfy even those minimal due process"

protections afforded to prisoners. It held, however, that Burns had failed to show that he was deprived of a cognizable liberty or property interest.

On appeal, following oral arguments, prison officials sent Burns a letter on April 10, 2008, "purporting to declare that it would not take any steps to deduct any money from his inmate account as a result of the Mobley incident." The defendants then argued that the letter rendered the appeal moot.

The Third Circuit disagreed, recognizing that voluntarily ceasing alleged unconstitutional conduct does not deprive a court of the power to hear the case. Noting the defendants' argument that their voluntary promise to refrain from the future seizure of funds in Burns' account obviated his interest in the case, the Court of Appeals found that such an argument "fundamentally misreads the nature of Burns' due process claims." His "injury was ... complete at the time that his account was originally assessed," assuming "that (1) the Department of Corrections impaired a cognizable property interest by virtue of the assessment and (2) the disciplinary process failed to afford him sufficient process."

Turning to the merits, the appellate court found that Burns did not allege he was deprived of a liberty interest, and "the sole issue on appeal is whether the Department of Corrections [DOC] impaired a protected property interest for purposes of procedural due process" when it placed an assessment on his prison account.

Quoting *Reynolds v. Wagner*, 128 F.3d 166, 179 (3rd Cir. 1997) and *Higgins v. Beyer*, 293 F.3d 683, 693 (3rd Cir. 2002), the court acknowledged that "it is clear" that prisoners "have a liberty interest in the funds held in prison accounts," and they may not be deprived of those funds without due process of law. "Burns does not, however, allege a seizure of any funds from his account. Instead, he argues that the Department of Corrections' assessment of his ... account for 'medical and other expenses,' even absent any attempt to seize the funds, deprived him of his 'right to security' in that account."

The majority observed that "no court has either accepted or rejected the argu-

ment that Burns advances." Rather, "it appears to be an issue of first impression across the courts of appeals."

In a "scholarly" analysis of "the right to security," the majority agreed with Burns that while the "analogy is technically imperfect," the assessment "placed the Department of Corrections in a position analogous to that of a Judgment Creditor." The "legal right obtained by the Department ... through its assessment of Burns' account, mirrors the interest held by a Judgment Creditor under Pennsylvania law."

Moreover, "with respect to the amount of the assessment ... the Department ... – unlike a putative Judgment Creditor – controls the process through which the amount of medical expenses will be determined Similarly, the Department ... need not rely on third party enforcement of their assessment interest. Instead, they physically control Burns' institutional account and can deduct any assessed fees without resort to an intermediary." These differences afford prison officials a "stronger and more readily collectable legal right" than a traditional Judgment Creditor.

For those reasons, the majority was "satisfied that the Department of Corrections' assessment of Burns' institutional account constituted the deprivation of a protected property interest for purposes of procedural due process," even though no money had actually been removed from Burns' account. The Court of Appeals concluded that "through its assessment, the Department ... attained a status akin to that of a Judgment Creditor. In doing so, it necessarily reduced the economic value of Burns' account for a period of more than three years. That deprivation is sufficient to trigger the protections of the Due Process Clause."

One appellate judge dissented, citing a reluctance to become "the first in the Nation to find such a right," because he feared that the majority's decision opened a can of worms which "renders unconstitutional a host of innocuous DOC regulations that limit without due process, inmates' rights to 'use' and 'transmit' the funds in their prison accounts." See: *Burns v. Pa Dep't of Corr.*, 544 F.3d 279

(3d Cir. 2008).

Following remand, on May 26, 2009 the district court granted in part and denied in part the defendants' second summary judgment motion, and also granted in part and denied in part Burns' motion for partial summary judgment. The court noted that the DOC had affirmed in writing that it would not assess any costs against Burns' prison account "for any expenses related to the incident at issue in this case."

Upon analyzing Burns' claims, the court determined that he was entitled to a limited declaratory judgment but could not obtain damages unrelated to

the DOC's attempt to infringe on his protected property interest in his prison account. As no funds had been taken from Burns' account, he was not entitled to monetary damages. Nor was he entitled to injunctive relief.

Thus, the court entered a final order dismissing Burns' lawsuit that included declaratory relief stating the "failure to independently assess the reliability and credibility of the confidential informants whose testimony [the hearing officer] relied upon in assessing Plaintiff's inmate account violated the procedural due process rights Plaintiff was entitled to given his protected property interest in

the security of his inmate account." Burns received no other relief or damages.

"The Third Circuit has determined that Plaintiff has a right to security in his inmate account," the district court wrote. "This right entitles him to limited due process protections. Qualified immunity further restricts the relief available to him. The Court concludes that the only relief to which Plaintiff is entitled is the narrow declaratory relief outlined above."

Burns has appealed the district court's ruling. See: *Burns v. Pa Dep't of Corr.*, U.S.D.C. (E.D. Penn.), Case No. 2:05-cv-03462-BMS; 2009 U.S. Dist. LEXIS 45357. ■

Tenth Circuit Reverses Dismissal of Failure to Protect Suit

by Brandon Sample

The U.S. Court of Appeals for the Tenth Circuit has reversed the dismissal of a lawsuit filed by a Colorado prisoner who requested but was denied protection from prison gang members.

Scott L. Howard, a self-described "openly homosexual" prisoner of "slight build," was a target from the moment he arrived at the Fremont Correctional Facility in 2004. Convicted of various financial crimes that garnered both local and national media attention, Howard was first approached by the "2-11 Crew" gang after being recognized in media reports.

Initially, the gang wanted Howard to commit similar financial crimes for their benefit. Eventually, though, they began extorting money from him. When Howard could no longer pay, he was forced into prostitution and repeatedly raped as payment for his "debts" to the gang. After contacting an attorney friend, Howard was questioned by prison officials and admitted that "he had been assaulted." His case manager replied, "I don't want to hear the details of this." Several days later he was moved to the Sterling Correctional Facility.

Howard's first permanent housing at Sterling was in Unit 2. There, he met with his case manager and "explained his ordeal with 2-11 Crew members" while at Fremont. Howard was in Unit 2 for several months before being transferred to Unit 33. Immediately after he arrived at that unit, he was recognized by a 2-11 Crew member from Fremont. The gang member approached Howard and told him that "Ghost," a prisoner responsible for threatening him at Fremont, "has a

friend here" at Sterling.

Howard immediately reported the incident to David Backer, his case manager. However, Backer did nothing to protect Howard, insisting that he could not be moved until he provided the names of the individuals who had threatened him and a recorded statement against them. Howard refused due to fear of retaliation.

He then started filing grievances. His first "step 1" grievance prompted a meeting with John Clarkson, Backer and a lieutenant named Halligan. During the meeting, Halligan allegedly told Howard that "[Sterling] is a prison and not a playground," that he would "have to learn to live with threats of violence," and that "crime just doesn't pay."

Howard continued to request a transfer to another unit through the grievance process, but his requests were denied. He was assaulted several more times by 2-11 Crew members before being placed in protective custody after he agreed to provide several hours of taped statements implicating numerous other prisoners.

Howard filed a 42 U.S.C. § 1983 complaint against Clarkson, Backer, Halligan and other Sterling officials, alleging they were deliberately indifferent to his safety in violation of the Eighth Amendment. The district court, however, granted summary judgment to the defendants upon finding that Howard's initial refusal to identify the specific individuals involved in the assaults and threats excused the defendants' inaction. Howard appealed.

The Eighth Amendment, contrary to the district court's conclusion, does not

require prisoners "to give notice of who precisely is behind [a] threat," the Tenth Circuit held. Rather, all that is required is that prison officials have "knowledge that the prisoner is actually in danger." In Howard's case, he "presented evidence, both direct and circumstantial, that prison officials *knew* he faced an ongoing risk from a prison gang with a substantial presence in the facility, and that they had reasonable responses available to them."

As such, the Tenth Circuit concluded it was error for the district court to enter summary judgment for the defendants on Howard's Eighth Amendment claim, except for one defendant whose only knowledge of the incidents alleged by Howard were from reviewing his grievances. The judgment of the lower court was therefore reversed in part and affirmed in part. See: *Howard v. Waide*, 534 F.3d 1227 (10th Cir. 2008).

On remand, the court granted Howard's motion for reconsideration on October 2, 2008, and approved his case to be included on a list for representation by pro bono counsel. Two months later, attorneys with the Denver law firm of Kilmer, Lane & Newman, LLP agreed to represent him. The defendants filed a renewed motion for summary judgment in January 2010, which remains pending. See: *Howard v. Clarkson*, U.S.D.C. (D. Col.), Case No. 1:06-cv-00282-PAB-CBS. ■

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Ninth Circuit: California Jail Detainee's Excessive Force Suit May Proceed

by John E. Dannenberg

The Ninth Circuit Court of Appeals reversed a district court's decision granting summary judgment to Orange County, California jail officials who allegedly used excessive force while restraining a detainee. The appellate court found that because there were triable issues of fact, summary judgment was not appropriate.

Donald C. Fuller, Jr. sued Orange County under 42 U.S.C. § 1983 and state law claims for excessive force and violations of his First and Fourteenth Amendment rights during his booking and incarceration at the Orange County Jail. He named three deputies, a supervising sergeant and Sheriff Michael Carona – who has since himself been indicted and convicted in an unrelated case. [See: *PLN*, Nov. 2009, p.38; Feb. 2009, p.1].

The defendants moved for summary judgment on grounds that the evidence did not show “objective unreasonableness” as required for a Fourth Amendment violation, or that they had chilled the exercise of Fuller's First Amendment rights. The sergeant moved for summary judgment because he was not one of the restraining officers, and Sheriff Carona moved for summary judgment because he was not present during the incident. The district court granted summary judgment to all the defendants and Fuller appealed.

The Ninth Circuit largely reversed in an unpublished opinion. First, it disagreed with the district court that there were “no triable issues of fact” because in fact there were. As to the three deputies, they were potentially liable because their actions were part of standard procedures used by the Orange County Jail. The sergeant, while not liable under a respondeat superior (supervisory) theory, was nonetheless liable because he directly observed and supervised the complained-of actions of the deputies.

Sheriff Carona, the Court of Appeals held, was not personally liable for the alleged excessive use of force. However, he was liable in his official capacity because he was the policy-maker for the standards relied upon by his deputies.

The Ninth Circuit next denied the defendants' common defense of qualified immunity. The Court held that the defen-

dants had the requisite “fair warning” that their actions were unlawful because there was evidence which, when viewed in Fuller's favor, would establish a Constitutional violation. Further, it was established in the Ninth Circuit that the force alleged by Fuller could violate the Constitution; the Court also held that a jury could find the requisite “deliberate indifference” to sustain a violation under 42 U.S.C. § 1983. As to Fuller's state law claims, the defendants were not eligible for qualified immunity according to *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002).

However, the appellate court rejected Fuller's First Amendment claims because the alleged violations did not objectively chill his free speech rights. Additionally, the Court of Appeals affirmed the district court's denial of Fuller's summary judgment motion because, viewing the facts in a light most favorable to the defendants, their use of a rear wristlock in restraining Fuller was not objectively unreasonable.

Accordingly, the case was reversed and remanded, with each party to bear his own costs on appeal. See: *Fuller v. County of Orange*, 276 Fed. Appx. 686 (9th Cir. 2008) (unpublished).

Following remand, the case proceeded to a two-day jury trial on April 21, 2009. The jury found for the defendants and the court clerk's office subsequently assessed costs against Fuller in the amount of \$1,014.31.

Fuller's attorney noted that the judgment did not include an assessment of costs, and argued that imposing costs against his client would be unfair, would have a chilling effect on future civil rights litigants, and was inappropriate given the meritorious nature of Fuller's claims even though they were unsuccessful at trial. The district court agreed and vacated the assessment of costs on September 9, 2009. See: *Fuller v. County of Orange*, U.S.D.C. (C.D. Cal.), Case No. 2:04-06851-SVW-PJW. ■

Defendants Denied Qualified Immunity in Tennessee Jail Detainee's Death

by Mark Wilson

The Sixth Circuit Court of Appeals has held that a lower court improperly deferred a qualified immunity determination to the jury. The appellate court decided that jail guards, a jail physician and a paramedic were not entitled to qualified immunity in a Tennessee prisoner's death, though qualified immunity was granted to several other defendants.

Sonya Phillips was a pretrial detainee at the Roane County Jail in Kingston, Tennessee. On November 24, 2000, guards “found her unconscious in her cell, not breathing, and with no detectable pulse.” She regained consciousness before paramedics arrived but still appeared “almost purplish” in color, “very swollen” and “very slow.”

Paramedic Duranda Tipton, who observed Phillips' condition, asked if she should be transported to an emergency room for evaluation; however, Phillips was not hospitalized because Captain Fay Hall

said “she should be left in the jail if she was not in ‘distress.’”

Phillips' physical condition continued to deteriorate and fellow prisoners had to bathe and clothe her because she was unable to do so herself. She began vomiting frequently and passing out. Her breathing sounded as though she had fluid in her airway, and she vomited blood.

Jailers placed Phillips in a medical observation cell, where she continued to complain of chest pains, nausea, constipation and fatigue. On November 27, 2000 she sought medical assistance, complaining of chest pain, numbness on her left side and dizziness. But she wasn't seen for two days.

Jail physician Thomas Boduch briefly examined Phillips. During a cursory six-minute appointment he “just glanced at her,” “failed to even touch her,” conducted no tests and ignored jail protocol that required Phillips to be transported to an emergency room.

On December 4, 2007, Phillips again requested medical attention for nausea, constipation and a possible “kidney infection.” Two days later Dr. Boduch tried to see her, but she was unavailable because she had been transported to a previously-scheduled psychiatric appointment. Boduch reviewed Phillips’ medical request, prescribed antibiotics and ordered a urinalysis. He did not follow up or confirm that the urinalysis was conducted.

When Phillips continued to complain of vomiting, nausea, chest pains and constipation, guards turned off the water in her cell so she couldn’t flush the toilet, to confirm her claims. Jail officials didn’t think her condition was serious enough for medical attention.

In the morning on December 8, 2000, guards found Phillips lying on the floor of her medical cell with a bloody mouth. At about 3:00 p.m., Captain Hall asked Phillips’ psychiatrist if she was over-medicated, because she “appeared ... dizzy, lethargic, and nauseated.” At 5:20 p.m. Phillips was found dead on the floor. An autopsy revealed her cause of death was “diabetes-ketoacidosis, or untreated diabetes.” She also apparently had suffered a heart attack on November 24.

Phillips’ estate filed suit in federal court, alleging deliberate indifference to her serious medical needs. The defendants, which included jail staff, other county officials, Dr. Boduch, two paramedics and Ambulance Service of Roane County (ASRC), filed motions for summary judgment asserting qualified immunity. The district court denied the motions, explaining that because “determining deliberate indifference to a serious medical need ... is such a fact-intensive endeavor, summary judgment is improper.” Rather, the court concluded that “where the legal question of a qualified immunity turns upon which version of facts one accepts, the jury, not the judge, must determine liability” See: *Estate of Phillips v. Roane County*, 2007 U.S. Dist. LEXIS 22099 (E.D. Tenn., Mar. 14, 2007).

On appeal, the Sixth Circuit first explained that the denial “of qualified immunity is immediately appealable only if the appeal is premised not on a factual dispute, but rather, on ‘neat abstract issues of law.’” Therefore, the appellate court lacked jurisdiction to consider arguments contesting different versions of facts in the case.

The Court of Appeals concluded that

the district court had improperly deferred the qualified immunity analysis to the jury, finding that “in a suit against government officials for an alleged violation of a constitutional right, the court – not the jury – must consider the ‘threshold question’ of whether ‘the facts alleged show the officer’s conduct violated a constitutional right.’”

The Sixth Circuit found that Phillips’ “symptoms show the existence of a sufficiently serious medical condition, which was ‘so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.’” The Court then held that the jail guards knew of Phillips’ condition and “possessed a sufficiently culpable state of mind in denying Phillips the appropriate medical care,” especially given their disregard of jail protocol requiring emergency room evaluation of complaints of chest pain.

While faulting the lower court for denying “summary judgment en masse” to all 20 guards named as defendants, rather than evaluating each claim individually, the Court of Appeals agreed that none

of the guards was entitled to qualified immunity. The Court also rejected qualified immunity for Dr. Boduch and paramedic Duranda Tipton, finding “a callous indifference to Phillips’s medical needs.”

However, the Sixth Circuit decided that qualified immunity should be granted to paramedic Howie Rose, who was not aware of Phillips’ prior medical complaints, and to supervisory officials including Roane County Mayor Ken Yager, Sheriff David Haggard and ASRC Director Gloria Wright. The case was remanded for further proceedings. See: *Estate of Phillips v. Roane County*, 534 F.3d 531 (6th Cir. 2008), *rehearing en banc denied*.

Upon remand, and in compliance with the appellate ruling, the district court dismissed all claims against defendants Yager, Haggard, Wright and Rose on grounds of qualified immunity. This case settled in February 2010, under confidential terms because it involved minor children, against the remaining defendants, with a trial date scheduled for January 12, 2010. See: *Estate of Phillips*

Texas to Eliminate Centralized Release of Prisoners

By September 1, 2010, a long-standing Texas prison tradition will come to an end--the centralized release of prisoners.

The vast majority of Texas prisoners released each year--more than 42,000 in 2008--are processed out through a red-brick walled prison built in 1842 designated the Huntsville Unit that Texas prisoners call “The Walls.” Female prisoners are released through a women’s prison in Gatesville. Texas is the last state in the nation to practice centralized release of prisoners.

The legislation mandating the change is codified at § 493.029, Texas Government Code, and requires that prisoners be released through one of at least six regional release centers or the prison at which the prisoner is incarcerated no later than September 1, 2010. Prison system spokeswoman Michelle Lyons said that the prison system expects to save money by not having to transport prisoners to Huntsville or Gatesville, but is unsure of how much the savings will be. Currently, the prison system operates a fleet of 80 buses and vans that transport over 2,100 prisoners each day for transfers between prisons and to medical

facilities and courts.

“It’s been nuts to take prisoners from 112 units and haul them all the way back to Huntsville from El Paso, then let them out and buy them a bus ticket back to El Paso. This change represents a huge step forward. There’s no reason for that long ride back to Huntsville to continue,” said John Whitmire, Democratic State Senator from Houston and Chair of the Senate Criminal Justice Committee.

Some local politicians are complaining that, when Texas was building a record number of prisons in the 1990s, they were promised that prisoners would not be released into their communities. State officials say they will take that into account when designating the prisons to be used as regional release centers. ■

Source: *Austin American-Statesman*

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News in Brief:

Australia: Ipswich resident Kurt James Milner, a former security guard, pleaded guilty in January 2010 to charges of possessing cartoon pornography. Police recovered 64 images of “cartoon child exploitation material” from Milner’s computer, including X-rated cartoon images of child characters from *The Simpsons*, *The Incredibles* and *The Powerpuff Girls*. As a result of his guilty plea, Milner received a 12-month suspended sentence and must register as a sex offender.

California: In late November 2009, Craig Howard, 47, formerly a state parole agent, was arrested at Sacramento International Airport trying to smuggle drugs onto a plane by flashing his old badge at a security checkpoint. Transportation Security Administration agents observed him attempting to stuff a bag of marijuana in his shoe; they also found methamphetamine in his bag. Howard has been charged with various drug-related offenses and for impersonating a peace officer.

Connecticut: Hartford city police officer Rhashim Campbell was charged with misdemeanor assault and felony fabricating evidence on December 9, 2009. He is accused of beating prisoner Michael Stewart on November 1 after Stewart flooded his cell. Officer Kent Lee also was involved in the beating, but was not charged. Campbell has been suspended without pay; Lee retired from the police force after the incident.

Florida: Michael Combs, a guard at the Orange County Jail, was charged with battery on December 21, 2009. Two female prisoners claimed he touched them inappropriately while awaiting trial in a holding cell. Combs admitted that he touched them on the buttocks, but said his actions were not sexually motivated. He was released on bond following his arrest and has been placed on administrative leave.

Florida: Wayne Kerschner was fired from his job as a guard at the Alachua County Jail on December 31, 2009 for violating a policy prohibiting employees from participating in subversive or terrorist organizations. He admitted to investigators that he was a dues-paying member and officer of the Ku Klux Klan. He defended his membership in the KKK, arguing it is a faith-based organization.

Great Britain: Stephen Gough was arrested for public indecency just seconds after being released from Perth Prison on

December 17, 2009. Gough has gained notoriety and spent a considerable portion of the past seven years behind bars for trying to walk around the country naked. He was repeatedly warned by the court that he would be re-arrested every time he attempted to step out of prison without wearing pants. Gough said that he accepts he may continue to be jailed, but defended his right to remain naked as an expression of individual freedom. He was allowed to represent himself in court while completely nude, but may face additional jail time for contempt of court.

Italy: On January 27, 2010, *United Press International* reported that Italy was nearing completion of a prison unit that will only hold transgender prisoners – a first for that nation’s prison system. The unit, located at the Pozzale correctional facility, will house about 30 transgender prisoners.

Massachusetts: In January 2010, the State Ethics Commission found that Norfolk County jail guard Brian Laumann violated conflict of interest laws when he offered to buy a prisoner’s house in late 2003 or early 2004. He was fined \$6,000 by the Commission. Laumann had agreed to pay off approximately \$200,000 in outstanding mortgages and to give the prisoner’s wife between \$10,000 and \$20,000 in cash. Laumann paid the mortgages but only gave the prisoner’s wife \$5,000. He sold the home a few months later for \$289,000. “Mr. Laumann used his position as a county correction officer, a position with tremendous power and authority over the jail’s inmates, to enter into an inherently coercive private commercial relationship with an inmate,” said Commission Executive Director Karen Nober.

Mexico: On January 20, 2010, 23 prisoners were killed and an unknown number were injured during a riot at a prison in Durango. The riot began when a fight broke out between two drug cartels. The region has been the scene of increasing violence between the rival gangs. Seven prisoners were killed during a riot in March 2009 at the Durango prison, and 20 more died of knife and gunshot wounds in August during a separate incident at the Gomez Palacio prison. As previously reported in *PLN*, Mexico’s prisons are bulging at the seams since the country stepped up its war on drugs, with more than 67,000 drug-related arrests in just

three years. Police aggression and overcrowding have contributed to many of the disturbances, including armed cartel members raiding prisons to free their incarcerated compatriots.

Michigan: On January 14, 2010, state prisoner Leonard P. Riffe, 51, died after stabbing two guards at the St. Louis Correctional Facility. Riffe reportedly stabbed the guards during a fight after a routine search revealed he was carrying a shank. He was taken to a holding cell, where he collapsed and died of a heart attack. The guards were treated at a local hospital and released. Riffe was serving a life sentence.

Missouri: On November 12, 2009, Jeffrey Tedrick, 46, pleaded guilty to various federal offenses for stealing \$22,960 from fellow prisoners. Tedrick, who has never held a license to practice law, told other prisoners that he was a disbarred corporate attorney and offered to provide them with legal services. In one case, he took thousands of dollars from the family of Michael Belfield, a prisoner serving a life sentence for murder, and promised to file appeals on his behalf. No appeals were ever filed and Belfield is now barred from challenging his convictions.

New Mexico: Charles Buccigrossi, 65, a former education director at the New Mexico Women’s Correctional Facility, has been indicted for criminal sexual penetration of a prisoner. On August 10, 2009, the unidentified prisoner was cleaning the director’s office when she claimed Buccigrossi instructed her to have sex with him. He told her she would “stay doing more time” if she refused. DNA supported the prisoner’s accusation. The facility is run by Corrections Corporations of America (CCA). *PLN* has previously reported on sexual abuse of prisoners by CCA staff. [See: *PLN*, Oct. 2009, p.40].

New York: Guards at the Varick Federal Detention Facility broke up a hunger strike by detainees who were protesting immigration policies and practices. According to one detainee, “all hell broke loose” on January 19, 2010, when about 100 prisoners refused to go to the mess hall and handed guards a flier declaring they were on a hunger strike. The detainee, who asked to remain anonymous, said guards used pepper spray and “beat up” prisoners in retaliation. Other detainees were transferred to jails in other states,

thrown in segregation, or threatened with similar treatment if they continued the hunger strike. A spokesman from the Department of Homeland Security denied the allegations, saying guards merely searched the dormitory in question.

Ohio: Cuyahoga Hills Juvenile Correctional Facility guard William Hesson, 39, died of a cardiac rhythm disturbance on April 29, 2009. Hesson was wrestling with prisoner Hubert Morgan, 18, at the time. The guard had Morgan in a headlock when Morgan kned him in the chest, causing the heart attack. Morgan later pleaded guilty to voluntary manslaughter in connection with the incident; he faces a sentence that ranges from probation to ten years in prison. According to a report released in January 2010, prisoners at the facility claimed that horseplay between guards and offenders was commonplace.

Oklahoma: Calista Hullet, 30, an employee at the Cleveland County Detention Center, was arrested on January 5, 2010 for embezzling about \$1,000 from prisoners. She apparently took cash from the prisoners while they were being transferred out of the jail to other facilities. Hullet confessed to the theft when questioned by investigators. She was fired and booked into her former place of employment upon her arrest.

Oklahoma: On December 17, 2009, Oklahoma County Detention Center guard Gavin Douglas Littlejohn was acquitted of federal civil rights charges stemming from his alleged involvement in beating prisoner Christopher Beckman to death in May 2007. *PLN* previously reported on Littlejohn's indictment, as well as the indictment of fellow guard Justin Mark Isch. [See: *PLN*, Dec. 2009, p.33]. Prosecutors later decided that Isch was not at fault for Beckman's death and dropped all charges against him.

Pennsylvania: In January 2010, Kar-eem Haskins was acquitted of aggravated assault after he passed gas in a guard's face at the Monroe County Jail. Haskins was housed in the segregation unit when officers came to search his cell on May 13, 2009. He farted in guard Mathew Knowles' face during a pat search. The incident was caught on a security camera, which showed Knowles forcibly shoving Haskins into a wall in response to the ill-timed flatulence. A scuffle ensued and Haskins struck Knowles in the face with his handcuffed fists. The acquittal sparked criticism from law enforcement officials, who couldn't understand how a

jury could watch the videotape and return a not-guilty verdict. Perhaps the jurors found that Knowles had overreacted to

Haskins' fart and unnecessarily escalated the situation.

Texas: On December 15, 2009, 30-

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In Brief (cont.)

year-old Nathan Jones, formerly a contract guard at the Leidel Comprehensive Sanction Center in Houston, was sentenced to five months in federal prison and five months of home detention for sexual abuse of a prisoner. He admitted that in 2007 he had sex with a female prisoner in his office.

Texas: Texas law enforcement officials are searching for former prison guard Albert James Turner, 44, who is suspected of murdering his wife, Keitha, and his mother-in-law, Betty Jo Frank, on December 27, 2009. The public was advised that Turner may still be wearing his Texas Dept. of Criminal Justice uniform. "He knows what goes on in prison, so who knows what he's going to do," said

Rosenberg police Lt. Colin Davidson. "He probably wouldn't want to go back to the place where he worked." Turner was profiled on America's Most Wanted; he was captured in a North Carolina shopping mall on March 5, 2010.

Virginia: Prisoner George Golder Phillips II, 30, shot one sheriff's deputy in the leg and stabbed another in the face in a holding cell at the Fauquier County courthouse on December 30, 2009, while awaiting trial for bank robbery. Phillips took the gun from one of the deputies but it was not clear what he used to inflict the stab wound. Both deputies survived, though officials refused to release their identities or comment on their condition. Phillips now faces additional charges of attempted murder.

Washington: On January 28, 2010, Special Commitment Center (SCC) su-

perintendent Kelly Cunningham disclosed to the Senate Corrections Committee that eight residents had been caught with child pornography in recent weeks. Seven other residents were found with child porn in September 2009 and are being prosecuted in federal court. The SCC is the state facility responsible for housing civilly committed sex offenders following the completion of their prison sentences. Because the residents are supposedly confined for treatment, they are not considered prisoners and have access to more privileges, including personal computers. Cunningham is asking for legislation to limit residents' computer access. A similar request died in committee during the 2009 legislative session. The SCC has been plagued with contraband-related problems since its inception. [See: *PLN*, Oct. 2009, p.18]. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: 323-822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York

Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700. www.famm.org

Florida Prison Legal Perspectives

A bi-monthly newsletter that includes court rulings, administrative developments and news related to the Florida DOC. \$10 yr prisoners, \$15 yr individuals, \$30 yr professionals. Contact: FPLP, P.O. Box 1069, Marion, NC 28752. www.floriaprisoners.net

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3

for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

Just Detention Int'l (formerly Stop Prisoner Rape)

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Eighth Circuit Rejects Debt Offset of EAJA Fees; Supreme Court to Hear Case

by Mark Wilson

The Eighth Circuit Court of Appeals has held that attorney's fees awarded under the Equal Access to Justice Act (EAJA) may not be withheld to pay debts owed to the federal government.

South Dakota attorney Catherine G. Ratliff successfully represented two claimants in their efforts to obtain Social Security benefits. She was subsequently awarded attorney's fees and costs under 28 U.S.C. § 2412(b) of the EAJA.

The government reduced the fee award to offset debts that the claimants owed the United States. Ratliff challenged the offset, arguing that it violated the Fourth Amendment; the district court rejected the challenge, concluding that Ratliff lacked standing because the fees were awarded to the parties, not their attorney.

The Eighth Circuit reversed based on controlling Circuit precedent "that the attorney's fees ... are awarded to the parties' attorney." Applying *Curtis v. City of*

Des Moines, 995 F.2d 509 (8th Cir. 1990), the appellate court held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt." Therefore, "Ratliff has standing to bring an independent action to collect the fees," and the Court found "that the government's withholding of the fee awards to cover the claimants' debts was in violation of the Fourth Amendment."

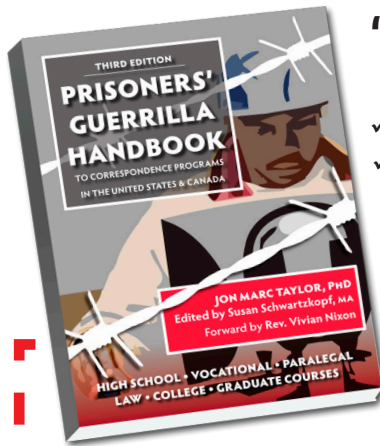
The Eighth Circuit acknowledged that several other courts had reached the opposite conclusion, and suggested that if it was "deciding this case in the first instance, we may well agree with our sister Circuits and be persuaded by a literal interpretation of the EAJA, providing that 'a court may award reasonable fees and expenses of attorneys ... to the prevailing party.' ..."

One judge concurred, agreeing that *Curtis* compelled the majority's conclusion but observing that "*Curtis* is inconsistent

with language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts," all of which indicate that attorney's fees are awarded to the client, not the attorney. See: *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008).

The government filed a certiorari petition with the U.S. Supreme Court, which was granted on September 30, 2009. The issue on appeal is whether an award of fees and other expenses under the EAJA is payable to the prevailing party rather than the prevailing party's attorney, and, therefore, may be used to satisfy that party's pre-existing debt to the United States. Oral argument is scheduled for February 22, 2010; the Supreme Court docket number is 08-1322.

This case is of importance to prisoners as the EAJA controls the recovery of attorney's fees in lawsuits against federal defendants, including employees of the U.S. Bureau of Prisons. ■



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April 2010

Appalling Prison and Jail Food Leaves Prisoners Hungry for Justice

by David M. Reutter, Gary Hunter & Brandon Sample

Prison food. The very words conjure images of unidentifiable mystery meat, chili-mac, watery oatmeal and creamed chipped beef – the latter being commonly, though not very appetizingly, known as “shit on a shingle” in jailhouse parlance.

Before someone goes to prison or jail, what they eat is usually taken for granted. But behind bars, food becomes a serious issue. With the trend towards privatizing prison food services, plus economic pressures on state and local governments, there are growing concerns as to whether prisoners are receiving nutritionally adequate diets.

When confronted with jail or prison

cuisine, prisoners have only three options: eating what is served or buying overpriced food items from the institutional canteen or commissary, assuming they have sufficient funds, or stealing prison food and preparing it themselves. Most prisons and jails use a rotating menu for their meals, with the same foods being served on a regular cycle. Others plan meals according to whatever foodstuffs can be purchased at the lowest price.

Over the past decade, prison and jail officials have been turning to private for-profit companies to cut the cost of feeding prisoners. Leading the way in contracted food services is Philadelphia-based Aramark Correctional Services. Other prison food service firms include A’Viands Food & Services Management, ABL Management, and U.K.-based Compass Group’s Canteen Correctional Services and Trinity Services Group.

portions are minimal in county jails,” said Rev. Kenneth Glasgow, who visits Alabama jails to register prisoners to vote. The practice has also led to legal problems.

Morgan County, Alabama Sheriff Greg Bartlett was jailed by federal authorities on January 8, 2009, after he admitted to pocketing over \$200,000 allocated for meals for prisoners in the county jail. A federal judge found Bartlett had failed to provide the prisoners with “a nutritionally adequate diet.”

Prisoners Johnny Maynor and Anthony Murphree filed suit in the U.S. District Court for the Northern District of Alabama over conditions at the Morgan County Jail. Maynor’s and Murphree’s complaints stemmed from violations of a previous Consent Decree that had been entered by the court on September 25, 2001. Pursuant to the decree, the county had agreed to serve nutritionally adequate meals to prisoners at the jail.

What the district court found was deplorable. For breakfast, prisoners received a serving of unsweetened grits or oatmeal, a slice of bread and half an egg or less. Lunch consisted of either two baloney sandwiches or two sandwiches with a dab of peanut butter, plus a small bag of corn chips. For dinner prisoners were served either chicken livers, meat patties or two hot dogs, either slaw or onions, beans or mixed vegetables, and a slice of bread.

Each meal was accompanied by weak tea or an unsweetened beverage. Milk was not provided, and prisoners received fruit only three or four times during the two-year period considered by the court. Salt, pepper and other condiments had to be purchased from the jail’s commissary.

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Alabama Sheriffs Pocket Meal Payments

The privatization of prison and jail food services began in Alabama. Over 70 years ago, Alabama passed a law that provided county sheriffs with \$1.75 a day per jail prisoner to cover the cost of their meals. While the law went into effect in 1939, it is still in use today. Under that system, Alabama sheriffs are personally responsible for paying for prisoners’ food, but are allowed to keep any excess funds if they can feed prisoners for less than the payments they receive from the state.

Not surprisingly, this creates an incentive for sheriffs to skimp on the quality and quantity of meals served to prisoners. “Most of it is like powdered food and the

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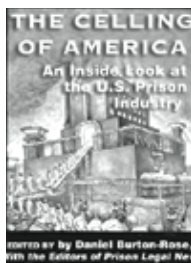
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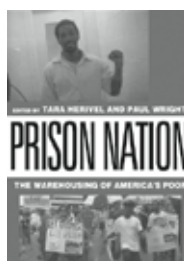
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By Paul Wright & Tara Herivel

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Prison and Jail Food (cont.)

On one occasion, Bartlett and another sheriff paid \$1,000 to split a tractor-trailer load of hot dogs. Bartlett then served the hot dogs "at each meal until they had been depleted," the court emphasized.

The district court further noted that "During the relevant period, Sheriff Bartlett has deposited in excess of \$200,000 into his personal account from the funds allocated to him by the State of Alabama and the federal government for the feeding of inmates."

That was not illegal, because under Alabama's 1939 law, sheriffs are allowed to keep any excess state funds provided to pay for prisoners' food. Fifty-five counties in Alabama operate under this system, but Bartlett took the practice to an extreme level. "I was shocked by the amount of money he pocketed ... all while men and women in the jail go hungry," stated Melanie Velez, with the Southern Center for Human Rights.

On January 7, 2009, the court concluded the sheriff had "contumaciously violated the Consent Decree," specifically finding that Bartlett "makes money by failing to spend the allocated funds for food for the inmates." The sheriff was arrested for contempt and incarcerated at the federal Talladega Correctional Facility. However, he was released the following day after meeting the court's requirement to bring the jail up to the standards required under the Consent Decree. Among other things, Bartlett agreed to fire his nutritionist and to keep state funds in a separate account.

On January 21, 2009, Sheriff Bartlett filed a motion for a new trial or to alter or amend the judgment. The district court found his motion "frivolous," and entered an order stating it was "unhesitatingly DENIED, in all respects." See: *Maynor v. Morgan County*, U.S.D.C. (N.D. Ala.), Case No. 5:01-cv-00851-UWC.

Previously, in 2006, Mobile County, Alabama Sheriff Jack Tillman was charged with various criminal offenses related to illegally pocketing money meant for jail meals. Tillman, who resigned, pleaded guilty to misdemeanor perjury and ethics violations; he also agreed to repay \$13,000 he had shifted from a food fund at the Mobile Metro Jail to his personal retirement account. [See: *PLN*, Aug. 2006, p.34].

A bill is presently pending in the Ala-

bama legislature (HB 407) that would end the practice of letting county sheriffs keep excess state funds allocated to cover the cost of feeding jail prisoners. Although the state pays just \$1.75 *per day* per prisoner, some sheriffs, including Bartlett and Tillman, managed to fatten their wallets on that meager amount.

Aramark Contracts Leave Unpleasant Aftertaste

Aramark provides food and commissary services at over 600 detention facilities nationwide, and according to its website serves over 1,000,000 meals a day. However, not all of those meals are well-received by prisoners – or by the prisons and jails that contract with the company. [See: *PLN*, Dec. 2006, p.10].

In April 2008, over 270 prisoners at Florida's Santa Rosa Correctional Institution became sick after eating chili. Whether a matter of coincidence or a corporate practice to use leftovers to plan meals, in February 2008 up to fifty prisoners at Colorado's Larimer County Detention Center also became sick after eating chili that had not been kept at the correct temperature.

Food services at both prisons were provided by Aramark, which believes its meals are the best thing since sliced bread. "It's a tremendous piece of inmate happiness," said Laurie Stolen, the inmate services director for Larimer County, who didn't indicate whether she ate the food prepared at the facility.

Many prisoners who partake of Aramark meals, however, are not happy. "We used to get two slices of bread, then we got one. We only got half a scoop of vegetables instead of a full scoop," said Angela Sewel, incarcerated at Wisconsin's Taycheedah Correctional Institution, which contracts with Aramark. "They ran out of milk ... the soda was being watered down. They really cut back."

Pennsylvania's Allegheny County Jail contracted with Aramark until August 2007. When interviewed by a news reporter, one prisoner held up an orange slice of cheese and remarked, "I don't think you could melt this with a blast furnace." Other prisoners said things improved after a new contractor, Canteen, took over. "You can melt this cheese," a prisoner said about Canteen's fare.

In Clayton County, Georgia, prisoners went three months without hot food – from October 2009 to January 22, 2010 – after the pressure cookers in the jail's kitchen

Prison and Jail Food (cont.)

went out. Most of the ovens and skillets were inoperable, too. Prisoners received cold pasta, bologna, cereal, sandwiches, fruit and hard-boiled eggs. "This is the fourth day I've had cold noodles," said Clayton County jail prisoner Joquayla Perry, who was five weeks pregnant. "This is what we eat every day, and it's nasty."

"It's still the same amount of portions. It's just cold," said food services manager Ricky Jordan, who presumably didn't go three months without eating hot meals. Under Georgia law, prisoners are to receive at least two hot meals a day. The food service at the jail is provided by Aramark, which is paid \$.82 for each meal served.

Prisoners in Macomb County, Michigan have also been eating cold food. A mold problem shut down the kitchen at the county jail, resulting in prisoners being served a steady diet of bologna and peanut butter sandwiches. On January 28, 2010, county officials allocated \$1.7 million to renovate the jail's kitchen, which is expected to take approximately 10 months. Bag lunches will be provided in the interim – ironically, at a higher cost. The jail's food service is contracted out to Aramark.

The problems at the Clayton County and Macomb County jails appear to be part of a pattern or practice in which Aramark does not provide adequate maintenance for kitchen facilities and

equipment. That pattern extends beyond the correctional context. In January 2009, Aramark agreed to a \$1 million settlement with the Keller school district in Fort Worth, Texas. The school district alleged Aramark was guilty of "gross negligence," and claimed the company did not "implement an effective system to prevent facilities and equipment from deteriorating or failing."

Aramark announced in September 2008 that it was withdrawing from its contract with the Florida Department of Corrections (FDOC), and Florida's prison food services reverted to state control in January 2009. Aramark had been fined over \$241,000 in 2008 alone for contract violations, including insufficient staffing.

"The outsourcing of food service operations has not met its stated objectives," an in-house FDOC audit concluded. The audit found that canceling the Aramark contract "would save the state \$7 million annually, while at the same time feeding more inmates." Although another private company, U.S. Foodservices, Inc., currently provides food for FDOC facilities, meals are being prepared by prisoners under the supervision of state employees. [See: *PLN*, Oct. 2009, p.36].

In at least one case, Aramark is the dissatisfied contract partner. The company filed suit against Community Education Centers (CEC) in U.S. District Court in Pennsylvania on February 18, 2010, claiming it was owed \$7.3 million for providing food services at CEC's privately-operated correctional facilities. According to Aramark, CEC has been in default on its payments since June 2008. CEC officials said the "companies are in negotiations regarding the matter." See: *Aramark v. CEC*, U.S.D.C. (E.D. Penn.), Case No. 2:10-cv-00685-PBT.

Saving Money by Slashing Food Costs

Most prisons and jails already spend as little as possible on meals for prisoners. Regardless, some jurisdictions are targeting food services for further cuts due to the current economic crisis. It almost seems as if there is a competition to see how far food budgets can be slashed.

Thus, prisoners across the U.S. can look forward to losing weight as state and local governments balance their dwindling budgets by cutting back on the amount of food served in prisons and jails, and by providing cold instead of hot meals.

In Tennessee, a bill that would require

only two meals a day for state prisoners was introduced by Senator Doug Jackson, who claimed the legislation was intended as a way to save money and not a form of punishment.

The bill was withdrawn from the State and Local Government Committee on March 3, 2010 after the Tennessee Dept. of Correction (TDOC) expressed concern that the two-meal-a-day plan might not meet prisoners' nutritional needs. In 2009, the TDOC reduced the amount of milk served to prisoners from two servings a day to one as a cost-saving measure. Tennessee prisons already serve only two meals on Saturdays and Sundays.

Georgia's state prison system has pared its prison menu to two meals a day on weekends, too. Lunch on Friday also was recently eliminated. Prison officials claim prisoners are still receiving the required amount of daily calories – 2,800 for men and 2,300 for women.

Prisoners' family members and loved ones, however, have expressed serious concerns about the cutbacks. "I don't know how the guys who don't have someone on the outside helping out handle it," said Barbara Helie, whose son is in Georgia's Valdosta State Prison. "Food has been an ongoing issue for him ... he's hungry a lot."

Georgia officials justified the reduction in food by saying prisoners still get three meals a day on the days that they work. The prison system has altered its work week from five 8-hour days to four 10-hour days. Prisoners still work forty hours a week but receive fewer meals. Even with the change, the state is unsure if money is being saved.

What is sure is that reports of prisoner assaults increased dramatically in the Georgia DOC in 2009. Prison officials said the reduced diet was not the cause of the surge in violence, but offered no alternative explanation. It has been observed that every country is three missed meals away from revolution. This theory may well be tested in American prisons as meals are eliminated outright or curtailed.

"We don't think this [elimination of lunch on Friday] is a good idea," said Sara Totonchi, of the Southern Center for Human Rights. "It destabilizes things inside the prison and that is not good for any of the inmates or staff."

Ohio is also preparing to cut back on meals for prisoners. State officials are considering the possibility of serving brunch instead of breakfast and lunch. It "could

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save us some real dollars when it comes to staffing and food costs,” said Ohio DOC director Terry Collins. He also opined that the change would not upset prisoners so long as food quality was not sacrificed.

Alabama has drastically cut the amount of milk and fresh fruit that prisoners receive. Milk was reduced from seven servings a week to three. Fruit was cut from two times a week to once. The state estimates cost savings of about \$700,000.

Gordon Crews, a professor at West Virginia’s Marshall University, had a different prediction. “A lot of prisoners will see something like that as some kind of retribution against them or some kind of mistreatment,” he said. “It’ll be something that the correctional staff will pay the price for ... another reason [for prisoners] to argue and fight back.” Professor Crews, who authored a book on prison violence, said there is a connection between food-related problems and institutional unrest.

At the Linn County Jail in Oregon, prisoners can no longer expect a hot breakfast. Beginning on March 23, 2009, the county approved cold morning meals for the first time in two decades. The jail expects to save about \$38,000 a year, mostly in food preparation time. Food service at the facility is provided by Aramark.

Breakfast fare will now include peanut butter bars, biscuits, hard-boiled eggs and fruit. “If they don’t like the food, they should stay out of jail,” said Sheriff Tim Mueller. “Then they can have steak and eggs or whatever they want.”

The Cook County Jail in Illinois is cutting food costs, too. Previously, breakfast was served to prisoners in their cells at 4:30 a.m., when most were still asleep. Uneaten food was thrown away and wasted. On March 18, 2010, it was reported that prisoners will be required to leave their cells as a group for breakfast; the reduced number of food trays prepared under the new policy will result in an estimated \$1 million in annual savings.

Prisoners Removed from Jail Due to Inadequate Diet

In September 2009, U.S. Magistrate Judge Todd Campbell ordered the U.S. Marshals to remove a pre-trial detainee from a county jail in Tennessee after determining the facility had failed to provide a nutritionally adequate diet.

While being held at the Robertson County Jail on federal charges, Tellis Williams sent a letter to the district court

complaining about insufficient nutrition, hygiene and medical care. “My ribs are visible, and I am constantly hungry!” he informed the court.

Over the government’s objections, Judge Campbell held a hearing concerning Williams’ allegations, finding that the court “had authority under the Bail Reform Act ... to make decisions regarding the detention or release of individuals awaiting trial and/or imposition or execution of sentence.” He also noted that poor conditions at the jail could affect Williams’ “ability to make a knowing, intelligent and voluntary decision to go to trial or enter a guilty plea,” because “harsh conditions can become a coercive force in the defendant’s decision about whether to accept” a plea agreement.

During five days of hearings in September 2009, Williams and other prisoners testified they were not fed enough and were “perpetually hungry.” Tellis weighed 149 lbs. at the time of the court hearing; he claimed he had lost 16 pounds. Prisoner Jonathan Stone said he lost approximately 100 pounds over 19 months. “No man should be treated like this or fed like this nowhere in America,” he complained.

Jail detainee Phillip Santiago testified that his weight dropped 28 pounds in nine months due to inadequate meals at the jail. “My son is 5 and he gets fed more than I do,” he stated. Another prisoner, William Trotter, said he had lost 30 pounds, observing “I can finish my oatmeal and grits in five spoons.”

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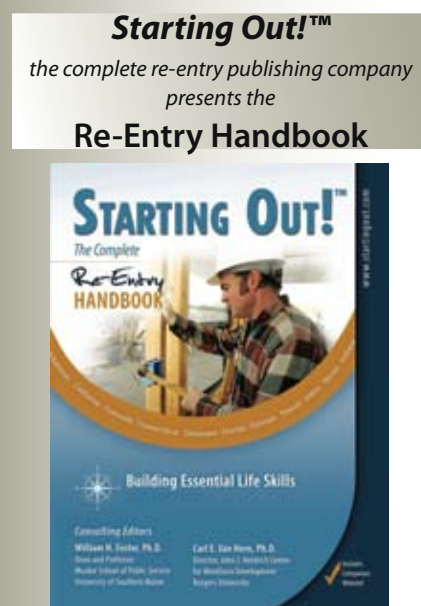
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Government officials attempted to defend the jail’s dietary practices, using witness testimony and arguing that the facility’s menu provided at least 2,700 calories a day. However, the menu was not regularly followed, the district court concluded.

The government also contended that any weight loss suffered by the prisoners was “healthy.” But Judge Campbell said he was “not persuaded that a mandatory weight reduction plan for overweight inmates is a legitimate penological objective for the jail.”

Finally, the government argued that



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Prison and Jail Food (cont.)

Williams' complaints were unfounded because the jail had been certified by the Tennessee Corrections Institute (TCI). The TCI representative who testified at the hearing, though, said he had not looked at the quantity of food served to prisoners, and admitted the TCI did not have the manpower to monitor jails that closely.

Based largely on evidence that prisoners were losing weight, Judge Campbell ordered Williams moved to another facility "to ensure that he does not experience any further weight loss." Judge Campbell declined to address Williams' other complaints in light of his order that Williams be transferred. See: *United States v. Williams*, U.S.D.C. (M.D. Tenn.), Case No. 3:09-cr-00090.

In addition to Williams, several other federal pre-trial detainees were removed from the Robertson County Jail due to dietary problems. "The food is not enough. I'm always hungry all the time," said prisoner Reza Koushkbaghi, who lost 10 pounds in two months at the jail. He was later released on bond, while three other federal detainees were transferred to a different facility on December 10, 2009.

"Jail is not supposed to be a hotel, that's true," stated criminal defense attorney G. Kerry Haymaker. "That being said, [some of] these people haven't been convicted of anything and these are the conditions they've been subjected to."

The food service at the Robertson County Jail is provided by ABL Management, a Louisiana-based company that is paid \$1.13 to \$1.24 per meal per prisoner. An ABL dietician, Babette Lanius, who was not licensed to practice in Tennessee, testified at a hearing before Judge Campbell that meals at the jail provided adequate nutrition.

However, Jane Green, a clinical dietitian at the Vanderbilt University Medical Center, disagreed. "The [calorie] numbers ... they just don't quite make sense," she said. "[T]here are discrepancies in nutritional values."

ABL also provides food services at the Criminal Justice Center in Nashville, Tennessee, where the company has been the target of complaints and at least two lawsuits filed by prisoners at that facility.

As for Williams, he will likely find that the food is better in Bureau of Prisons facilities compared to what he received at the Robertson County Jail. On December

7, 2009, he was sentenced to 168 months in federal prison after pleading guilty to a charge of armed bank robbery.

Food Contracts, Poor Food Lead to Corruption

In September 2008, the president of Dallas, Texas-based Mid-America Services, Inc. pleaded guilty in a criminal prosecution that accused him of bribing former Potter County Sheriff Michael C. Shumate. Mid-America was fined \$100,000, while the company's president, Robert W. Austin, Jr., was sentenced to two years probation, a \$4,000 fine and 80 hours of community service. Shumate was convicted of engaging in organized criminal activity in June 2008 and removed from office. He was sentenced to 180 days in jail, a \$5,000 fine and eight years on probation.

The criminal charges were filed following a two-year FBI investigation. Mid-America provided food services for several Texas jails, including Potter, Lubbock and Tarrant Counties, and company officials were accused of paying bribes to obtain food service contracts.

According to the Texas Attorney General's office, "Evidence obtained by the FBI indicated that Shumate and Austin were engaged in an illegal scheme to ensure Mid-America was awarded and retained the county's jail food service and commissary contracts." The bribes provided to Shumate included "cash and checks, out-of-state trips, laptop computers, meals, clothing and other items of value."

Even after the guilty pleas, Potter County continued to contract with Mid-America for jail food services. "This conviction doesn't have to do with the provision of food, per se," said Assistant County Attorney Dave Kemp. "I kind of doubt there is a way to get rid of the contract." That wasn't the case in Lubbock County, which found its association with Mid-America distasteful and canceled its jail food contract with the company on September 22, 2008.

Sometimes the food in prisons and jails is so bad that prisoners will go to extreme – and expensive – lengths to obtain something decent to eat. In February 2006, Wayne County, Michigan jail guard Dorian J. Merriewether pleaded guilty to accepting \$1,200 in bribes to smuggle food and beverages to a prisoner at the jail. He also smuggled food, a cell phone and tennis shoes to another prisoner in exchange for several hundred dollars and a \$4,000 plasma TV. The contraband food items

included three corned beef sandwiches, two bottles of cognac and a pound of shrimp.

However, the district court found that Merriewether's conduct did not violate federal law under the Hobbs Act, and declined to accept his plea bargain. The charges were later dismissed. See: *United States v. Merriewether*, U.S.D.C. (E.D. Mich.), Case No. 2:06-cr-20001.

Merriewether was indicted again in April 2007, on eight counts of smuggling cocaine and marijuana into the jail. Those charges stuck; he pleaded guilty and was sentenced to 30 months probation and a \$2,500 fine on November 15, 2007.

Another Wayne County jail employee, Michelle Wilson, had accepted \$400 for helping Merriewether smuggle food to prisoners. She pleaded guilty and was sentenced to two years probation and 50 hours of community service.

As extensively reported in *PLN*, the largest prison food-related fiasco that led to criminal prosecutions was the VitaPro scandal in the Texas Dept. of Criminal Justice (TDCJ) in the mid-1990s. An investigation into the TDCJ's \$33.7 million contract to purchase tons of VitaPro, a powdery soy-based food supplement produced by a Canadian company run by an ex-prisoner, resulted in the 1998 indictment of former TDCJ director James A. "Andy" Collins. Collins, who was accused of receiving \$20,000 in consulting fees from VitaPro Foods, was convicted in August 2001 on federal bribery charges, as was VitaPro president Yank Barry. However, their convictions were reversed by the district court in 2005, and they were acquitted in a 2008 retrial.

The Texas Supreme Court had invalidated the TDCJ's VitaPro contract in 1999, but not before Texas state prisoners had been served the largely inedible food product for years, complaining that it caused diarrhea, skin rashes and other health ailments. [See: *PLN*, May 1996, p.8; Aug. 1996, p.18; July 1998, p.12; July 2000, p.13; July 2006, p.34; Sept. 2008, p.27].

It's Not All Bad News and Bad Food

Food is finding a different niche in Boston's Suffolk County House of Correction for Women, where a three-year \$950,000 grant has been used to teach women prisoners how to prepare and eat healthier meals.

The women learn about different types of fats, carbohydrates and proteins. They fill out worksheets and study nutrition labels. "The core objective of our program

is instilling a sense of empowerment and to build their sense of self-esteem,” said program director Christina Ruccio.

Almost all of the students pointed out that the nutritional diets they were learning about were not available at the Suffolk County jail. Much of what the prisoners study “will be more applicable when you get out,” instructor Abby Dunn told her students, who also learn about stress-reduction, exercise and other health-related topics.

On February 26, 2010, a U.S. District Court in Ohio ordered the state’s juvenile detention system to change its practice of withholding food from prisoners. The meal refusal policy at juvenile facilities had been changed in August 2009 to discontinue the practice of delivering food to offenders who didn’t go to the cafeteria for meals.

Some prisoners stayed in their cells during meal times because they feared being physically or sexually assaulted by other prisoners. “These youths were allegedly required to remain on their unit when the rest of the youth on their unit went to eat; and as a result there were youths that were not receiving food and not eating,” the court found.

Over a six-month period from September 2009 through February 2010, prisoners at Ohio juvenile facilities were denied more than 2,200 meals after they refused to go to the cafeteria. The district court held the new meal refusal policy didn’t take into account the juveniles’ health and safety, and ordered that prisoners who did not report for meals still must be fed.

A spokesperson for the Ohio Department of Youth Services said the agency “... has not and does not withhold food for punishment, and youth have not missed more than two consecutive meals pursuant to the protocol, and DYS’ meal protocol has in no way compromised the health or safety of any youth.” Officials said most of the meal refusals were by prisoners who wanted to sleep in at breakfast time.

The juvenile offenders were represented by civil rights attorney Al Gerhardstein, who is counsel in a class-action lawsuit concerning conditions in Ohio juvenile facilities. See: *S.H. v. Stickrath*, U.S.D.C. (S.D. Ohio), Case No. 2:04-cv-01206-ALM-TPK.

Many prisoners wish they had the privileges afforded to detainees at the jail in Bexar County, Texas. Beginning in March 2010, jail prisoners will be allowed to order meals from outside the facility

through Aramark’s ICare program. In exchange, ICare will give the county almost a third of its income. “It’s a privilege that we provide the inmates provided that they follow all the rules,” stated Sheriff Armado Ortiz.

But it’s an expensive privilege – a cheeseburger and fries will cost about \$9.00. The jail will only allow prisoners to order outside food a few times a week, and like other privileges the program can be withdrawn due to misconduct.

“I know there’s going to be some resentment from the general public,” said Ortiz. “They say inmates should not be given such privileges, but we need to keep in mind that the majority of the people in this jail are waiting to go to court; they haven’t been convicted of any crime.”

That sentiment is routinely ignored by most corrections officials and politicians, who believe if prisoners don’t like the food they shouldn’t break the law. However, this get-tough mindset disregards a few relevant factors; for example, why should pre-trial detainees be subjected to substandard, cold or paltry meals when they haven’t been convicted and are (in theory) presumed innocent?

Additionally, prisoners have few op-

tions other than eating the food they are served; thus, prisons and jails are responsible for providing sufficient, nutritious diets. Food is a basic necessity and failure to provide adequate meals can lead to health-related problems or even violence by hungry and frustrated prisoners.

In many cases, though, providing decent prison and jail food is an unappetizing prospect for government officials, who are increasingly cutting costs at the expense of prisoners’ waistlines. Which is an unhealthy practice that is hard to stomach. ■

Note: Also see two separate food-related articles in this issue of *PLN*, “Illinois Prisoners Sue over Soy-Based Food” and “Food Problems Contribute to Riot at Kentucky Prison.”

Sources: *St. Petersburg Times*, *Palm Beach Post*, *Oakland Tribune*, *The Coloradoan*, *Associated Press*, *Post-Gazette*, *JSOnline*, *Commercial Appeal*, *Boston Globe*, www.timesnews.net, www.philly.com, *Atlanta Journal-Constitution*, *Detroit News*, *Toledo Blade*, www2.nbc4i.com, www.kens5.com, <http://thebrandeishoot.com>, *Dallas Morning News*, *Dothan Eagle*, *CNN*, *Tennessean*, www.wsmv.com

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From the Editor

by Paul Wright

This is the first issue of *PLN* published from our new office location in Vermont. On March 16 a shipping truck arrived in Brattleboro with the bulk of our office on it. Thanks to volunteers Samuel Schwartzkopf, Sam Phillips, Zach Phillips, Dan and Elizabeth and Sascha Bratton we were able to unload the entire truck in one day. As of this writing we are still in the process of unpacking and organizing the Brattleboro office so that all book and other sales will be shipped from here effective April 1. We have continued to process orders from a very downsized Seattle office during this transition. I would like to thank Christine, Danielle and Sam for the great jobs they did working for *PLN* and assisting in this transition and move.

After April 1 all mail sent to our Seattle address will be forwarded to Vermont. To avoid any delays please write to us directly in Vermont. The subscription insert cards in each issue will continue to use the Seattle address until they run out and we print new ones but readers should send them to the Vermont address listed in each issue of *Prison Legal News* for faster service.

For readers who are passing through Brattleboro, feel free to stop by our office and say hello.

Next month marks *PLN*'s 20th anniversary issue. It will be a special issue that will outline *PLN*'s history over the past twenty years. Feel free to send a donation to mark the event. As many readers probably know, most publications never publish ten issues. You are currently read-

ing the 243rd consecutive issue of *PLN*. This is an impressive accomplishment not just for the prison media in particular but for the media in general with the demise of so many publications within the past few years. It is thanks to the support of our readers that we have lasted this long.

One of our goals for the coming year is to increase our subscriber base above the current 7,000 subscribers. If you are in prison and other prisoners borrow your copy of *PLN* to read, encourage them to subscribe. Encourage your facility library to subscribe as well. And please consider gift subscriptions to *PLN* as well. Remember that *PLN*'s website at www.prisonlegalnews.org has all back issues of *PLN* on it as well as thousands of pleadings, briefs, publications and tens of thousands of articles and court cases dealing with prisons and jails. We are the number one ranked website for prison and jail news content. Books and subscriptions can also be purchased online as well.

We continue to have censorship problems in different parts of the country. The Florida and Virginia DOC's have subjected *PLN* to a blanket ban. Other states have censored books shipped by *PLN* claiming they violate prison or jail rules. If any copies of *PLN* or books ordered from *PLN* are censored, please notify us and send us the documentation you receive and file a grievance or appeal to the censorship. Most of the time *PLN* is not notified of the censorship and unless readers inform us we cannot take action to assert our rights to ensure delivery. We currently have litigation pending against the states of Virginia and Texas on censorship issues and we are attempting to resolve censorship issues in other states as well. Note that our last two issues have been late mailing due to a problem with our database; we hope to be back on our normal schedule shortly.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Washington Jail a Modern-Day Debtor's Prison

by Gary Hunter

In Washington state's Spokane County, some people are serving more jail time for failing to pay court costs than they served under their original sentence.

Michael Lafferty was sentenced to less than 90 days for a third-degree assault conviction. Court costs and restitution assessed by the Superior Court totaled \$2,207; an additional 12 percent interest began to accrue on the costs the moment he was sentenced. Lafferty has long since completed his jail term. But because he didn't pay the court fees he was jailed an additional 75 days. The way the law is being applied, Lafferty could literally be indebted to and imprisoned by the county for the rest of his life.

"From the outside looking in, it's a modern-day debtor's prison," said John Rodgers, a Spokane County Public Defender.

According to a state study published in early 2009, the practice of incarcerating citizens who have defaulted on court costs is counterproductive in terms of reducing

recidivism. Even people like Lafferty, with only a single conviction on their record, can become "ensnared in the criminal justice system long after they've completed their original sentences," the study stated.

A quick calculation indicates that at 12 percent interest, Lafferty could be in debt for almost six years even if he pays the court \$50 per month. The fact that he lives on a \$674-per-month disability check means he will likely never pay off his debt.

Many of the people incarcerated for delinquent court costs are on Social Security or other fixed incomes or forms of public assistance.

"This is what keeps me awake," said public defender April Pearce. "Locking these people up when they make about \$300 per month. It bothers me because it doesn't punish crime. It punishes people because they are poor. It's like nobody can ever get from underneath the system even if they tried."

Pearce tracked her clients who were incarcerated for indebtedness. She calcu-

CORRECTION

The article titled "Defendants Denied Qualified Immunity in Tennessee Jail Detainee's Death," on page 48 of the March 2010 issue of *PLN*, contained an error in the last paragraph. The last paragraph should read as follows: "Upon remand, and in compliance with the appellate ruling, the district court dismissed all claims against defendants Yager, Haggard, Wright and Rose on grounds of qualified immunity. This case settled in February 2010, under confidential terms because it involved minor children. See: *Estate of Phillips v. Roane County, U.S.D.C. (E.D. Tenn.)*, Case No. 3:00-cv-00692."

lated that over a one-year period, Spokane County spent \$3 million keeping them in jail. That total did not include booking fees, medical or other miscellaneous expenses.

The additional 75 days that Lafferty spent behind bars cost Spokane County over \$6,000; instead of alleviating his indebtedness, his bill has reached nearly \$3,000.

County clerk officials said they were flexible when it comes to collecting court costs, and charge as little as \$5.00 per month. However, a records search and numerous interviews did not reveal a single person with a \$5.00 monthly payment. One woman, who requested anonymity, has a monthly income of \$400 but is required to pay \$50 a month on her court costs.

Judge Maryann C. Moreno presides over the Superior Court for Spokane County. She acknowledged that many of the people who come before her are poor, but insisted they must be held accountable. Apparently she meant accountable for their court debts and not their crimes, since the people in question have already served their time.

Robert Stanley was participating in drug therapy sessions at the Union Gospel Mission when he was arrested and sent to jail for failing to pay his court costs. Jason Wagner had served his sentence and moved to Texas. When he returned to Spokane to take custody of his son, the county locked him up for unpaid court debts.

"I thought I was done paying," said Wagner. "This messed up trust with my

family, they think I committed another crime." Even when he attempted to pay it wasn't enough. Wagner tried to give the county collections officer his last \$240 but she turned it down, opting to leave him in jail.

"Spokane County makes it so undoable," said Breanne Beggs, executive director of the Center for Justice. "Poverty should not be the top priority in terms of putting people in jail. It's a diversion of our resources."

As it stands, Spokane County's jail is filled to overflowing, and county officials are asking voters to approve an increase in property taxes so they can build a new facility. If approved, the jail would cost \$245 million to construct and \$8 million annually to operate.

Even hardliners are skeptical of the county's approach to assessing and collecting court costs. "I've always thought the interest was too high," said Gary Berg, chief deputy of the Spokane County clerk's office. But he pointed out that his hands are tied. "[T]he changes have to be legislative," he observed.

David Bennett, who was hired to evaluate Spokane County's criminal justice system, noted there were problems. "We want some accountability, but we have to make it attainable," he said. "The role of the jail when it comes to punishing people who can't pay has to be re-evaluated."

Nationally, 80 percent of defendants charged with a felony are indigent. Not only is Washington one of only a few states that incarcerate citizens for failing to pay court costs, it is also one of the few states to charge interest on those costs.

"[W]e absolutely don't have people sitting in jail because they owe court fines," said Walt Beglau, prosecutor for Marion County in Salem, Oregon, in contrast to the situation in Spokane.

Some have suggested that Spokane County use a collection agency instead of allowing court clerks to send debtors to jail. Kootenai County, Idaho began using a collection agency in 2002, and according to County Clerk Dan English "it has been quite effective."

Under the original system, clerks in Kootenai County averaged \$3,900 a week in collections. Now that they are using a collection agency, the recovery rate has increased to \$8,000 a week.

"It reduced a lot of failure to pay," said English. "With jail space at a premium, and the cost to jail them, it seemed like a better option."

"We are still evaluating collections as an option," stated Spokane County Clerk Tom Fallquist, who noted that interest rates for collection agencies can exceed the 12 percent levied by the court. Regardless, "[n]o collections agencies have the power to put people in jail [but] the clerk's office does," said Beggs of the Center for Justice.

Beglau agreed. "Governments can't afford to continue to build jails. The more alternatives you can find, the better off you going to be." Unless, of course, the goal is to collect as much money in court costs as possible, without regard to the fiscal and societal costs of incarcerating people in order to do so. ■

Source: *The Spokesman-Review*

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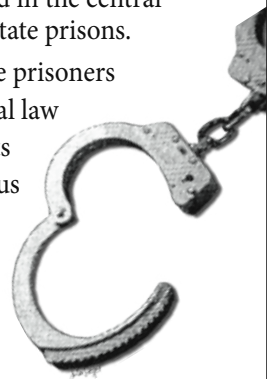
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Food Problems Contribute to Riot at Kentucky Prison

by David M. Reutter

A major riot at Kentucky's Northpoint Training Center on August 21, 2009 resulted in 16 injuries and the destruction of several buildings critical to the prison's operation. The riot was the second serious incident at the facility in as many years, and both involved food-related issues. [See: *PLN*, Oct. 2009, p.40].

The disturbance occurred the same day that prison officials had started releasing prisoners following a three-day lockdown. After 10 to 15 Hispanic prisoners assaulted black and white prisoners on August 18, the facility was placed on lockdown during an investigation to determine who had participated in the attack.

The prison began a "controlled movement" schedule on the evening of August 21, 2009, allowing prisoners to enter the recreation yard on a dorm-by-dorm basis. Soon afterwards the prisoners began rioting and setting fires.

It took guards about two hours to regain control of the medium-security 1,200-bed facility. Eight guards and eight prisoners received minor injuries; four of the prisoners were hospitalized. Kentucky Justice and Public Safety Cabinet Secretary J. Michael Brown said the lack of serious injuries "was as close to a miracle as you can get."

Six buildings were extensively damaged. The kitchen, canteen, medical center, visitation area and two dormitories were set ablaze. Prison officials transferred around 700 prisoners to other facilities across the state; the remaining prisoners were housed in a 196-man dorm, the gym and the chapel.

The damaged buildings were a total loss, and prison officials plan to raze and rebuild them at an estimated cost of \$10.8 million. "We will have to start from scratch," said Brown.

In October 2007, 60 to 70 prisoners at Northpoint staged a peaceful sit-in on the rec yard to complain about the prison's food and commissary prices. An accreditation team that visited the facility a year later noted that a "common theme of the complaints was about the quality of food service and the canteen prices." Prisoners and their family members who contacted Lexington's *Herald-Leader* said food-related issues continued to be a source of unrest and were a factor in the August 2009 riot.

Prison officials defended their private food contractor. At Northpoint, "there are nutritional standards and calorie levels that must be met, and there is a certified dietician who reviews the menus, so inmates are being offered nutritionally balanced meals," said Justice Cabinet spokesperson Jennifer Brislin.

Regular *PLN* readers will recall that Northpoint's food service provider, Aramark, is known for skimping on ingredients and providing unpalatable meals, and has had food cleanliness issues. Aramark provides meals for Kentucky's prison system for \$2.63 per prisoner per diem. The state saves about \$5.4 million a year by contracting with the company; some of the savings were used to give pay raises to prison employees.

Under increased scrutiny following the August 2009 riot, Aramark's \$11.8 million annual contract with the Kentucky DOC is now on shaky grounds. State Rep. Brent Yonts has filed a bill that would cancel the contract and prohibit privatized prison food services (HB 33). [See: *PLN*, Oct. 2009, p.36].

Rep. Yonts said he had received numerous complaints about prison food quality, shortages and even "crawling creatures in the food" over the past year. He noted that some prisoners claimed they found hair balls, rocks, cardboard, worms and even human feces in their meals. Guards who responded to questionnaires distributed by Yonts said food-related issues had caused "control" problems with the prison population.

"There's no reason for people to be treated inhumanely," Rep. Yonts stated. "I don't think the system is recognizing the problem with Aramark. I'm hoping the administration will ... cancel the contract."

Kentucky prison officials, however, maintained that food was not the primary reason for the riot, claiming it was due to the lockdown and tighter restrictions on yard movement at Northpoint. However, upon being questioned by lawmakers, Corrections Commissioner LaDonna Thompson admitted that prisoners "do not like the food" served by Aramark. Prison guard Matt Hughes, who testified at a legislative hearing, was more direct. "The food was slop," he said.

A summary of an investigative report

by the Kentucky DOC was provided to lawmakers on November 20, 2009. Legislators were not initially informed that they hadn't received the full report, and it took two weeks of requests and the threat of a subpoena to obtain the original unedited version.

The summary initially provided by prison officials emphasized that anger over the lockdown and yard restrictions at Northpoint had resulted in the riot. The role of food was downplayed. But the original unedited report indicated that almost every prison employee and prisoner who was interviewed cited complaints about food quality and canteen prices as contributing factors to the disturbance.

On the day of the riot, some prisoners reportedly dumped food trays on the floor in the dining hall during the morning and lunchtime meals. "Apparently, there had been complaints for years about the quality of the food, the portion sizes and the continual shortage and substitutions for scheduled menu items," the report stated, noting that "sanitation of the kitchen was also a source of complaints."

"Systematic failure of management over time to deal with the food situation resulted in the riot, which was foreseeable and predictable," Rep. Yonts said at a Jan. 27, 2010 hearing before the House Judiciary Committee, which voted in favor of HB 33. The following day, the State Auditor's office announced it would be conducting an audit of Aramark's performance under the prison food service contract.

Governor Steve Beshear said he wasn't pleased with the legislature's "continued fixation with the menus for convicted criminals," stating, "We have more than 10 percent unemployment and Kentucky families are struggling to put food on the table, and I am loath to consider millions more dollars for criminals who wish they could go to Wendy's instead."

Lawmakers were not dissuaded. "The truth is we had a riot over there that's going to cost the taxpayers of Kentucky probably upwards of \$10 million, and we need to find out what the hell happened," House Speaker Greg Stumbo said in response. Rep. Yonts agreed, stating bluntly, "The root problem was the issue of food."

Yonts cited a May 2008 Lyon County grand jury report, based on a visit to the Kentucky State Penitentiary and Western

Kentucky Correctional Complex. "We were distressed and concerned about the food services being operated by private industry," the grand jurors wrote. "Those of us who had eaten at the center prior to privatization were greatly disturbed at the

difference in the quality of the food. We, in the strongest terms, urge Corrections to return to the previous system and utilize more inmate labor in the cooking and preparation of the food."

Rep. Yonts' legislation and the state

audit of Aramark's food service contract with the Kentucky DOC both remain pending. ■

Sources: *Herald-Leader*, *Associated Press*, *Courier-Journal*, www.newstimes.com

Swine Flu Scare Leads to Unrest at Overcrowded Massachusetts Jail

by Matt Clarke

On July 5, 2009, prisoners at the Middlesex County Jail in Cambridge, Massachusetts staged a disturbance after 11 prisoners and 2 guards presented flu-like symptoms and the hospital discharge papers for one prisoner indicated probable H1N1 (swine flu). [See: *PLN*, Feb. 2010, p.1]. However, the Sheriff, jail officials and prisoner advocates said the root cause of the riot was overcrowding.

The 38-year-old jail occupies the 17th through 20th floors of the 22-story Edward J. Sullivan Courthouse, which is vacant except for the jail and the Sheriff's Department. The facility was built to hold 160 prisoners, but the population routinely exceeds 400. The chapel, indoor gym, visitation room and some hallways have been converted to sleeping areas. On the day of the disturbance, the population stood at 403.

"The fact of the matter is the jails are brutally overcrowded in Middlesex County," said Boston attorney David W. White, Jr., chair of the state bar association task force that released an April 2008 report on overcrowding. The report also noted that jail populations in Bristol, Essex and Suffolk Counties were well above their capacities.

According to the report, statewide jail populations increased 522% between 1980 and 2008 while Massachusetts' prison system experienced a 368% population increase, resulting in overcrowded state fa-

cilities. The total number of prisoners in the state's jails and prisons exceeds 25,000.

The seeds of the July 5, 2009 disturbance were sown when a prisoner exhibiting flu symptoms was taken to Massachusetts General Hospital on June 30. After he was treated, the prisoner was given discharge papers indicating a probable H1N1 infection. Upon being returned to the jail he was quarantined and treated with Tamiflu.

On July 4, ten other prisoners were quarantined with flu-like symptoms and treated with Tamiflu. Two guards also presented similar symptoms. None of the other cases was confirmed as swine flu.

The next day, nine prisoners who were concerned about rumors of a swine flu outbreak began "throwing paper and trash." Some broke sprinkler heads and pipes using a wooden bench, which caused extensive flooding. The power had to be cut off for a day and 193 prisoners were temporarily evacuated to jails in Essex, Norfolk, Plymouth and Suffolk Counties and the Middlesex House of Correction.

About 1,000

doses of Tamiflu were provided to jail officials in the wake of the disturbance, and by July 10, 2009 no prisoners or guards had flu-like symptoms. Four prisoners face malicious destruction of property charges as a result of the uprising.

The flooding caused damaged ceiling tiles and disabled elevators, and the cost of repairs was estimated at \$400,000 or more. The Edward J. Sullivan Courthouse had been undergoing renovations at the time, including asbestos removal, which had proved to be excessively expensive. There are now plans to remove all of the remaining prisoners and relocate the jail. ■

Sources: *Boston Globe*, www.corspecops.com, www.wickedlocal.com, www.cctv-cambridge.org

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Illinois Prisoners Sue over Soy-Based Food

by Brandon Sample

Prisoners at the Danville Correctional Center in Illinois have sued the Illinois Department of Corrections (IDOC) in federal court over the predominantly soy-based diet they are served.

According to the Weston A. Price Foundation, which promotes the consumption of whole, traditional and largely unprocessed foods, Illinois prisoners are being served “up to 100 grams” of soy protein a day. The USDA recommends no more than 25 grams of soy protein consumption daily.

“Beginning in January 2003, inmates began receiving a diet largely based on processed soy protein with very little meat. In most meals, small amounts of meat or meat by-products are mixed with 60-70 percent soy protein; fake soy cheese has replaced real cheese; and soy flour or soy protein is now added to most prison baked goods,” the foundation stated.

“Never before have we had a large population like this being served such a high level of soy with almost no other choice,” said Price Foundation President Sally Fallon Morell. She compared the soy-heavy diet in Illinois prisons to “torture,” and said it was “the Tuskegee of the 21st century,” likening it to the infamous government syphilis experiments performed on African Americans from the 1930s to the 1970s.

The nine plaintiffs in the lawsuit claim the IDOC is endangering their health—especially prisoners who have allergies, sensitivities and existing gastrointestinal and thyroid problems—by serving them too much soy. They are seeking monetary damages and an injunction against soy-based food products. Although the suit was not filed as a class-action, the district court has received numerous letters from other prisoners attempting to join the case as plaintiffs.

The IDOC began using soy-rich foods as a way to save money. According to prison menus, prisoners are being fed as many as seven soy-enhanced “meat” entrees a week. Some of those entrees include soy-based chili mac, turkey patties, hot dogs, chicken patties, sloppy joes and polish sausages.

Critics contend that too much soy can adversely affect thyroid function, increase the risk of breast cancer, affect heart health, decrease sperm count and cause flatulence.

Gas is the number one complaint among people who consume soy.

The IDOC obtains most of its soy-based foods from Archer Daniels Midland (ADM) through contracts with Central Management Services. ADM would not disclose how much soy it provides to the state’s prison system, citing the pending lawsuit.

The Price Foundation has claimed that ADM “contributed heavily to the campaign of [former Illinois governor Rod] Blagojevich. The change from a [prison] diet based largely on beef to one based on soy happened in 2003, when Mr. Blagojevich began his first term as governor.” ADM was also a member of the Illinois Food Systems Policy Council, which was created by legislation signed by Blagojevich in June 2005. Further, aside from regular soy, the Price Foundation alleges prisoners are being served genetically modified soy. Developed by Monsanto, genetically modified soy has up to 27 percent more trypsin inhibitors than regular soy according to Jeffrey Smith, author of *Seeds of Deception*, a book that criticizes genetically

modified foods. Trypsin inhibitors reduce the availability of trypsin, an enzyme essential to nutrition.

The Price Foundation has called for a return to a time when “many prisoners grew their own food, raised their beef, their chickens [and] their vegetables.” The foundation is funding the prisoner’s lawsuit, which has been consolidated with two other related cases.

On November 20, 2009, the district court dismissed several of the defendants from the suit, including the State of Illinois, the IDOC and Central Management Services. The IDOC’s director, Michael Randle, was substituted for those defendants in his official capacity. The plaintiffs’ motion for a temporary restraining order, based on claims of retaliation, was denied on January 26, 2010; the court noted in its ruling that several of the co-plaintiffs apparently had not exhausted the grievance process. The suit is ongoing. See: *Harris v. Brown*, U.S.D.C. (C.D. Ill.), Case No. 3:07-cv-03225-HAB-CHE. ■

Sources: *Chicago Tribune*, *Associated Press*, www.wnd.com

Oklahoma Courts Collecting Fines, Costs at Expense of Justice

Oklahoma judges are pushing for larger fines imposed on criminal defendants to compensate for a shortfall in courthouse budgets.

The downturn in the economy has affected almost everyone, and the courts are no exception. Judges in Oklahoma have seen a 7 percent decrease in state funding for court operations. To deal with that shortfall, they are being encouraged to increase financial penalties and not forgive court costs. Further, offenders who receive probation are being required to pay larger fines.

The push to increase fines and ensure collection of court costs is being spearheaded by the Oklahoma Supreme Court. During workshops sponsored by the Supreme Court, judges have been encouraged to get “defendants to pay their fines, fees, and costs by credit card,” and to reject plea agreements that include low fines.

“I would suggest to you that a plea

bargain that does not take into consideration the court which must accept it, ratify it and enforce it is one that should be looked at askance,” Chief Justice James E. Edmondson told judges in a pre-recorded video during the workshops.

Even crime victims are being put at the back of the line. During one workshop, judges were told they should reject plea bargains where payments to the victims fund exceed the fine paid to the state.

Oklahoma County Public Defender Bob Ravitz, along with other criminal defense attorneys, said the push to impose larger fines and other financial burdens on defendants interfered with rehabilitative efforts. “The full scope of these is just too much,” Ravitz remarked.

Apparently, though, someone must pay to keep the wheels of justice turning in Oklahoma, and the courts have decided who that will be. ■

Source: www.newsok.com

Parole Denials Based Upon Assumptions; Tough Policies Threaten Public Safety at Great Cost

by David M. Reutter

“Inaccurate assumptions about the impact of longer prison stays on reoffense rates generally, and about the future behavior of people who committed assaultive and sex offenses in particular, have led us to routinely continue the incarceration of thousands of parole-eligible prisoners who would not have returned to prison in any event,” concludes an August 2009 report by the Citizens Alliance on Prisons and Public Spending. “The cost to those families and tax payers is enormous.”

The report, *Denying Parole at First Eligibility: How Much Public Safety Does it Actually Buy?*, examined 76,721 cases of Michigan prisoners sentenced to indeterminate terms after 1981 and released for the first time from 1986 through 1999. While the report is fact-specific to Michigan prisoners, its findings and conclusions should have widespread applicability, for human nature, after all, is universal.

The purpose of the report was to answer two important questions: (1) Does continuing to incarcerate people who have served their minimum sentence actually improve public safety and, if so, to what extent and to what cost? (2) Specifically, does denying parole at the minimum only to release a person a year or two thereafter have a substantial impact on re-offense rates?

The average length of stay for a Michigan prisoner is 16 months longer than other Great Lake states, and higher than the national average. That average comes due to longer sentences for assaultive and sex offenders. Yet, Michigan's prison commitment rate is below national

averages because it imprisons fewer drug and nonassaultive offenders.

A “get tough” mandate in 1992 changed Michigan's parole board composition from civil servants to political appointees. Since then, the proportion of prisoners beyond their earliest release date (ERD) grew from 16% to 31%. That mandate resulted in increased parole denials due to a conscious choice to keep assaultive and sex offenders longer based on their crime, not their risk of re-offending.

The proportion of those who had low risk scores who were granted parole fell from 81% to 55%. Sex offenders gained parole only 13% of the time while those who had a crime involving a death gained parole at a 28% rate.

The report found that success upon release varied greatly by offense type. Overall, 63% did not return to prison within four years. About 20% of parolees were returned with technical violations while 18% returned with new crimes. The greatest success rate belonged to those convicted of homicide (80.1%) and sex offenses (77.6%). Meanwhile, those with crimes that were financially motivated returned to prison at a rate of 45% of all releasees. Larceny was the most common crime for parolees returning with new sentences.

As to the main question of the report, it was found that holding people beyond their ERD had very little impact on their success rates. In fact, the report found those held a year beyond their ERD were slightly less successful than those released on their ERD; keeping people two, three

or four years beyond their ERD made no difference compared with the success of those released on their ERD.

Yet, under the guise of avoiding an increase in returns for new crimes, 9,664 assaultive and sex offenders who would not have committed new crimes were denied parole and held one to four years beyond their ERD. Had everyone been released upon their ERD, Michigan could have saved 33,000 prison beds over 14 years – or 2,300 yearly. That would have saved taxpayers \$1 billion over that period – or \$73 million annually.

The report acknowledges the need to manage the risks parolees present to public safety. This matter of public “debate often rests on assumptions about parolee crime that are widely held but thinly supported by the facts,” says the report. This report, which is available on *PLN's* website, dispels those assumptions with hard facts. ■

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CCA Loses Contracts for 9,754 Prison Beds in 18 Months; More Losses Looming

Corrections Corporation of America (CCA), the nation's largest private prison company, has lost or terminated contracts totaling 9,754 prison beds within an 18-month period, and is expected to lose at least 1,536 more contract beds by the end of this calendar year.

CCA announced on January 21, 2010 that based on the State of Arizona's proposed budget, the company would lose its contracts to house Arizona prisoners at the company's 752-bed Huerfano County Correctional Center in Colorado and its 2,160-bed Diamondback Correctional Facility in Oklahoma. Last year, CCA generated about \$56.5 million in revenue from those contracts.

It has since been confirmed that the Huerfano contract, which expires in March 2010, will not be renewed; on March 4, CCA announced that the Diamondback facility would close within 60 days. Arizona officials have said they intend to return all of their prisoners from out-of-state facilities.

On January 13, 2010, CCA announced that the federal Bureau of Prisons had not renewed its contract to house prisoners at the company's 2,304-bed California City Correctional Center. The contract, estimated at \$553 million over ten years, instead went to competitor Cornell Corrections.

Previously, Alaska removed approximately 770 of its prisoners from CCA's Red Rock facility in Arizona in December 2009, and that same month CCA announced the closure of its 1,600-bed Prairie Correctional Facility in Appleton, Minnesota after losing contracts to house Washington and Minnesota offenders at the prison. The Prairie facility shut its doors on February 2, 2010, with CCA laying off 400 employees.

In January 2009, CCA's contracts to manage the B.M. Moore Correctional Center and the Diboll Correctional Center, both in Texas and totaling 1,018 beds, went to competitor Management and Training Corporation. And on October 9, 2008, after CCA terminated its contract to operate the 1,150-bed Bay County Jail in Panama City, Florida, the county's Sheriff's Department took over management of that facility.

Thus, over an 18-month period from October 2008 to March 2010, CCA lost

contracts totaling 9,754 prison beds.

During CCA's fourth quarter 2009 earnings conference call held on February 10, 2010, CCA CEO Damon Hininger acknowledged in response to a question from an Avondale Partners analyst that the company was facing around 12,000 total empty beds. As CCA has approximately 87,000 prison beds available nationwide, this represents a vacancy rate of almost 14%.

Further, two other stock analysts who participated in the conference call inquired about CCA's contract with the State of Tennessee to house prisoners at the 1,536-bed Whiteville Correctional Facility. Mr. Hininger was equivocal, saying the "legislature will take this up and think about potentially funding these beds through this fiscal year and potentially long-term." However, he failed to mention that the Governor's recommended budget states the Whiteville prison "will be closed at the end of calendar year 2010, and all inmates will be transferred to other ... facilities." Tennessee's proposed state budget only includes funding for CCA's Whiteville prison until the end of the year.

Additionally, Texas' budget reduction plan, unveiled on February 16, 2010, indicates that \$10.7 million in funding for 817 private prison beds will be eliminated. CCA, which operates seven facilities that hold Texas state prisoners, likely would be affected by this fiscal reduction. Texas state Senator John Whitmire – Chairman of the Senate Criminal Justice Committee – had previously suggested terminating CCA's contract to house prisoners at the company's Mineral Wells Pre-Parole Transfer Facility.

CCA has added some contract beds over the past year to counterbalance its losses, including a Bureau of Prisons contract at the company's newly-opened 2,232-bed Adams County Correctional Center in Mississippi, which was announced in April 2009. Further, CCA increased the number of California prisoners it can hold in out-of-state facilities by another 2,336 contract beds, and contracted with ICE to house up to 500 immigration detainees at the company's North Georgia Detention Center.

Although CCA also has several new prisons and facility expansions in the

construction phase, they do not make up for the company's recent loss of 9,754 contract beds and the additional 1,536 beds that CCA is expected to lose at its Whiteville prison in Tennessee by the end of 2010.

Another CCA contract may be in jeopardy this year, too. On March 2, Sheriff Richard Nugent in Hernando County, Florida, where CCA operates the county jail, announced he could run the facility at a lower cost while providing better management. If Sheriff Nugent takes over the jail, CCA would lose another 876 contract beds. "Obviously with the current economic state, it's really not a surprise that our customers are looking at options," said CCA warden Russell Washburn, who oversees the Hernando County Jail.

Nor will CCA have an opportunity to bid on a proposed Bureau of Prisons contract to house illegal immigrants convicted of federal crimes. The BOP withdrew the proposal in early March 2010, citing a funding shortfall.

"It's hard to understand how CCA can continue to maintain its market share and its projected earnings with the loss of so many contracted prison beds," stated Ken Kopczynski, executive director of the Private Corrections Working Group, which opposes prison privatization.

Apparently, CCA's numerous contract losses and potential future losses have caused some investors to become bearish on the company. On February 16, 2010, it was reported that billionaire investor George Soros had disinvested all of his holdings in CCA. CCA's Chairman, John D. Ferguson, sold 20,000 shares on February 22. Further, Zacks, an investment research firm, issued a sell recommendation for CCA stock on March 3, 2010.

According to recent news reports, lost contracts, empty prison beds and declining investor confidence aren't CCA's only problems. On February 23, 2010, *Courthouse News Service* reported that two former prisoners had claimed they were sexually victimized by CCA employees at the company's Correctional Treatment Facility in the District of Columbia. The former prisoners, who are represented by counsel, have filed separate \$20 million lawsuits against CCA. Less than a week

earlier on February 18, Hawaii prisoner Bronson Nuhuna was murdered at CCA's Saguaro Correctional Facility in Eloy, Arizona.

Despite contract losses and other setbacks, CCA continues to reap profits. In its fourth quarter for 2009, the company's gross revenue increased 4% to \$430.7 million while net income rose 12.5% to \$.36 per diluted share. Evidently private prisons remain profitable even while

states and citizens struggle during the current economic crisis. However, CCA announced that it expected lower earnings per share in the first quarter of 2010 due to higher bed vacancies as a result of lost contracts. The company's gross revenue was \$1.7 billion in 2009.

"State budgets continue to be of concern as states struggle to balance their needs with their revenue, the impact of which is difficult to predict,"

said CCA CEO Hininger. "Although the environment continues to be challenging, we remain optimistic about our long-term outlook." Which is good news for CCA, and not-so-good news for prisoners held in the company's for-profit lock-ups. ■

Sources: *PCWG press release* (www.privateci.org), www.khon2.com, *Hernando Today*, *Reuters*, www.marketwire.com

Missoula County Jail Agrees to Settle Excessive Force Suit for \$490,000

Missoula County, Montana has agreed to pay \$490,000 to a mentally ill woman who was shot six times by guards with a pepperball gun.

Sunny Bartell was arrested on July 1, 2006 for disorderly conduct after police were called by St. Patrick Hospital employees. Bartell has severe mental illness and is borderline mentally disabled.

After being taken to the Missoula County Detention Facility, Bartell was strapped into a restraint chair, where she remained for two hours. Bartell was then moved to a cell.

Bartell fell asleep, but later awoke screaming for her father. Jason Sorini, the head of the jail's Disturbance Response Team, responded along with other guards.

Sorini ordered Bartell to get down on her bunk, adding "or force will be used against you." Bartell failed to comply. Sorini then shot Bartell six times with a pepperball gun. Three additional rounds were shot at the wall near Bartell's head.

Guards then entered Bartell's cell, strapped her to a restraint chair, and moved her to another cell. Bartell was left in the restraint chair for 44 minutes before she was allowed to shower and otherwise decontaminate. The entire pepperball attack was captured on video.

The incident became public after Mike Burch, a longtime guard at the jail, leaked a report to a local Montana paper. Burch was threatened with prosecution and later fired by Sheriff McMeekin for disclosing "confidential criminal justice information." Burch died in May 2007 of a heart attack.

After details of the incident became known, Disability Rights Montana (DRM), a nonprofit law firm, began an investigation.

In late 2008, DRM issued a scathing 25-page report which found that jail officials had violated Bartell's "rights under [the] Montana Constitution, statutes, and multiple jail policies and procedures."

Jail staff, for instance, failed to screen Bartell for mental illness upon her arrival, violated jail policy governing the use of nonlethal weapons, and violated the Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act.

Sorini was cleared by jail officials and the FBI of wrongdoing, though.

Alexandra Volkerts, an attorney for DRM, called the jail's response to the incident "disturbing," and criticized the firing of Burch. "Their investigation exonerated the officer who was abusive and punished the officer who made the correct

moral choice," she said.

Bartell sued Missoula County, the Missoula County Sheriff's Office, Sorini and Mike McMeekin, the Sheriff of Missoula County, alleging violations under 42 U.S.C. §1983, along with violations of the Montana Constitution, and claims for negligence, false imprisonment, and assault and battery.

The suit was settled for \$490,000 in 2009. The jail has since adopted policies and implemented greater training concerning the handling and screening of mentally ill prisoners.

Bartell was represented by Heather Latino of Paoli, Latino, and Kutzman, a Missoula law firm. See: *Bartell v. Missoula County*, No. CV-08-69-M-JCL (D. Mont.). ■

Other source: www.missoulilian.com

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New York Passes Legislation Making HIV, AIDS and HCV Prisoner Care a Department of Health Responsibility

by Christina Hernandez

New York took a major step last fall to provide care for HIV-positive prisoners—and a victory for prisoners' rights activists—with legislation giving the state Department of Health an official oversight role in the HIV/AIDS and hepatitis care provided in prison. But it underlined a problem that concerns public health experts and criminologists: what happens to HIV-infected prisoners when they return home?

The failure of many of those prisoners to continue treatment after they leave prison is “both a public health and a public safety issue,” Prof. Roberto Hugh Potter, director of research at the University of Central Florida's Department of Criminal Justice and Legal Studies, told *The Crime Report*. According to Potter, when former prisoners return to dangerous behaviors such as drug use and unprotected sex, it is more likely they will transmit the virus in potentially new and drug-resistant strains.

No one can be forced to continue HIV treatment after he or she leaves the prison system—unless it's a condition of parole, Potter said. “The state has no more control over you, and that extends to health issues. It's up to that individual.”

The scale of the problem is still unknown, but the substantial population of HIV-positive prisoners across the country raises concerns about what happens to them beyond prison walls. In 2006, the latest year for which figures were available, 1.6 percent of male prisoners and 2.4 percent of female prisoners in state and federal prisons were known to be HIV-positive or have AIDS, according to the Department of Justice. While that number represents a decline from the previous year, the overall rate of estimated AIDS cases among the prison population in 2006 (0.46 percent) was more than twice the rate in the country's general population (0.17 percent).

A Texas study conducted by doctors and researchers, released in February, 2009, found that about 80 percent of the state's HIV-positive former prisoners did not fill a prescription for their medication within 30 days of release. This number goes down to 70 percent after 60 days, but that still means only about 30 percent of

former prisoners had continued treatment within two months of their release.

More Data Needed

Similar post-release treatment data is not available in other states with high numbers of HIV-positive prison populations. In 2006, the combined HIV-positive prison populations of New York, Florida, and Texas accounted for nearly half of all known HIV/AIDS-infected persons in U.S. state prisons. New York alone has the largest number of male HIV-positive prisoners (3,650), representing about six percent of the state's male incarcerated population; and it reports the second largest number—after Florida—of female HIV-positive prisoners (350), a staggering 12.2 percent of female prisoners in New York prisons.

What makes the situation particularly ironic is that, as New York's recent move demonstrates, care for HIV-positive patients inside prison walls has become a priority. Despite the high numbers of infected prisoners, prison HIV care “is very decent and very effective,” said Dr. David A. Wohl, an infectious disease expert and associate professor of medicine at the University of North Carolina at Chapel Hill. “Overall, people do very well in prison.”

Many prisons try to prepare for an HIV-positive prisoner's release with programs that arrange for doctor visits and access to medication on the outside. The best programs, Wohl said, have a low caseload number and can provide individual attention. While programs offered by some states like Rhode Island and Connecticut are admired nationally, the quality of services varies across the country.

Considering that roughly 95 percent of incarcerated prisoners are eventually released, according to the American Correctional Association, both the quality and the consistency of treatment for ex-felons should be a high priority, according to experts. Halting treatment, as well as reverting to dangerous behaviors such as drug use and unprotected sex, diminishes the benefits prisoners received while they were under direct prison supervision, Wohl said. “Many people fall through

the cracks when they get out of prison,” he said. “That's a perfect storm for (HIV/AIDS) transmission.”

One key worry is the impact of recidivism: since various HIV strains are mixing and mutating, people who go in and out of prison (and therefore on and off treatment), are increasing their chances of succumbing to the virus, warned Florida's Roberto Potter. “There's a point when you're likely to become treatment-resistant,” he said.

Prison officials seem aware of the problem. New York State's continuity of care programs focus on educating prisoners about their treatment and aftercare options, as well as the risks of unprotected sexual behavior, before their release. The continuity of care programs, which are voluntary, are provided on a case-by-case basis and typically begin between three and six months prior to release, said Erik Kriss, a spokesman for the state Department of Correctional Services.

In 50 of the state's 68 correctional facilities, prisoners are trained to educate fellow prisoners about HIV, Kriss said. Prisoners can receive guidance from peer educators in different settings, including informal interactions and more formal training sessions. When release is imminent, prisoners are connected with community organizations that help them plan for their continued HIV care. Appointments are arranged for prisoners to visit a clinic or doctor upon release, and each prisoner leaves prison with a 30-day supply of medications and additional prescriptions.

Although several other states have employed a variety of programs to help former prisoners continue HIV care, experts say more needs to be done. Continuity of care programs are “incredibly important,” said Florida's Potter, adding, “there's certainly a promise there.”

But, added Potter, the programs might not be as effective as they could be. Researchers don't yet know enough about how well community groups and clinics follow through with the former prisoners they're tasked with aiding or how well those former prisoners follow through with their care. One measure suggested

by Potter is making HIV/AIDS care and education available before a prisoner starts serving time—and possibly widening it to include those on probation.

“From my perspective, the real issue

is earlier intervention,” he said, “and not waiting until people progress all the way to prison.” ■

Christina Hernandez is a freelance writer

and editor based in the Philadelphia area. Her work is available at www.christina-hernandez.com.

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\$491,668 Settlement in Class-Action Suit Against Spokane County Jail

by Matt Clarke

On September 18, 2009, a U.S. District Court in Washington state granted preliminary approval to a settlement in a class-action lawsuit that challenged booking fee procedures at the Spokane County Jail.

Shawn Huss, a former jail prisoner, filed suit against Spokane County pursuant to 42 U.S.C. § 1983, alleging the county's method of collecting booking fees violated his federal due process rights and that the statute authorizing the fees, RCW § 70.48.390, was unconstitutional. The class was certified as “all individuals, from May 5, 2004, to December 20, 2006, who were deprived of their property pursuant to the booking fee policy of the Spokane County Jail without being provided the constitutionally guaranteed due process of law.”

RCW § 70.48.390 allows a jail to charge a booking fee for the actual costs of booking or \$100, whichever is less. The jail can immediately collect the fee from the person being booked, or can assess the fee against arrestees who don't have sufficient funds at the time. The statute requires the county to refund the fee to defendants who are not convicted by sending the refund to their last known

address. Spokane County charged federal prisoners the daily rate of \$69.12, while non-federal prisoners were charged actual booking costs of \$89.12.

During the litigation the district court determined that RCW § 70.48.390 was unconstitutional because it violated the Due Process Clause. [See: *PLN*, Feb. 2007, p.22]. However, that ruling was withdrawn after the court granted the defendants' motion for reconsideration.

The court then granted Huss partial summary judgment on the issue of liability. Mediation was attempted unsuccessfully, and the court certified the class on August 25, 2008. The defendants filed an interlocutory appeal of the court's partial summary judgment and class certification orders.

Before the Ninth Circuit could rule, the parties again entered into mediation and reached a settlement agreement. The settlement requires Spokane County to pay 137% of the booking fee to defendants who had paid the fee but were not convicted of a crime and did not receive a refund. The amount drops to 37% of the booking fee if the person was not convicted but did receive a refund. This subclass of defendants who were not convicted is

limited to a total settlement amount of \$231,668. Any funds remaining after the payouts will be used to provide mental health benefits to prisoners at the jail.

Defendants who were convicted of a crime are, by statute, not entitled to a refund of the jail booking fees. A total of \$260,000 was allocated to compensate those class members, pay the class counsels' attorney fees, and pay an incentive award to Huss for bringing the lawsuit. Any amount remaining after those payments will be used to provide legal services to former jail prisoners.

A hearing was held on March 16, 2010 to determine the fairness of the settlement agreement and the amount of attorney fees and the incentive award. The court approved the settlement and awarded a \$10,000 incentive payment, \$147,487.48 in attorney's fees and \$3,376.39 in costs.

Huss and the class members were represented by attorneys Breean Lawrence Beggs, Jeffry Keith Finer and John D. Sklut with the Spokane-based Center for Justice. See: *Huss v. Spokane County*, U.S.D.C. (E.D. Wash.), Case No. 2:05-cv-00180-FVS. ■

Additional source: *Spokesman Review*



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Retired New York Supreme Court Justice Sentenced to Prison for Sex Trafficking

by David M. Reutter

Retired New York Supreme Court Justice Ronald H. Tills, 74, has been sentenced to 18 months in federal prison for a felony charge of transporting prostitutes across state lines (a violation of the Mann Act). He began serving his sentence on October 1, 2009.

Tills' long fall from grace, from a well-respected jurist known for imposing tough sentences to a federal prisoner, resulted following an investigation into the Royal Order of Jesters, a Masonic group that has 191 chapters and 22,000 members nationwide.

The probe, conducted by the Western New York Human Trafficking Task Force, began in late 2007 after federal agents learned that a judge and a police captain were among the customers of a Niagara County massage parlor that hired illegal immigrants to work as prostitutes.

At sentencing, U.S. District Judge William M. Skretny admonished Tills for victimizing the most vulnerable illegal immigrants, "the undocumented women involved in the sex trade." One woman, Coco, barely spoke English and had been sold into sexual slavery. Tills took her across state lines to work at a Jesters convention in Kentucky.

Further, Tills reportedly engaged in a sexual relationship with a woman who appeared before him in court and recruited her to work as a prostitute at a Jesters convention. Likewise, he recruited prostitutes who appeared before him to provide sexual services at such conventions.

"I will never forgive myself for the possible harm I've caused to the victims in this case," Tills said at his sentencing hearing. "I'm embarrassed, and I feel terrible about the shame I've brought to the bench and the bar." See: *United States v. Tills*, U.S.D.C. (W.D. NY), Case No. 1:08-cr-00242-WMS.

The federal investigation also resulted in the convictions of two other members of the Royal Order of Jesters—John Trowbridge, a former Lockport police captain, and Michael R. Stebick, Tills' former law clerk. Trowbridge was sentenced to two years on probation. Stebick received four months of home confinement and was required to forfeit the motor home

he used to transport prostitutes across state lines.

A spokesman for the Jesters said only the group's Buffalo, New York chapter had used prostitutes at organizational gatherings, which was "isolated, inappropriate" and not condoned by the national leadership. Several U.S. presidents, including Truman and Ford, as well as a number of other politicians have been members of the Jesters.

"I quit the Jesters more than 20 years ago, and this kind of thing has been going on at least 40 or 50 years," said former member Malcolm Herring. "I quit because I don't drink, and I don't mess around with other women, other than my wife. Going to one of their events was like going to a whorehouse." ■

Additional sources: *Buffalo News*, www.noonehastodietomorrow.com

Crisis in Reverse: Counties Struggle with Dwindling Jail Populations

by Gary Hunter

Morgan County, Missouri was in dire financial straits before contracting with U.S. Immigration and Customs Enforcement (ICE) to house immigration detainees at the county's jail. For a while things were great—Sheriff Jim Petty replaced his worn-out police cruisers with new SUVs, upgraded the local jail and hired more deputies with funds received under the ICE contract.

Ten years ago Morgan County was having budget problems. "We needed a way to generate income," said Petty. That's when the county went into the ICE detainee lock-up business. "It wasn't hitting the jackpot ... but [the contract has] given us a little freedom to operate the way we ought to be," he stated.

ICE paid the county \$65 per day per prisoner, as opposed to the \$45 per day paid by surrounding counties. However, with the contract came obligations. For example, ICE required upgrades such as a recreation area, a dietician and a full-time nurse. Further, the county spent hundreds of thousands of dollars to expand its jail by 130 new beds.

The facility averaged 45 ICE detainees a day in 2008 and netted \$1.1 million in profit. But things have since changed. The detainee population has dropped to an average of 27 per day, and the county is looking at fiscal cutbacks.

"It's a concern," said Sheriff Petty. "We're going to struggle to make ends meet."

Lincoln County, Missouri was also

left out in the cold by ICE. For years, the county contracted to fill 60 percent of its jail with immigration detainees, which covered half of its law enforcement budget. The jail has averaged 30 to 40 detainees a day over the last six years, but it's now been months since the county has housed a single ICE prisoner.

"We do miss them," said Sheriff's Lt. Andy Binder. "In this economy, it's not easy to find \$150,000 lying around in a small county. It hurts."

Hubbard County, Minnesota is struggling with a shortage of prisoners, too. When county officials built a state-of-the-art jail in Park Rapids, they hoped to attract contracts from overcrowded jails in neighboring counties. The 116-bed facility currently holds only 34 prisoners. The county jail population has dropped 3.5 percent statewide, according to statistics released by the Minnesota Department of Corrections.

"When you have a bad economy, statistically speaking, crime trends tend to go up," said Jim Franklin, director of the Minnesota Sheriff's Association. "What we don't know is that this appears to be almost the opposite for the moment. ... It's kind of an unusual circumstance that we find ourselves looking at at the moment."

A dearth of ICE detainees is also causing problems in Hernando County, Florida, where Corrections Corp. of America (CCA) operates the county's jail.

As of October 2009 the facility stopped housing ICE detainees, which led to a 25 percent reduction in the jail's population. "While CCA has made every effort to return the detainees to the facility, it does not appear that they will be returning in the near future," CCA employee Natasha Metcalf wrote in a March 2, 2010 memo to county officials.

Unable to generate sufficient profit without the ICE detainees, CCA faces the loss of its contract to run the facility. The company is looking elsewhere for replace-

ment prisoners.

Back in Missouri, Platte County and McHenry County have seen drops in their average jail populations. But due to their proximity to larger metropolitan areas, they are not experiencing any adverse effects. "I don't think we're worried we're going to go out of business," said Patrick Firman, a McHenry County chief deputy.

The jails in Mississippi County and Christian County, Missouri are still filled to overflowing thanks to ICE contracts,

but officials are keeping a close eye on the situation. "So far, we haven't seen a negative impact. That isn't to say we won't see one," noted Junior DeLay, clerk of Mississippi County.

Which leads one to wonder: what does it say about a society that's worried when it doesn't have enough people to fill its jails? ■

Sources: *Minneapolis Star Tribune*, *St. Louis Post-Dispatch*, *TIME Magazine*, *Hernando Today*

Florida Jail Prisoner Paralyzed by MRSA Sues Prison Health Services

When Brett A. Fields entered Florida's Lee County Jail to be booked on charges of criminal mischief, violating an injunction and probation violation, he was a healthy 26-year-old man. Within a month, according to a subsequent lawsuit, he was paralyzed due to grossly inadequate medical care by Prison Health Services (PHS).

Several days after being booked into the jail in July 2007, Fields requested medical attention for a wound on his left arm. A PHS nurse observed a red, swollen and pus-filled boil that she identified as a furuncle – a boil caused by staphylococci. She treated it with Bactrim, an antibiotic.

Two weeks later the boil had not healed. Fields requested medical care via an "Inmate Medical Request Form," which was ignored by PHS and jail staff. In early August 2007, he began suffering from severe back pains, difficulty walk-

ing, numbness, weakness in his lower extremities and other symptoms. His pleas for medical treatment on August 6 were ignored, even though he stated he was having difficulty moving and had not urinated in days.

The next evening, Fields was finally examined by a PHS nurse. He explained his infection history and symptoms. The nurse arranged for him to see a physician's assistant (PA) the following day.

By that time, Fields was unable to walk and was taken by wheelchair to see the PA. After hearing Fields' medical history and symptoms, the PA conducted a cursory examination, ordered Tylenol and sent him back to his cell.

The next morning Fields had to drag himself across the floor to use the toilet. It was then that he noticed all the muscles in his anus had stopped working and his rectum, which had protruded through his

anus, was completely visible outside his body. Jail guards pushed his rectum back in and removed him from the cell.

It was not until 72 hours later that PHS decided to have Fields examined by a doctor. When he arrived at a local hospital, Fields had almost complete paralysis of his lower extremities due to a MRSA-related abscess in his spine. Despite surgery and two years of physical therapy, he still suffers from partial paralysis in both legs.

On August 11, 2009, Fields, represented by Fort Lauderdale attorneys Dion J. Cassata and Greg M. Lauer, filed a civil rights action against PHS, PHS employees and Lee County Sheriff Michael J. Scott. *PLN* will report future developments in this case, which is still in the preliminary stages. See: *Fields v. Scott*, U.S.D.C. (M.D. Fla.), Case No. 2:09-cv-00529-JES-DNF. ■



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Indiana DOC Changes Sexually Explicit Publication Policy Due to Class-Action Suit

by David M. Reutter

The ACLU of Indiana has reached a private settlement agreement with the Indiana Department of Corrections (IDOC) in a class-action lawsuit that challenged a policy prohibiting prisoners from receiving sexually explicit materials or publications containing “graphic nudity.”

At issue was IDOC Administrative Procedure No. 02-01-103. The lawsuit alleged that portions of the procedure were unconstitutional. While not admitting it had violated any federal law, the IDOC agreed to change its policy to settle the case.

The settlement specifies that prisoners will not be allowed to receive publications that contain frontal nudity, but can receive magazines that depict people in lingerie or bathing suits. Such a result was necessary because “current case law does not, in my opinion, allow for a strong argument that there is a constitutional right to receive publications that contain pictures that regularly feature frontal nudity,” ACLU attorney Kenneth J. Falk informed the class members.

The new IDOC procedure contains examples of commercial magazines that prisoners can receive because they do not contain “depictions of nudity or sexually explicit conduct on a routine or regular basis or promote [themselves] based upon such depictions.” Examples include *National Geographic*; *Our Body, Our Selves*; swimsuit issues of sports magazines, and lingerie catalogs.

The new policy “also provides that material that contains writing, not pictures, will not automatically be excluded.” Instead, such publications will be reviewed on a case-by-case basis to determine whether they “pose a threat to security or that facilitates criminal activity.”

Additionally, the revised procedure specifies that “Printed matter may not be excluded from an adult facility solely on the grounds that it is obscene or pornographic, unless it is obscene under Indiana law.”

“I believe this settlement is as good, if not better, than would be won if the case went to trial,” Falk stated. The ACLU will receive \$18,000 in attorney’s fees.

The parties entered into a private

settlement agreement rather than a court-enforced consent decree to avoid requirements under the Prison Litigation Reform Act. The IDOC cannot change the revised procedure for two years without giving 30 days notice to the ACLU. During the two-year period, the settlement “can be enforced in a state court as

a breach of contract action or a violation can result in starting the federal lawsuit again,” Falk explained.

The district court found the settlement to be fair and reasonable in an order entered May 28, 2009. See: *Meisberger v. Donahue*, U.S.D.C. (S.D. Ind.), Case No. 1:06-cv-01047-LJM-DML. ■

Eighth Circuit: Shackling Pregnant Prisoner During Labor Unconstitutional

by Matt Clarke

On October 2, 2009, the Eighth Circuit Court of Appeals, sitting en banc, held that shackling a pregnant prisoner while she was in labor constituted cruel and unusual punishment in violation of the U.S. Constitution.

Shawanna Nelson was six months pregnant when she was sent to the Arkansas Department of Corrections (ADC) for a non-violent crime. She reported to the prison infirmary after she went into labor, and nurses arranged for her to be transported to a local hospital when her contractions reached five-minute intervals.

ADC guard Patricia Turensky, who drove the transport van, provided an armed escort. Her lieutenant ordered her to “RUSH [Nelson] to the hospital [and] to NOT take time for cuffs.” Instead, despite observing Nelson having severe contractions that rendered her incapable of walking, Turensky put Nelson in handcuffs.

Although Turensky never considered Nelson a security or escape risk, after arriving at the hospital she shackled Nelson’s legs to a wheelchair. Nelson was allowed to change into a hospital gown in the maternity ward, then Turensky shackled both of her ankles to opposite sides of a hospital bed. At that time, Nelson was in late labor.

Nurses had to repeatedly request that Nelson be unshackled so she could change positions. No one asked for her to be reshackled. Nonetheless, Turensky reshackled her each time. One nurse told Turensky that “she wished they wouldn’t have to put those restraints on.” Meanwhile, Nelson was experiencing strong

labor contractions.

After Nelson had been at the hospital over an hour, an obstetrician arrived, requested removal of the shackles, and transferred her to the delivery room. The shackles were removed and Nelson delivered a baby boy 23 minutes later. Turensky then reshackled Nelson and went off-duty shortly afterwards.

With the assistance of the American Civil Liberties Union, Nelson sued Turensky, ADC Director Larry Norris, Dr. Max Mobley and Correctional Medical Services (CMS), alleging that the shackling during labor caused her “extreme mental anguish and pain, permanent hip injury, torn stomach muscles, and an umbilical hernia requiring surgical repair,” plus sciatic nerve damage.

As a result, Nelson stated she cannot engage in activities such as athletics and playing with her children, cannot sit or stand for long periods, and cannot bear weight or sleep on her left side. She has been told not to have any more children due to her injuries.

The defendants filed a motion for summary judgment based on qualified immunity, which was denied by the district court. On appeal, a three-judge panel of the Eighth Circuit reversed, granting summary judgment to Turensky and Norris. Dr. Mobley and CMS had been dismissed from the suit earlier in the proceedings. See: *Nelson v. Correctional Medical Services*, 533 F.3d 958 (8th Cir. 2008).

Nelson filed a petition for rehearing en banc. Thirty-four organizations, ranging from *Prison Legal News* and the National Women’s Prison Project to BirthNet, Inc.

and Penal Reform International, joined a friend-of-the-court brief on Nelson's behalf. The petition was granted.

On rehearing, a 6-5 majority of the Eighth Circuit held that shackling a pregnant prisoner while in labor was unconstitutional. Relying heavily on *Hope v. Pelzer*, 536 U.S. 730 (2002) [PLN, Nov. 2002, p.6], an Alabama case in which the Supreme Court found it was impermissible to shackle a prisoner to a hitching post, the appellate court held that Turensky should have known her actions were unconstitutional and thus was not entitled to qualified immunity. However, Norris was not personally involved in the shackling and prison regulations did not require shackling of pregnant prisoners in labor (though they also did not forbid it). Therefore, Norris was entitled to qualified immunity.

The Eighth Circuit reversed the district court's denial of summary judgment to Norris and affirmed the denial of summary judgment to Turensky, returning the case to the lower court where it remains pending. See: *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009),

en banc.

New York made the shackling of pregnant prisoners illegal in 2009. On March 18, 2010, the Pennsylvania Senate passed a bill (SB1074) that prohibits prison staff from shackling pregnant prisoners during labor and delivery. A similar bill has been introduced in Washington. However, the practice remains legal in 40 states.

One can only hope that the Eighth Circuit's decision in Nelson's case will persuade other states to change their barbaric policies, out of self-interest in order to avoid liability if not for moral and humanitarian reasons.

"Shackling pregnant women is inhumane," said Rite Sklar, Executive Director of the ACLU of Arkansas. "The importance of this decision cannot be overstated." Notably, however, five of the 11 appellate court judges who participated in the *en banc* decision found no constitutional violation when Nelson was shackled while in labor. ■

Additional sources: *New York Times*, *Seattle Post-Intelligencer*, www.aclu.org, www.philly.com

State of Washington Settles Parolee's Unlawful Detention Suit for \$39,695.10

In February 2008, the state of Washington entered into a stipulated judgment to settle a lawsuit for damages filed in Pierce County Superior Court by Mark Stephen Rice. In settling the suit, which was filed in June 2007, the state of Washington paid Rice \$30,000 plus costs and attorney's fees totaling \$9,695.10.

A first-time offender, Rice had pleaded guilty, in May 2006, to two counts of assault of a child in the third degree. The charges stemmed from Rice having slapped his step-daughter twice on an occasion when, in violation of house rules, she had stayed out all night, apparently with some young man. Rice was sentenced to standard conditions, which included a no-contact order prohibiting him from having contact with his step-daughter.

In September 2006, a review hearing was held to assess the extent of Rice's compliance with the court's previous directives. After the prosecutor conceded that Rice had in fact complied with the conditions of his sentencing, the court denied the request of the Depart-

ment of Corrections that Rice submit to quarterly polygraphs. Despite the court order, Rice was subsequently arrested by community corrections officer Jenny Sheridan for failing to submit to a polygraph. Released, he was arrested again by Sheridan, and then released a second time.

Pressed for an explanation, the Department of Corrections initially indicated, falsely, that Rice was required to submit to a polygraph because his offense involved sexual contact with his step-daughter. Although it later offered a different explanation, the Department could not reconcile its actions with the September 2006 court order denying its request for quarterly polygraph tests.

Rice subsequently filed a § 1983 lawsuit alleging that he had been unlawfully detained, falsely imprisoned (for 18 days), and defamed, and that he had suffered emotional distress. In settling the suit, the state did not admit any liability. See: *Rice v. State of Washington*, Case No. 07-2-09131-4, Pierce County Superior Court. ■

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Son, Wife of U.S. Congressmen Get Prison Time

by *Brandon Sample*

Jeffrey M. Rush, the son of U.S. Representative Bobby L. Rush (D-Ill.), was sentenced in October 2008 to serve six months behind bars plus three years on probation for having sex with female prisoners at the Fox Valley Adult Transition Center in Aurora, Illinois. He had been employed as the assistant supervisor of security at the facility, and was fired on September 10, 2007. His father had helped him get the job at Fox Valley.

Jeffrey Rush pleaded guilty to three counts of official misconduct, two of which related to sexual encounters with prisoners between February 1 and June 2007. The sex acts reportedly occurred outside the facility, with prisoners who were granted passes to leave the prison.

"Mr. Rush engaged in a pattern of conduct abusing his position of trust with the Illinois Department of Corrections for his own sexual gratification. This sentence sends a clear message that this type of conduct will not be tolerated," said Justin Fitzsimmons, the state prosecutor who handled the case.


"As a father, I am deeply disturbed and saddened by the allegations against my son Jeffrey," said Rep. Rush. "Throughout my life, the welfare of those on various ends of the criminal justice system has been a passionate concern of mine." Rep. Rush, a former member of the Black Panther Party, was himself arrested on July 15, 2004 for protesting genocide in Darfur in front of the Sudanese Embassy in Washington, D.C.

Another family member of a federal lawmaker may be headed to prison in a more recent, unrelated case. On March 10, 2010, Monica Conyers, a former Detroit City Council member and wife of U.S. Representative John Conyers, Jr., was sentenced to 37 months in federal prison and two years supervised release. She had resigned from the City Council after pleading guilty to a charge of bribery conspiracy in June 2009.

Monica Conyers was prosecuted as part of a federal corruption investigation. She was accused of taking bribes from a consultant for Synagro Technologies in connection with a \$1.2 billion sludge disposal contract, and had cast the deciding vote to approve the contract in 2007. Her husband, Rep. John Conyers, chairs the powerful House Committee on the Ju-

diciary, which routinely deals with issues involving the federal prison system.

Monica Conyers, who castigated the court and tried to withdraw her plea when the 37-month prison term was announced, said she would appeal the sentence. See:

United States v. Conyers, U.S.D.C. (E.D. Mich.), Case No. 2:09-cr-20025-AC-SDP. 

Sources: *www.suntimes.com*, *Detroit News*

Death Row Prisoner Loses Suit Challenging BOP's Ban on Face-to-Face Media Interviews

On January 15, 2008, the Seventh Circuit Court of Appeals held that a jury could conclude the Bureau of Prisons' (BOP) ban on face-to-face media interviews with death row prisoners was based not on legitimate security threats, but because policymakers did not want such prisoners to promote a "glamorization of violence."

The appellate court found the BOP's policy could eliminate any meaningful access to the media in violation of the First Amendment and the Equal Protection Clause. However, that decision was reversed by an en banc ruling, and the U.S. Supreme Court subsequently denied the prisoner's certiorari petition.

The Seventh Circuit made its initial findings in an appeal filed by federal death row prisoner David Paul Hammer, which ensued after an Indiana U.S. District Court granted summary judgment to the BOP and prison officials in his challenge to the ban on face-to-face media interviews.

Hammer was among the first prisoners incarcerated at the Special Confinement Unit (SCU), which houses federal death row prisoners in Terre Haute, Indiana. When Hammer gave three face-to-face interviews with media agencies between August and December 1999, there were no security problems. In late December 1999, he was instructed by prison officials not to provide the media with any information about other prisoners.

A month later Hammer was disciplined for giving a reporter information about another death row prisoner, but was not barred from giving face-to-face interviews. However, after CBS aired a national broadcast of *60 Minutes* in March 2000 that featured an interview with Oklahoma City bomber Timothy McVeigh, U.S. Senator Byron Dorgan pressured the BOP to prevent a "convicted killer" from

"intrusion into our lives through television interviews and from using those forums to advance his agenda of violence."

On April 12, 2001, then-Attorney General John Ashcroft announced a BOP policy that prohibited face-to-face media interviews with death row prisoners on any subject at any time. Hammer sued, and obtained a reversal of an initial dismissal by the district court. See: *Hammer v. Ashcroft*, 42 Fed.Appx. 861 (7th Cir. 2002) [*PLN*, Oct. 2003, p.36].

On remand, Hammer filed three requests for discovery. Rather than comply, the government defendants moved for summary judgment and objected to the discovery requests. Hammer filed a motion for a continuance that was denied by the district court, which then entered summary judgment for the defendants.

On appeal, the Seventh Circuit applied the four-prong test of *Turner v. Safley*, 482 U.S. 78 (1987). Hammer's evidence suggested the driving force behind the interview ban was not security concerns related to prisoners becoming "celebrities" or inflaming tensions with other prisoners, "but rather outrage over McVeigh's message and a desire to prevent death row [prisoners] from expressing their views about themselves or their fates and thereby influencing 'our culture.'"

Prior to the McVeigh interview, there were no security concerns about such interviews. Yet after the *60 Minutes* interview aired, all media requests for face-to-face interviews with Hammer were denied. Most significantly, when the new policy was announced, Ashcroft explained he wanted to deny death row prisoners a platform to spread their "irresponsible glamorization of a culture of violence." That, the Seventh Circuit held, was evidence of the government's actual motivation – which created a jury question and thus precluded summary judgment.

Additionally, the appellate court questioned whether the BOP policy left any meaningful way for Hammer to discuss his criminal case, which involves other prisoners who witnessed the murder of his cellmate. That issue implicated the BOP's prohibition on Hammer talking to the media about other prisoners. Thus, the Court of Appeals found that the district court had improperly granted summary judgment on Hammer's First Amendment claim.

The Seventh Circuit likewise found in favor of Hammer's equal protection claim, as the BOP policy does not apply to all SCU prisoners, only to those on death row. The appellate court further held it was improper to deny Hammer's motions for appointment of counsel and a continuance. The district court's summary judgment order was therefore reversed. See: *Hammer v. Ashcroft*, 512 F.3d 961 (7th Cir. 2008).

However, the BOP's request for rehearing en banc was granted, and the full Court of Appeals upheld the district court's judgment in a June 25, 2009 ruling, overturning the previous Seventh Circuit panel decision.

The en banc court held that the BOP's policy did not violate equal protection or Hammer's free speech rights. The appellate court quoted *Pell v. Procunier*, 417 U.S. 817 (1974), stating, "[N]ewsman have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." See: *Hammer v. Ashcroft*, 570 F.3d 798 (7th Cir. 2009), *en banc*.

In November 2009, *Prison Legal News* and 22 other news media organizations joined an amicus brief filed by the Reporters Committee for Freedom of the Press in support of Hammer's certiorari petition to the U.S. Supreme Court, urging the Court to hear the case. The National Lawyers

Guild, the John Howard Association of Illinois, the National Police Accountability Project and the Uptown People's Law Center filed other amicus briefs.

Unfortunately, on March 8, 2010, the Supreme Court denied Hammer's certiorari petition, leaving the Seventh Circuit's en banc decision – and the

BOP's restrictions on face-to-face media interviews with federal death row prisoners – intact.

Although Hammer's death sentence was overturned in 2005, he remains in the SCU at Terre Haute while he awaits re-sentencing. See: *United States v. Hammer*, 564 F.3d 628 (3d Cir. 2009). ■

\$300,000 Settlement in New York City Jail Prisoner's Slip and Fall Accident

The City of New York paid \$300,000 to settle a prisoner's slip and fall injury. The settlement came after a jury was picked for trial.

As prisoner Troy Washington was walking back to his cell at the Rikers Island jail, he slipped and fell in a puddle of water. He claimed that his November 12, 2004 fall could have been prevented had prison officials fixed a leaky pipe, of which they had actual and constructive notice, in the ceiling that caused the puddle.

Prison officials, however, contended there was no leaky pipe and that Washington was injured during a fight. In discovery, Washington requested documents to prove his claim. After prison officials refused to provide those documents, the trial court entered a conditional order that required the City to provide the discovery materials or have their answer struck.

When the City refused to provide

the ordered discovery, their answer was struck. Following a fruitless appeal, the matter proceeded to trial on damages only. The trial court granted a motion in limine that significantly reduced introduction of Washington's criminal history, redaction of his medical records to mention the fight, and limited use of a DVD surveillance that was unfavorable to Washington.

At trial, Washington would have proven that he suffered a comminuted fracture of the left distal radius (broken wrist). That fracture required open reduction-internal fixation that left Washington with limited motion of his wrist.

Following his attorney's advice, Washington accepted the \$300,000 settlement offer before the jury received opening statements. To secure the August 11, 2009 settlement, Washington was ably represented by New York City attorney Brad A. Kauffman. See: *Washington v. The City of New York*, Bronx Supreme Court, Index No. 6308/06. ■

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Arkansas Prisoner Almost Dies After Being Left in Feces

by Justin Miller

An Arkansas prison guard who had been previously fired and rehired by the state's prison system was terminated a second time after he was involved in an incident that almost resulted in a prisoner's death.

On June 22, 2009, the *Associated Press* reported that Sergeant Bobby Lunsford and Lieutenant John Glasscock were fired after it was discovered they had knowingly left a prisoner naked and covered in his own feces in his cell at the Tucker Unit prison for an entire weekend.

The prisoner, whose name was withheld, was later transferred to a hospital and placed on life support. He was suffering from septicemia and septic shock due to infections that reached his blood stream as a result of the unsanitary conditions.

Sgt. Lunsford had been fired by the Arkansas prison system in February 2002 after he accepted several Hot Pockets microwave sandwiches from a prisoner that had been stolen from a prison chaplain, and then lied about the incident. "Behavior such as this by a sergeant in the Arkansas Department of Correction is inexcusable," wrote Warden Grant Harris in a letter terminating Lunsford. "You are required to lead by example and enforce policy. You have failed with these tasks." However, Lunsford was rehired in 2003 and assigned to the maximum-security Tucker Unit.

Following the prisoner's near-death incident, which occurred on January 19, 2010, it was learned that Sgt. Lunsford had lied when he claimed he had told a supervisor about the prisoner's condition. It was later discovered that the supervisor in question was not working at the facility at the time. Lunsford also lied when he said he had been patrolling the prison's perimeter fence when the prisoner was found covered with feces in his cell.

Lt. Glasscock likewise was less-than-truthful about the incident. An internal report found he had engaged in conduct "resulting in injury and/or property damage." Glasscock, who joined the Arkansas Dept. of Correction in 1996, had not received any previous disciplinary infractions.

However, during the course of the investigation a number of other allegations about his conduct were raised – including that he had brought prisoners in to cook for night shift officers, had spent long periods of time in a prison office with female guards, and had received a lap dance from a prison nurse within the sight of prisoners.

Dina Tyler, a spokeswoman for the Arkansas prison system, called the incident in which the prisoner was left in his cell covered in feces "unpredictable." "I think what you've got here is a case of a couple of officers who were not doing their jobs up to their standards and we took appropriate action," she said.

The near-fatality was but the latest in a series of disturbing incidents in the Arkansas DOC. On May 29, 2009, Calvin Adams and Jeffrey Grinder, both serving life sentences for murder, escaped from the Cummings Unit by wearing fake guard uniforms that were made at the facility; five prison employees were fired as a result, including a captain and a sergeant.

And on June 20, 2009, a guard at the Tucker Unit shot and killed a parolee who prison officials claim crashed his car into an assistant warden's vehicle while fleeing from a security checkpoint outside the facility. The slain parolee, who was wanted for failing to report to his parole officer, was not identified.

Tyler cautioned against making blanket assumptions over what she called "three totally unrelated incidents." However, Arkansas Governor Mike Beebe, while stopping short of calling the series of events part of a systemic problem, asked for an "in-depth investigation" and said they raised serious concerns about the state's prison system. Legislators have also questioned the Department of Correction's Director, Larry Norris, and the Chairman of the Board of Correction, Benny Magness, about the incidents.

Yet the problems didn't stop there.

Varner Unit guard Danita Williams was fired on July 7, 2009 after an internal investigation alleged she had had a romantic relationship with a death row prisoner for several months. According to an anonymous letter sent to prison of-

ficials, Williams engaged in a sex act with the unnamed prisoner and helped him trade food items with another prisoner – a violation of institutional rules. She was fired due to the trafficking violation; the alleged romantic or sexual relationship was not confirmed.

"Things like this happen and they don't reveal it and they keep it to themselves," said Senator Bobby Glover, who chairs a legislative committee that oversees the state's prison system. "Then you begin to wonder what other incidents have occurred that they didn't report to the public and the governor."

"If the Department of Correction wants the Legislature and the public to trust them, then they need to act in a manner that's appropriate for us to give them that trust," stated Rep. John Burris. "So far they haven't." Another incident involved Betsey Wright, a former chief of staff for Bill Clinton when he served as governor of Arkansas. Wright was charged on August 12, 2009 with trying to smuggle contraband into Arkansas' death row at the Varner Unit. She is accused of attempting to bring a small knife, box cutter and 48 tattoo needles into the prison. The knife and box cutter were on her key chain, while the needles were hidden in a bag of Doritos that Wright said she found in the bottom of a vending machine at the facility. She also had a pen that contained a pair of tweezers.

"They think it's me, but it's not," she said. "I certainly did not do what they have charged me with." Wright, who opposes capital punishment, was a regular visitor to death row. She faces 51 charges. The Arkansas prison system is known for its troubled past. U.S. District Court Judge J. Smith Henley once declared the Arkansas DOC unconstitutional, when prisoners were allowed to carry weapons and guard other prisoners. At that time, forty years ago, Judge Henley described the state's prison system as a "dark and evil world." It is apparently still dark, and still has evil denizens – including prison employees in some cases. ■

Sources: *Associated Press*, *The Morning News*, *Arkansas Online*

Virginia DOC K-9 “Training” Results in Animal Cruelty Charges

by David M. Reutter

The training of a dog as a law enforcement K-9 unit requires hours of dedication and bonding between the animal and its handler. It appears that guards with the Virginia Department of Corrections (VDOC) believed in using a “hands on” approach when it came to the bonding part. In fact, their method of training bordered on bestiality.

On October 2, 2009, Powhatan County Commonwealth Attorney Robert B. Beasley, Jr. filed misdemeanor animal cruelty charges against Green Rock Correctional Center guard Kelvin Thompson, former Sussex County Prison guard Melvin Boone, Nottoway Correctional Center guards Adam R. Webb and Cheri Campbell, and former Nottoway Sgt. Anthony Eldridge.

An unidentified VDOC employee had filed a complaint after watching a video of K-9 training at the department’s Academy for Staff Development, and an investigation ensued. Apparently, the employee was appalled by the technique used by some

VDOC guards to train dogs to love and obey their handlers. In fact “handlers” was a particularly appropriate term.

In the video, Thompson “allegedly had some sexual contact with the animal,” said Beasley. “Essentially, he was touching the dog’s penis with his hand. The others were filming it. That’s actually how we learned of it – there’s a video.”

Beasley considered but could not prove a charge of bestiality. That felony charge is defined in state law as a crime against nature that requires proof of “carnal knowledge” of a “brute beast,” which implies intercourse.

The rationale behind videotaping the K-9 “training” mystified Beasley. “I don’t have the slightest idea – I really don’t,” he said. Thompson, Webb and Campbell were removed from the K-9 program after the incident was discovered.

Thompson argued in court that his actions weren’t cruel to the dog, a German Shepherd. “I would characterize it as haz- ing,” he stated, adding that other employees

had told him, “If you masturbate your K-9 unit, you’ll have greater control over it.” Thompson’s attorney noted that prosecutors would have a hard time trying to prove animal cruelty. “The statute is not set up to deal with this type of thing,” he said. “I don’t think the legislature quite had this in mind.” He was apparently correct.

The charges against Thompson and the other current and former VDOC guards were later dropped, after Beasley was informed by several veterinarians that fondling the dog did not cause it any harm. “I came to the conclusion that if you have reputable veterinarians in disagreement over the issue, you’re not going to be able to prove it in court,” he stated.

Evidently, not only is a dog a man’s best friend, but the opposite also holds true – at least when the man is in the VDOC’s K-9 training program. ■

Sources: www2.starexponent.com, www2.nbc4i.com, *Richmond Times Dispatch*



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Kinship Care More Beneficial Than State Foster Care for Children of Incarcerated Parents

by Jimmy Franks

Published in May 2009, *Kinship care when parents are incarcerated: What we know, what we can do*, is an in-depth examination of current statistical and practical information regarding the plight of children with one or more incarcerated parents, the caregivers charged with their welfare and the government agencies and officials attempting to oversee the relationships between the two. The research was prepared for the Annie E. Casey Foundation by Creasie Finnie Hairston, Ph.D., who is Dean and Professor at Jane Addams College of Social Work, University of Illinois at Chicago.

The purpose of the report is to highlight the many and varied difficulties faced by a growing number of American children and their caregivers. The report points out there are over 1.7 million children in the U.S. who have a parent incarcerated. Although most of the children are in the care of relatives, many are in foster care in the custody of the child welfare system. It appears the most common caregiver for children of incarcerated parents are grandparents. These kinship care providers, be they grandparents, aunts, siblings, cousins, or other relatives or family friends, are becoming increasingly aware of the myriad effects the new social situations can have on the children in their care.

Of the nearly 2 million children with a parent in prison, a whopping 62% are between the ages of five and 14. Not surprisingly, some of these children experience significant social and emotional problems due to the parent's absence causing their environmental upheaval. For school age children, the problems may be more pronounced due to the stigma of having a parent in prison. However, several factors have been identified that help ease the emotional turmoil many children experience. For instance, the quality of the child's home environment, the influence of the caregiver, and the ability to communicate with the incarcerated parent have each been shown to have a positive impact on a child's ability to successfully adjust to his new living arrangements.

The financial burden placed on caregivers in these situations often leads to additional stress in an already difficult

matter. Since many of the families in these circumstances are poor to begin with, the added expense can easily lead to problems within the new, extended family. Additionally, 70% of the children live with a caregiver who is over 50 years old, many of whom have physical or mental health issues of their own.

Despite these possible shortcomings, child welfare officials encourage placing children in kinship care as opposed to unrelated foster care. Research suggests that the benefits gained by keeping the children in the care of the family when possible outweigh the potential "environmental adversities" they may encounter.

Dr. Hairston wants her report to

serve as a "stepping-off" point for further exploration of a complex topic." She believes state and federal agencies should become more involved in developing and introducing new initiatives geared toward providing adequate protections and care for children with incarcerated parents. Hopefully, such initiatives will lead to new policies and programs that will not only ease the burden on the children and their caregivers, but help the parents rebuild their families and maintain their freedom upon release. ■

Source: *Kinship care when parents are incarcerated*, C.F. Hairston, Ph.D., pub. May 2009, Annie E. Casey Foundation.

Illinois Prison Officials Fail to Report MRSA Infections

Recognizing that Methicillin Resistant Staphylococcus Aureus (MRSA) is rampant in Illinois' prison system, and that MRSA poses a threat to guards and visitors as well as prisoners, Illinois legislators enacted a law, effective March 3, 2008, that requires prison officials to report MRSA outbreaks to state and local health authorities. Prison officials, however, have failed to file most of the required reports.

An August 2009 article in the Belleville, Illinois *News-Democrat* changed that situation by exposing it. Following an investigation by the newspaper, officials with the Illinois Department of Corrections (IDOC) announced they would strictly comply with the MRSA reporting law, despite reservations.

"We have concerns about the notification process," said IDOC spokeswoman Dede Short. "What we are going to do is ask the prisons that they follow up with written notification to the local health departments. We are going to reach out to staff and make sure that they follow up. But our first priority is treating symptoms."

Critics, however, countered that the IDOC's priority was in hiding the scope of the MRSA problem. "It is rampant in the prison system and they've been covering it

up," said Jeanine Thomas, founder of the MRSA Survivor's Network.

According to an IDOC memorandum, laboratory tests confirmed that 1,037 prisoners were diagnosed with MRSA between July 2007 and December 2008. Another 1,094 were treated for symptoms. Further, there were 400 confirmed MRSA cases in the first six months of 2009. That translates to an infection rate of about 900 per 100,000 population, or 35 times the rate reported at San Francisco hospitals based on a study in the *Annals of Internal Medicine*, a medical journal. MRSA can be fatal, having caused 18,650 deaths nationwide in the U.S. in 2005.

The *News-Democrat's* investigation revealed that the IDOC had failed to report nine MRSA outbreaks in 2008 and another four in 2009. Of the 16 outbreaks in Illinois prisons since the reporting law went into effect, the IDOC only reported three – all at the Vienne Correctional Center.

Hopefully, with full compliance with the MRSA reporting law, the IDOC will take additional preventive actions to stop the spread of MRSA infections, since the outbreaks will no longer be concealed from the public's view. ■

Source: *News-Democrat*

New York Voters Okay Prison Slave Labor for Nonprofits

New York voters have approved an amendment to the New York constitution that permits state and county prisoners to work “voluntarily” for non-profit organizations.

The amendment was largely sought in order to provide an air-tight defense to potential lawsuits surrounding the practice.

Non-profit organizations, according to the amendment, are defined as “an organization operated exclusively for religious charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.”

In spite of the amendment’s passage, it is unlikely many prisoners will be doing work for non-profits anytime soon due to budgetary constraints facing the New York Department of Corrections (DOC).

Communities that used to rely on prison labor to clean parks, cemeteries and other places are being hit hard because of the decrease in work crews.

“The cemeteries aren’t getting done. They’re not being raked and cleaned. I don’t have the staff. That’s going to have to be done in the spring. It’s going to be much harder if we don’t get it done now,” said Kirklin Woodcock, Highway Superintendent for Mount McGregor. Only state-run sites, such as the Saratoga Spa State Park, are receiving work crews.

“We went from 207 crews statewide in October 2008, just prior to the first round of prison consolidations, to 93 crews statewide as of now,” said Erik Kriss, a

spokesperson for the DOC.

The DOC claims to have saved \$11 million by cutting back on community work programs. Each crew must have one guard, and there are transportation and vehicle maintenance costs, too. While the prisoners are paid a pittance for their labor, the guards who supervise them are well paid.

Crews are made up of prisoners who

are nearing the end of their sentences. Crew participants receive \$1.05 a day for their labor. Their cheap slave labor displaces non prisoner members of the community who would otherwise be able to earn at least the minimum wage, thus further driving down the wages of non prisoners. ■

Source: *Saratogian.com*

Guards Suspended, Fired in Prostitution Probe at CCA-Run D.C. Jail

In June 2009, a District of Columbia jail sergeant and two lieutenants were placed on paid leave during an investigation into allegations that the sergeant paid a pimp to have sex with a jailed prostitute. One of the lieutenants was later fired for unrelated reasons.

Jessica Rubio, 32, is a self-described prostitute and drug addict. She was arrested for prostitution and incarcerated at the Correctional Treatment Center annex of the D.C. Jail in Washington, D.C. when corrections counselor Sgt. Aundra Powell allegedly paid her pimp \$50 to have sex with her. The pimp gave Rubio a receipt, which she showed to Powell. Powell then reportedly took Rubio to a satellite kitchen and had sex with her. This occurred four times.

Rubio was released, but re-arrested and again convicted of prostitution in June 2009. At that time, D.C. Department of Corrections investigators questioned her about her relationship with Powell.

After she told them about the paid sexual encounters, she was transferred to the Rappahannock Regional Jail in Virginia.

Powell, assistant shift supervisor Lt. Ricardo Rich and an unidentified substance abuse counselor were immediately placed on paid leave. Rich was fired for unrelated reasons in June 2009. The Treatment Center is managed by Nashville, Tennessee-based Corrections Corporation of America (CCA).

Rubio has since filed a \$20 million lawsuit against the District of Columbia and CCA, alleging violations of her rights in connection with the sexual encounters involving Powell. She said her treatment by Powell, who was supposed to be helping her “turn her life around,” made her feel “cheap, used and abused.” See: *Rubio v. District of Columbia*, U.S.D.C. (D. D.C.), Case No. 1:10-cv-00262-RWR. ■

Source: *Washington Examiner*

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Indian Country Gets Stimulus Money ... to Build More Jails

by David M. Reutter

The U.S. Department of Justice, through the Obama administration's American Recovery and Reinvestment Act, has brought stimulus money to Indian reservations – awarding \$224 million to build and renovate tribal jails. The funding comes after years of unsuccessful lobbying efforts by Native American leaders.

The Justice Department is responsible for building detention facilities on land overseen by the Bureau of Indian Affairs (BIA), which is responsible for running the facilities as part of its mission to carry out the federal government's trust responsibility to Native Americans. The jails only house misdemeanants, as felonies are prosecuted in federal court.

The problems faced by tribal officials are many and substantial, and the Navajo Nation, located on a 27,000-square mile reservation that straddles Arizona, New Mexico and Utah, is illustrative.

Navajo officials say they are dealing with record-high gang activity and are battling chronic alcoholism and substance abuse that make domestic violence and drunk driving offenses common. With only 59 jail beds available in the Navajo Nation for almost 56,000 arrestees a year, the tribal jails have revolving doors.

"We're always playing musical chairs – or musical jails beds," said Delores Greyeyes, head of the Navajo Nation's Department of Corrections. "We just pump [prisoners] through."

It might be a good thing that most prisoners spend only a short time in jail before being released. A 2004 Interior Department Inspector General report found the tribal jails "were egregiously unsafe, unsanitary, and a hazard to both inmates and staff alike," and that the "BIA's detention program is riddled with problems ... and is a national disgrace."

The federal government's failure to provide sufficient funds for social programs and law enforcement had affected the reservation's overall atmosphere. "A lot of crimes go unreported because there's an impression that we won't hold the criminal [in jail]," said Tuba City, Arizona district prosecutor Peterson Wilson.

"Our message was simple and effective: the lack of detention facilities on the Navajo Nation is creating a public safety emergency for Navajo people and

their communities," explained Raymond Joe, vice chair of the Navajo Nation's Public Safety Committee, which lobbied Congress for assistance. Federal officials listened, and provided \$224 million in funding to tribal governments in September 2009.

Navajo officials plan to build 144 jail beds in Tuba City and Kayenta, Arizona and Ramah, New Mexico with \$74 million of the stimulus money. Tuba City, which is constructing a 48-bed jail, intends to offer mental health and alcohol rehabilitation counseling to prisoners.

"We don't want to build another 100-bed facility in the future. We don't want to go into the business of warehousing individuals like the rest of America does,"

said Navajo Nation council delegate Hope MacDonald Lonetree. "We want to rehabilitate people."

However, the sad reality of building more jail beds is that they are quickly filled, leading to overcrowded and financially-stressed facilities that tend to cut rehabilitative programs first when operating costs increase. Previously, in July 2008, the U.S. Senate approved \$2 billion for Native American public safety and water projects, including \$185 million to construct and renovate tribal jails. [See: *PLN*, Dec. 2008, p.43]. ■

Sources: *Los Angeles Times*, *Navajo Nation Council press release* (Sept. 21, 2009), www.reznetnews.org

Three Prisoners Raped at Oklahoma Governor's Mansion

In October 2009, news agencies reported that three female prisoners had claimed they were raped by employees at the Oklahoma Governor's mansion. A three-month investigation by the Oklahoma Dept. of Corrections (ODOC) concluded the head chef and groundskeeper at the mansion had sexually assaulted the women.

The three prisoners were part of an 11-member work crew from the Hillside Community Corrections Center. The horticulture program at the prison chose them to maintain the flower beds, shrubs and other greenery at the Governor's mansion because they were minimum security and low escape risks.

While the alleged rapes occurred between March 2008 and January 2009, the ODOC investigation did not begin until June 1, 2009. The delay was attributed to the prisoners' fear of retribution. Upon her release, one of the women reported that she had been raped. A second prisoner made similar accusations after she was later released.

Some of the sexual assaults occurred in a storage building outside the perimeter fence that encircles the mansion's 14-acre grounds. "My client was dragged down," said attorney Janet Roloff. "She's told me that she was raped and that it was a brutal bloody rape. She was raped by two individuals. One of who [sic] held her down,

while the other perpetrated the act."

The *Associated Press* filed a public records request, which revealed the two employees accused of raping the prisoners were executive chef Russell Humphries and groundskeeper supervisor Anthony Bobelu. Both were fired by the Department of Central Services on September 29, 2009. They maintained they were falsely accused.

However, the ODOC investigation determined that the two men had committed acts of sexual battery, forcible sodomy and rape. "If we denied them any kind of sexual thing, our work would be twice as hard," one of the prisoners stated. "I had to dig a thirty-foot trench because I denied them."

The Oklahoma County District Attorney investigated the claims, but announced in January 2010 that there was insufficient evidence to file criminal charges against the former mansion employees. While sex acts may have taken place, whether they were non-consensual could not be corroborated, according to prosecutors.

"We believe that it occurred," said ODOC spokesman Jerry Massie. "The charging is one for the district attorney's office. Those are difficult cases, particularly if you don't have any physical evidence." Evidently, testimony from multiple prisoners who stated they were

forcibly raped was insufficient – although such testimony is routinely used in rape prosecutions involving non-incarcerated victims.

The sexual abuse scandal followed closely on the heels of an investigation that revealed three state troopers had falsified their work hours to indicate they were guarding the Governor's mansion when they were not.

Governor Brad Henry insisted that he and his family were safe at the mansion. Roloff said prisoners likewise should be safeguarded. "The fact that someone is a prisoner of the state puts an obligation on the state to make sure that individual is safe," she observed. "They take away their freedom in some ways, but they must replace it with security."

The prisoner work crew was reassigned during the investigation into the rape allegations, but has since returned to the Governor's mansion. Mansion officials have ordered "refresher training" for employees, to remind them that they cannot have sex with prisoners – or rape them, presumably. ■

Sources: *Associated Press, News 9, News Channel 4, The Oklahoman*

Washington DOC Agrees to Settle Inadequate Medical Care Suit for \$55,000

The State of Washington has agreed to settle a prisoner suit alleging deliberately indifferent medical care. The suit, filed in 2006, took almost two years to resolve.

Richard Hibdon sued the Stafford Creek Corrections Center, a Washington Department of Corrections facility, after he was given inadequate care for his back and back pain, and almost died as a result of appendicitis that went untreated.

While at Stafford Creek, Hibdon repeatedly complained about "chronic and degenerative back pain," according to Hibdon's complaint. Medical staff allegedly ignored Hibdon's pleas, asserting that he was faking it.

An independent physician, Dr. Ali Akbar, recommended that Hibdon receive an MRI and be seen by an orthopedic specialist, but medical staff ignored Akbar's recommendations, Hibdon's complaint states.

Eventually, Hibdon received an MRI, and it confirmed what Hibdon had claimed and what Dr. Ali had suspected—that Hibdon had serious back and

neck problems.

Aside from failing to treat Hibdon's back problems, Hibdon alleged that he nearly died because medical staff failed to diagnose and treat his ruptured appendix timely. Despite having obvious signs of appendicitis, medical staff kept telling Hibdon that he had a "24-hour chest cold," was "faking it," or that he had been "rectally assaulted."

Hibdon was not faking it, though. When his appendix was finally removed by doctors, "it was gangrenous," Hibdon's complaint states. Portions of Hibdon's stomach also had to be removed because "of fluids that leaked out when his appendix ruptured." Doctors told Hibdon that he was only hours away from dying.

The State agreed to settle the case for \$55,000 on June 6, 2008. Hibdon was represented by Thomas Vertetis of Gordon, Thomas, Honeywell, Malanca, Peterson & Dalheim LLP, a Tacoma, Washington firm. See: *Hibdon v. Stafford Creek Corrections Center*, No. 06-2-13412-1 (Pierce County Sup. Ct.) ■

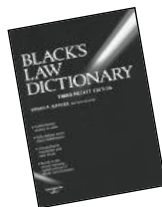
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New Mexico Prisoner Vindicates Native American Religious Rights with Injunction, Fees and Damages

A New Mexico prisoner has prevailed in a religious freedom case that vindicated his right to practice his Native American beliefs. The lawsuit resulted in a settlement in April 2009 that specified the religious practices prison officials must allow, as well as nominal damages, costs and attorney fees.

New Mexico state prisoner Jimmy Kinslow is a member of the Potawatomi tribe of Native American Indians. While incarcerated at the Southern New Mexico Corrections Facility, he filed a federal lawsuit claiming prison officials were not providing him with adequate time in a sweat lodge or materials needed for his religious expression.

Shortly after the suit was filed, Kinslow was reclassified to a higher security level and transferred to the Supermax at the Penitentiary for New Mexico (PNM). Appearing pro se, Kinslow withstood the defendant prison officials' motion for summary judgment, with the court ordering the defendants to submit a *Martinez* report.

After a supplemental report was filed which allowed the court to determine the prison's policies, practices and security needs, the district court advised prison officials that they had conceded limiting Kinslow's "access to the Sweat Lodge and denying him materials for his medicine bag," and "had not come forth with the specific policies for their actions." Consequently, an evidentiary hearing was ordered.

Kinslow, still proceeding pro se, testified at the hearing. In addition to testifying about the deprivations related to his religious practices, Kinslow said prison officials were requiring him to prove he was Native American, "since I was mostly white."

In the Magistrate's second report it was noted that "security" was mentioned several times by prison officials to justify their actions, but in a conclusory manner that failed to explain the deprivation of Kinslow's religious rights. The district court found Kinslow was entitled to summary judgment on his claims under the First Amendment and Religious Land Use and Institutionalized Persons Act (RLUIPA). He also prevailed under New Mexico's Religious Freedom Restoration Act.

The court awarded Kinslow \$100 in nominal damages, and in a third report the Magistrate recommended granting a preliminary injunction. Prior to a trial to determine if the injunction should be permanent, Kinslow was appointed counsel.

In April 2009, the New Mexico Department of Corrections conceded defeat without admitting wrongdoing. They agreed to allow at least four hours a month for a sweat lodge ceremony and another one-hour period twice a month for prisoners to use the sweat lodge. Prison officials also agreed to let Kinslow receive tobacco

and other items needed for his religious ceremonies while at PNM.

In addition to the nominal damage award, Kinslow received \$453.60 in costs. His attorneys, from the Santa Fe law firm of Holland & Hart, received \$20,000 in fees and \$4,167.60 in costs.

Kinslow notified the court in January 2010 that the defendants had violated the settlement agreement, but his counsel later stated they were "attempting to resolve the matters ... without court involvement." See: *Kinslow v. New Mexico Corrections Department*, U.S.D.C. (D. New Mexico), Case No. 6:07-cv-01164-MV-RLP. ■

Florida County Jail Discontinues Medical Co-Pay Policy

by David M. Reutter

Saying it was "not even worth it" to collect an \$8 medical co-payment from prisoners seeking medical care, Florida's Pinellas County Sheriff Jim Coats has abolished the practice at his jail. In these tough economic times that have squeezed budgets, it is surprising Coats would forfeit \$50,000 in annual revenue.

Jails and prisons across the nation have turned to co-pays. Officials say it reduces bogus ailments. "The money obviously is a big part...but the other side of it is there are some inmates who would go to the doctor every day," claimed Florida Department of Corrections (FDOC) spokeswoman Gretl Plessinger. "And if they have a medical need, they need to go, we want them to go. But this minimizes inmates who might be trying to game the system."

When Pinellas County began its co-pay system in 1995, it said demand for medical care by prisoners was reduced by half. Paperwork related to the program, however, caused a bureaucratic nightmare. With over 350,000 prisoner medical visits in 2008, the co-pay required more time than it was paying for.

"The administrative reviewing and tracking of all that cost us more than we make," said Pinella's chief Deputy Bob Gualtieri. Other officials hope medical personnel will be able to focus on their main mission more. "The nurses should be seeing inmates and treating them," said Lt. Sean McGillen, "not filling out

paperwork for co-pays."

The decision to discontinue collecting co-pays comes as a surprising move, especially after the Pinellas Sheriff's Office had its budget reduced by a quarter, which hacked \$67 million and 363 positions. Coats said he planned to increase revenue via the increased \$20 booking fee.

Pinellas' policy change is a stark contrast to the decision Florida lawmakers made during their last legislative session. They increased FDOC medical co-pay from \$4 to \$5. In FY 2008, FDOC collected \$640,000 to offset the millions it pays for medical care annually, which continues to increase due to the prison population becoming older.

Other Florida counties near Pinellas charge from \$5 to \$20 for medical or dental care. Federal prisons assess a \$2 co-pay for medical visits.

Despite the popular trend to require prisoners to make medical co-payments, Pinellas County feels it takes too much effort and sacrifices services, resulting in lawsuits and staff chasing co-pays. There is no correlation between charging prisoners for medical care and whether that care is adequate.

"It doesn't make good business sense," Coats said. "You can only squeeze so much juice from an onion. Sometimes it gets to the point where it's counterproductive." ■

Source: *St. Petersburg Times*

Texas Tech and TDCJ Settle Prisoner Suicide Suit for \$85,000

On April 2, 2009, Texas Tech University Health Science Center (TTUHSC) and the Texas Department of Criminal Justice (TDCJ) settled for \$85,000 a lawsuit involving a prisoner who committed suicide at the Clements Unit.

Theodore Schmerber was a Texas state prisoner when he committed suicide by tearing a damaged anti-suicide blanket and using the strips to hang himself from a light fixture in a Crisis Management Cell on October 20, 2006. On October 19, 2006, Schmerber had been given a mental health evaluation. The evaluator found him to be delusional with suicidal ideation and intent and noted that he required emergent care. This resulted in his transfer to the Crisis Management Cell with mandatory checks by guards every 15 minutes.

On October 20th, Schmerber had been seen by five nurses and a psychiatric nurse practitioner, all of whom noted delusional and suicidal behavior and two of whom recommended that he be transferred to the psychiatric facility at the Montfort Unit for stabilization. Even though he had injured himself by slamming his head against the cell wall that day, none of them made sure that he was actually transferred to Montfort.

The guards on the pod where Schmerber was housed failed to conduct the every-15-minute bed checks. Schmerber hung himself. A nurse discovered him hanging, but failed to enter the cell and attempt to help him.

Schmerber's mother filed a civil rights suit in federal district court against TDCJ and TTUHSC employees pursuant to 42 U.S.C. § 1983. She alleged that the failure to send her son to Montfort, to check the blankets for damage and defects and to conduct the suicide watch bed checks constituted deliberate indifference to her son's medical condition and right to protection from known suicidal tendencies. She also made state law claims of negligent wrongful death. TDCJ removed similar light fixtures from its Crisis Management Cells and inspected its suicide prevention blankets, discarding damaged blankets. It also disciplined the guards who failed to conduct the bed checks and had tried to cover it up by later falsifying records.

Admitting no wrongdoing, TTUHSC and TDCJ settled the suit for \$85,000. "To TDCJ's credit they examined the cells and made sure the manner in which Schmerber committed suicide couldn't happen again,"

said plaintiff's attorney Jeff Edwards of Amarillo. "One of the reasons my client was willing to resolve the case was because they were taking proactive steps."

The plaintiff was also represented by Baltimore, Maryland, attorney Steven H. Heisler. See: *Daniels v. Smith*, U.S.D.C.-N.D.Tex., No. 2-07-CV-227-J. ■

Sex Addicted Ohio Sheriff's Jail Supervisor Receives \$1,000 Following Termination

Ohio's Warren County Sheriff's Office has agreed to pay \$1,000 to settle a lawsuit filed by a former jail supervisor who was fired for viewing pornography and masturbating at work.

A 2006 investigation of former Lieutenant Shaun Wells resulted in an internal computer audit that uncovered rampant improper Internet use at the jail. Wells and Sgt. Steve French were placed on leave and later terminated, while guard Michael Lanning resigned.

A forensics computer report revealed that Lanning had viewed 400 pornographic or nude images. Wells had viewed 65 images, and admitted that he sometimes spent five or six hours a night visiting inappropriate Internet sites while on duty at the jail.

Wells filed suit after he was terminated, claiming that he was the victim of discrimination. Specifically, he said he had mental disabilities, described as "dysthemic disorder and [an] addictive personality." Yet while other jail employees who committed similar misconduct were allowed to keep their jobs, he had been fired.

Wells argued he was a sex addict who should have been allowed to receive treatment instead of being terminated. His lawsuit raised claims under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Ohio Fair Employment Practices Act.

Wells had a point about disparate treatment by the Warren County Sheriff's Office. Although at least two other jail employees had "much more egregious and detailed disciplinary backgrounds and had a more voluminous amount of pornographic images" on their computers, neither was fired. Other staff members implicated in the investigation received discipline ranging from written reprimands to suspensions. Sgt. French later regained his job position through arbitration.

Wells settled his federal lawsuit for \$1,000 on August 11, 2009. See: *Wells v. Warren County*, U.S.D.C. (S.D. Ohio), Case No. 1:08-cv-00061-MRB. ■

Sources: *www.cincinnati.com*, *The Enquirer*

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Dying in Cell 40: Vermont's Flawed Contract and Prison Health Service's Drive for Profit Lead to Prisoner's Death

by Terry J. Allen

Ashley Ellis' misdemeanor arrest turned into a death sentence. Her crime was careless and negligent operation of a motor vehicle. On Aug. 16, 2009, less than two days after she began a 30-day sentence at Vermont's only prison for women, she died from the careless and negligent operation of a privatized, for-profit prison health care system.

"It is a pretty blatant and obvious and extreme case of gross negligence," said Seth Lipschutz, supervising attorney at the Vermont Defender General's office. "We figured out in a day that they killed her."

In January 2010, when Tennessee-based Prison Health Services (PHS) left Vermont under a cloud, the state hired the fifth private company in 14 years to run its prison health care system. The contract was expanded to absorb mental health functions.

Vermont's serial contracts with for-profit corporations follow a nationwide pattern: Oversight is flawed, prisoner care is stingy, contractors are indifferent to or insulated from lawsuits, and states switch providers when trouble hits. Meanwhile, a fundamental conflict remains: A for-profit system thrives by cutting costs and services, while sound prisoner and public health care principles demand that careful medicine comes first.

Ashley Ellis' tragic death throws the nature of this conflict into sharp relief.

Just the Facts

Ellis was 5 foot 6 and weighed 87 pounds when her grandmother drove her past dairy farms and August corn fields to the rings of chain link and razor wire that wrap Northwest State Correctional Facility in Swanton.

The 23-year-old was "gaunt and haggard," according to a news report, when she was sentenced last August. Ellis was ordered to report to prison two days later, although her public defender had begged for no jail time for the July 2007 accident: Traffic accidents aren't crimes, argued Mary Kay Lanthier, insisting that her client was just too sick for prison.

Rutland District Court Judge Thomas Zonay, ignoring or ignorant of the prison's bare-bones medical staffing on weekends, ordered Ellis to report to the 160-bed red

brick prison just south of the Canadian border on August 14, a Friday before a three-day weekend. Judge Zonay declined to be interviewed for this story.

From the moment Ellis entered the bleak intake room with its two barred cells, her life was in the hands of a company with a cross-country rap sheet that is spattered with deaths, lawsuits, millions of dollars in fines and settlements and numerous investigations.

A 2005 three-part *New York Times* investigation found PHS' care "flawed and sometimes lethal." The company, the paper noted, has "hopscoched from place to place, largely unscathed by accusations that in cutting costs, it has cut corners."

Ellis' doctor and her lawyer had alerted the prison to the young woman's fragile health. Police reports and state investigators confirm that days in advance of her incarceration, Ellis' doctor, Michael Garcia, faxed her health records to Dr. Delores Burroughs-Biron, head of Department of Corrections (DOC) Health Services. The extensive document detailed her serious anorexia/bulimia nervosa and her need for frequent meals, and most importantly, the regular potassium supplements meant to prevent her heart from shutting down.

No one competent to assess her health was present at Ellis' medical intake. There was no doctor at the facility, and only one RN (for one shift) during the almost two days Ellis survived in jail, according to DOC records. Nursing at Northwest on weekends – 5 p.m. Friday to 7 a.m. Monday – by contract is light and assigned to licensed practical nurses. LPNs, who typically study for one year, are barred by state nursing regulations from assessing patients, and may not have had the training to understand how critically ill Ellis was.

Ellis, who never got the prescribed potassium, was found dying in her cell at 6:30 a.m. Sunday, according to the police report. An autopsy determined the cause of death as hypokalemic (potassium deficiency) induced cardiac arrhythmia caused by a denial of access to medication.

PHS' public relations firm issued a statement that Ellis "received care that met applicable standards ... and PHS did

not deny her access to medications." The corporation has declined to say more.

At the same time, Franklin County State's Attorney Jim Hughes chose not to prosecute, saying his "decision was to seek no charges against any individuals in the case." Sandra Gipe, Ellis' grandmother, says she is "not mad that they didn't charge one person; there were a lot of people who didn't do their job."

For the state's part, no agency has decided to go after PHS, either. Although a corporation can be charged with a crime, Vermont's Defender General Matthew Valerio told the *Rutland Herald*, "I think that it would be difficult" for the state's attorney's office to have the resources to prosecute a corporation.

Ellis' family, meanwhile, is looking into a civil suit, and has hired the Rutland law firm of Kenlan, Schwiebert, Facey & Goss to review the death.

PHS is well practiced in paying off lawsuits as a cost of doing business. "It's in their interest to provide inadequate care, and take lumps when sued," said the defender general, attorney Lipschutz. And when things get really dicey, PHS simply leaves, "thus preserving its marketable claim that it has never been let go for cause," the *New York Times* reported almost five years ago.

Conveniently for PHS and Vermont, the current contract expired on Jan. 31, 2010, and the four-year relationship ended with a volley of I-quit /Don't-bother-to-reapply exchanges.

Potassium Girl

When Ellis entered prison that Friday afternoon of August 14, Wayne Hojaboom, an LPN, conducted the medical intake. He later told police that he had been given "no prior information" about Ellis' condition.

Burroughs-Biron said that "there should be an intake screening and assessment as soon [as] possible, immediately." Asked why an LPN – not legally qualified to assess patients – was given this role, she rephrased: "There should be a screening that is not assessment."

On Wednesday, two days before Ellis arrived at the prison, Burroughs-Biron faxed Ellis' medical records, including the

drug orders, to Northwest's clinical coordinator, Renee Trombley, an LPN. The police report details what ensued next, with disastrous consequences: a perfect storm of poor decisions and inadequate staffing coupled with a cumbersome bureaucracy and a breakdown in communications.

Trombley said that she received the meds order. But, she told police investigators, she got too busy because of a staffing shortage. After a nurse on the Friday shift "did not show up," Trombley asked Dr. Burroughs-Biron to excuse her from a meeting in Waterbury so she would not leave just one nurse at the facility, and so she would have time to fill in for the missing nurse. Trombley told police that Burroughs-Biron denied her request, and that was why "she didn't have a chance on Friday to follow up on Ellis' medication." Neither Burroughs-Biron nor Trombley would comment on the police statement.

On Saturday, when LPN Connie Hall showed up at 6 a.m. for her 12-hour shift and reviewed the day's medical charts, she told police that she called Dr. John Leppman, the only PHS physician in the state on call that weekend. He faxed an order to Hall for Ellis to receive folic acid, potassium and Tums.

Since the prison had no potassium in stock, Hall left a cell phone message for nurse Karen Hough, who was scheduled for the 6 p.m. shift, asking her to stop at the local drug store on her way in. But Hough, according to the police report, did not check her messages, and arrived at Northwest on Saturday evening just before the Rite Aid closed for the night. Hough, police say, quit her job after Ellis died.

"It is reasonable to create a picture that people receiving the order [for meds] didn't understand the full context," said PHS' on-call physician Leppman. "Communication of a medical problem, and the reason for the order, didn't rise to the level of urgency that it appeared it should have."

"I never got [Ellis'] medical reports, never asked for the reports," Leppman said. "I was not on the distribution list, and didn't have access to the information."

By Saturday, Ellis was desperately trying to communicate the urgency of her need. She begged so often and fervently for potassium that the corrections officers nicknamed her "Potassium Girl."

She had been hospitalized previously for eating disorders and knew the danger

signs. In a sick call request form she wrote but apparently never filed, Ellis pleaded, according to the police report, that "she could have a heart attack or die if her potassium gets too low."

One corrections officer had taken pity on the emaciated woman and violated rules to make her a peanut butter and jelly sandwich, according to Darla Lawton, an investigator with the Defender General's office. Another CO said angrily that a person as fragile as Ellis should have been hospitalized – not incarcerated. He described Ellis as "a skeleton," adding, "I have never seen anyone in that condition."

By 9 p.m., an hour before lockdown that Saturday, Ellis complained that she felt unwell and went to bed in her one-person cell. Her grandmother, Sanda Gipe, remarked in an interview, "Ashley was someone who needed help so much, and no one helped her."

Dying in Cell 40

By Sunday morning, Ellis' potassium levels must have been critically low. According to Lawton, the police and other sources, when a corrections officer came to collect her breakfast tray, the prisoner,

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Dying in Cell 40 (cont.)

who had been alert a half-hour before, lay crumpled on her bunk. Her eyes were fixed and staring, her mouth contained unswallowed food. A "Medical 33" call echoed through the prison, and within minutes, a CO applied the Heimlich maneuver and nurse Connie Hall did a mouth sweep. But the problem, the autopsy determined, was not the food Ellis had eaten, but medication she was denied.

"At first, there was no [protective] mask for mouth-to-mouth resuscitation," said Lawton, "so Connie went ahead without it." Hall and the corrections officer alternated for 10 to 15 minutes with chest compressions and breathing, trying desperately to establish a pulse.

Up and down Delta Block, locked-in prisoners, riveted by the unfolding tragedy in cell 40, pressed against the small windows in the steel doors of their cells. Most of Vermont's incarcerated women are short-timers, picked up for petty financial crimes, says David Turner the superintendent for Northwest. Sunday, August 16, 2009 happened to be the first day he served in that post.

An ambulance crew arrived and took Ellis to the hospital where she was pronounced dead at 7:35 a.m.

Lipschutz called Ellis' death "Just another example of the maxim: 'We don't care. We don't have to.'"

Waiting to Happen

There are cracks in all our paths that can open onto disaster. Ashley Ellis seemed to trip into more than her share. Her 2007 car accident was just that, an accident. Her auto insurance had expired two days before, but she was not speeding or impaired when she got distracted by one of her dogs and hit a man on a motorcycle. He suffered terrible injuries, was put on a ventilator, and is in a wheelchair.

Ellis' own injuries emerged over time. "Ashley was horrified by what she had done," said Ellis' grandmother. In the two years between the accident and her incarceration in the Northwestern Correctional Facility in Swanton, Ellis became a licensed nursing aide and "took care of people on ventilators," said Mary Kay Lanthier, her lawyer. "That was all she knew to do, since she couldn't help the man she hit."

She also dropped almost 40 pounds from her already thin 126-pound frame,

and her eating disorder became so severe she sought treatment. With a suspended driver's license, her local options were few, and her state health insurance would cover only 10 days hospitalization in a specialized center. At some point she developed a drug dependency, and the doctor performing her autopsy, according to the police report, found 17 cigarettes and some Suboxone pills (prescribed to treat opiate dependence) wrapped in electrical tape in her vagina.

But if Ellis was flawed and fatally unlucky, PHS and the Vermont Department of Corrections had their own problems. They knew the system was full of holes: From January 2008 to May 2009, PHS reported 169 sick-call and pharmacy violations system-wide, and Corrections imposed \$19,200 in fines. From August – the month Ellis died – through October 2009, Northwest alone racked up 43 additional penalties.

The contractor and the state were also unlucky. Other deaths under PHS have created only passing media ripples. But Ellis, a pretty young woman incarcerated on a misdemeanor, was an easy object of press attention and public sympathy.

"People admitted in newspaper comments," says Vermont's Defender General Matthew Valerio, "that 'I wouldn't give a damn' if it had been a sex offender" who died.

This time, Vermonters wanted to know whom to blame. The prison nurses were the easiest target. "My analogy is guards at Abu Ghraib," said Lanthier. "Sure the LPNs bear responsibility, but there is a systemic problem."

It took Valerio a bit longer to reach that conclusion. When Ellis died, he said, "I pointed the finger directly at the nurse on duty [Connie Hall], but realized she was just the last one in line. Now I think PHS is to blame. ... Profit-driven organizations are prone to cut costs. The system failed."

Staffing Issues

That system began in 1996 when Vermont stopped running the prison health care system, privatized the service, and opened it up to bids from out-of-state, for-profit companies. Darla Lawton, an investigator with the Defender General's office, attended a contract pitch that PHS won. "You had these companies saying, 'We can take care of Vermont's inmates,' and I'm thinking you can't even make your PowerPoint work. If nothing else, PHS is slick."

While slickness may play in comfortable meeting rooms, it doesn't go far in prisons where ill and impaired prisoners have few options. "Low staffing levels put Ellis in a position of not getting what she needed," said Defender General Valerio. "It frequently happens, but usually no one dies."

PHS' \$16.4 million-a-year contract allows it to staff Northwest and some other facilities on weekends (and many weekday shifts) with no one above the level of LPN. From Friday evening to Monday morning, only one PHS doctor is on call, by phone, to cover the more than 2,000 prisoners incarcerated in 2009, and many of the 7,000 to 8,000 people who pass through the state's eight jails annually. Dr. John Leppman, a PHS physician, says he typically fields 20 to 30 calls on a weekend. Nurses can work 12-hour shifts. One nurse said she was ordered to work 36 hours straight because no one else was available.

In all but one prison, PHS' contract allows it to substitute LPNs "without penalty if an RN is not available." The substitution is not trivial: Lower-paid LPNs are less trained. "It is not clear," says Valerio, "that an LPN would know that it would be life threatening" to delay potassium.

Martha Israel, an RN, quit her job at the women's prison after "PHS hired an LPN to be nurse manager and my supervisor," she said. "At the prison, nurse managers have to make patient assessments regularly, but I thought that was incredibly unsafe – and illegal," since the State Board of Nursing allows only RNs and others who are more highly trained to make patient assessments.

When PHS' contract was coming up for renewal in 2007, Israel warned then-DOC head Robert Hofmann, the Board of Nursing and the media about the use of under-qualified staff. "No one listened," she said.

Staffing problems are exacerbated by turnover rates, said Israel, and "PHS' reputation is so bad that good people don't want to work with them, or stay."

Lorene Gendron, who worked for PHS for two years as a prisoner advocate in Vermont, says that poor support, salaries and working conditions translate into high turnover. "They will hire any friggin' warm body because they go through staff so much," Gendron says.

Northwest "was understaffed and had trouble keeping people," confirmed Dr. Charles Gluck, who retired several

years ago. He worked one day a week at the women's prison, typically seeing 20 to 30 patients. "If a patient comes in with that kind of background," he said, referring to severe anorexia, "they should never have been admitted on a weekend, because no one is available. ... The poor LPN [on duty when Ellis died] was stuck with it, and probably not qualified."

Drug Delays

Fewer highly-trained medical staff means cheaper operating costs, a goal that can also impact the quality and timeliness of care. Failing to treat prisoners who carry infectious diseases, for example, saves money. "Treating people with hepatitis C is a very expensive procedure," said Gluck. "I had to argue adamantly, and talked about preventing patients from taking hep-C back out into the community. But they [PHS] were just not going to do it."

Gluck said his fight for better care was also frustrated by delays for meds and X-rays. Since prisoners are not allowed to bring in their own prescriptions, new ones must be obtained either from PHS' Texas-based supplier or in-house stocks. When neither is available, nurses, and sometimes even corrections officers, go to the local Rite Aid. Police reported Connie Hall as describing these pick-ups as "a courtesy thing that the staff does for inmates."

Vermont's contract with PHS allows entering prisoners to go two to three days without medication, except when orders are labeled "stat." Then, even out-of-stock medications must be administered within two hours. Leppman would not say if his Saturday meds order carried that automatic trigger word, but Burroughs-Biron said that no available prison records included an order that Ellis' potassium should be administered "stat."

"There appears to have been a delay,"

said Leppman. "If there was an unacceptable delay, then that was unacceptable."

Some caregivers will not tolerate the unacceptable. One RN, who did not want to be named, said she risked her career to deliver prescribed meds. In 2006 one of her patients was in pain, but the prescribed Tylenol 3 would not arrive at the prison for days. The nurse knowingly violated the rules by taking Tylenol 3 another prisoner had left behind on release, and giving it to the suffering woman. "I did the wrong thing legally," she said, "but I was trying to do what was right for my patient." PHS fired her.

"When I heard about Ashley's death, and the failure to provide meds," said the woman, who is still in nursing, "I thought: 'Here we go again.' They don't have enough staff, so they push people to the ultimate. I'll bet a dollar to a dime that's what happened to the LPN on the weekend Ellis died."

In her two years as Vermont's prisoner advocate, Lorene Gendron visited prisons and fielded grievances that included charges of medical care on the cheap. "I would say: 'Why can't you just give the patient the med they need.' And PHS would say: 'It's too expensive, or not on our formulary.' It was hard to see something so simple to do for someone, and not be able to get it done. There was so much pressure not to prescribe."

"The fewer services they provide, the more money they make," said Lipschutz.

"I'm still reeling," Corrections Commissioner Andrew Pallito said of Ashley Ellis' death. "Up until that point, they [PHS] were doing satisfactory work."

In fact, Ellis' was one of a number of untimely deaths in Vermont under Prison Health Services. A week into PHS' first contract in 2005, Robert Nichols, suffering heroin withdrawal, died the first day of

his imprisonment at Chittenden Regional Correctional Facility in South Burlington. According to the *St. Albans Messenger*, he never saw a physician and didn't get his prescribed meds. His wife successfully sued PHS, and the 1997 settlement was sealed under a confidentiality agreement. The next year, the death of Michael Estabrook at the same prison sparked the state to fine PHS \$36,000 for failing to follow department procedures.

Ten days after Ellis' death, Michael Crosby, 49, died less than 12 hours after entering the South Burlington prison. An autopsy revealed multiple intoxicants and various serious conditions. "I saw the tapes [of his intake]," said Pallito. "He appeared OK. He wasn't staggering."

When PHS' 2005 contract came up for renewal for 2007 – despite the deaths, the blistering *New York Times* exposé on PHS' abuses nationwide, and warnings by nurses and others – Vermont renewed the contract. The new contract let PHS cut back on 160 hours – 20 shifts a week – of nursing care at the Northwest correctional facility alone. It eliminated the prisoner advocate position as a cost-cutting measure. Asked if money was the real reason, Gendron, who earned \$14 an hour, said, "I'll never be sure."

Corrections, meanwhile, also allowed PHS to alter its contract so that it could use LPNs rather than RNs as clinical coordinators. Although Burroughs-Biron declined to say what reforms Vermont is considering for its next contractor, since the information might be used in litigation as a tacit admission of errors, the DOC head of health services acknowledged one change: "In future, the clinical coordinator, the person in charge of day-to-day functions, will be an RN."

However, after clinic coordinator Renee Trombley was, as Burroughs-Biron

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Dying in Cell 40 (cont.)

put it, “removed from the facility” in the wake of Ellis’ death, another LPN, James Bessette, took over the position.

Revolving Barred Doors

“Vermont has a moral responsibility because they know what’s going on and closed their eyes to it,” said Seth Lipschutz, supervising attorney at the Vermont Defender General’s office. “And that responsibility extends to all of us.”

Correct Care Solutions (CCS), based in Nashville, Tennessee, succeeded PHS on Feb. 1, 2010 as the medical care provider for Vermont prisoners, and, like its four predecessors, was handed much of that responsibility.

In 1996, Vermont hired its first for-profit contractor, Florida-based EMSA Correctional Care. A few months before, a Massachusetts auditor’s report found that the company had overcharged that state \$1.5 million for “unsubstantiated AIDS-related treatments,” according to *The Boston Globe*, which also reported charges that EMSA did a “poor job of caring for inmates.”

A year later, Lipschutz told the *Globe* that complaints of inadequate care in Vermont rose “exponentially” under EMSA.

In January 1999, EMSA was bought by PHS. In July 2000, Vermont moved on to Correctional Health Services, and six months later the contract was assigned to Correctional Medical Services (CMS). Vermont dumped CMS on January 31, 2005 after a series of problems, including seven in-prison deaths in a year. The investigation that followed concluded that CMS had “inadequate staff [that] would lead to significant medical problems and errors in medication administration,” and called for “drastic measures to insure contract compliance.” [1]

CMS had also used unlicensed staff, and once, after a prison head objected, the company simply transferred the unqualified employee to a different facility.

An auditor’s report on CMS in 2004 concluded that Vermont had no real way to fulfill its responsibility to evaluate the quality of the company’s care. Pallito, the Corrections Department’s management executive at the time, acknowledged the department’s failings: “We didn’t belly up to the bar to monitor them,” the website www.realcostof-prisons.org reported him saying, “I think we have made some improvements.”

Pallito, now Vermont’s Corrections Commissioner, called Ellis’ death “an isolated incident. ... [PHS has] been in Vermont for four years,” he told *The Burlington Free Press*. “On balance, it was not bad.”

Next

Bad or not, pushed or jumping, PHS left on January 31, 2010 and Correct Care Solutions is the latest contractor to swing through the revolving barred door. It has much in common with its predecessor. Both PHS and Correct Care are for-profit, out-of-state providers based in Tennessee. And both have been led by the same CEO, Gerald (Jerry) Boyle.

Before founding Correct Care in 2003, Boyle headed Prison Health Services from 1998 to 2003, during much of the period covered by the *New York Times* investigation that found PHS’ medical care “around the nation has provoked criticism from judges and sheriffs, lawsuits from inmates’ families and whistle-blowers, and condemnations by federal, state and local authorities. The company has paid millions of dollars in fines and settlements.”

Before he headed PHS, Boyle was a vice president at EMSA when it held the Vermont contract. Boyle visited the state several times, according to CCS executive vice president Patrick Cummiskey.

Cummiskey also revealed that Correct Care will assume far more responsibility than PHS, taking charge not only of physical health services but also mental health care as well.

Correct Care will probably retain many of the same staff and – barring a quite different contract – the same poten-

tial for medical lapses and lax oversight.

Sandra Gipe hopes that her granddaughter’s death will spark reform. But an investigation of Ellis’ death that fails to reach beyond finger-pointing and narrow fact-finding may end up obscuring the extent and causes of a systemic breakdown that was remarkable for its tragic outcome, rather than its particular errors.

No matter how good the investigation, the contract or the new provider, a fundamental contradiction will remain: For-profit companies pit the health care needs of an often despised population against their own corporate need to turn a profit. In the latter, at least, PHS was successful: Healthcare revenues from continuing contracts for the third quarter of 2009 – the quarter when Ellis died from lack of a \$4 bottle of pills – increased almost 28 percent from the prior year’s third quarter, to \$160 million. ■

[1] From Kurt Kuehl, DOC attorney. Vermont DOC medical care contract providers: EMSA, August 7, 1996 – June 30, 2000. Correctional Health Services, original contract period was July 1, 2000 – June 30, 2003. However, the contract was amended to assign it to Correctional Medical Services and the amendment became effective on January 24, 2001. That contract was then amended two times to extend the end dates to June 30, 2004 and then January 31, 2005. Prison Health Services, February 1, 2005 – January 31, 2010. CCS, February 1, 2010 to present.

This article originally appeared on www.vtdigger.org on December 14, 2009. It is reprinted with permission of the author and the publisher, and has been updated to reflect CCS as the new medical care contractor for the Vermont DOC.

Georgia Grand Jury Critical of Ticket-Fixing Scam

A Grand Jury in Georgia’s DeKalb County found that the County Recorder’s Court suffered from “a leadership competency issue.” The Grand Jury’s review of the court followed a scandal that cost the county millions of dollars plus the court’s credibility and reputation.

A fraud operation by low-level court employees and other individuals involved a ticket-fixing scheme. As part of the scam, court workers lied to judges, falsely telling them that police officers who issued the tickets had authorized downgrading them from fines to warnings. The operation ran from July 2005 to January 2008,

and included fixing traffic tickets as well as codes violations.

Two of the eleven people indicted in the scheme pled guilty in September 2009. The court’s former tribunal technician, Charlene N. Johnson, received one year in jail for two counts of violating the Georgia Racketeer Influenced and Corrupt Organizations Act. She admitted to charging fees to dismiss tickets, and was ordered to pay \$20,000 in restitution. Other court employees who were indicted included Stephan Roberts and Adrian Andrews; former court employee Vanessa Adel and former DeKalb probation office

employee Tanzey Swankey were charged in individual ticket fixing cases.

"Clearly, no 'check and balance' system was in place at the time of the alleged criminal actions, and, frankly, the Grand Jury finds it deleterious for the head of the Recorder's Court to fail to take any initiative, action, or corrective steps once her former employees were implicated," the Grand Jury report concluded.

Chief Judge R. Joy Walker disagreed, saying she acted swiftly to make changes. Her new policy requires officers to either show up in court or submit a request in writing to downgrade a ticket. The Grand

Jury also recommended several improvements that Walker agreed to implement.

A December 2008 report estimated that DeKalb County loses up to \$7 million annually due to uncollected fines. A major problem is the court's 85,000 outstanding warrants that only two sworn officers are charged with enforcing. Whether the court will receive funds to hire more officers and improve the computer system used to track tickets seems doubtful, given the county's budget woes due to the poor economy. ■

Sources: *Atlanta Journal-Constitution*, www.cbsatlanta.com, www.crossroadsnews.com

California AG's Spokesman Resigns After Caught Taping Phone Conversations

by Michael Brodheim

Just days after being accused of violating state law by secretly recording telephone conversations with reporters, Scott Gerber resigned from his position as communications director for California Attorney General Jerry Brown.

In a move fit for airing on an episode of "America's Dumbest Public Officials," Gerber — who, one would think, should have known better — sent a transcript of one of his secretly recorded conversations with a reporter to an editor at the reporter's newspaper. He did so, apparently, because he didn't agree with some of the statements in an article posted on the paper's website that included quotes from the conversation.

Then, in a refreshing display of candor, or perhaps just naiveté, Gerber acknowledged that he had recorded conversations with other reporters without obtaining their permission. "Sure, I've done it before," he told the *San Francisco Chronicle*, which broke the story of the secretly recorded conversations on October 30, 2009.

California is one of only a dozen states that prohibit the taping of phone calls without the consent of all parties involved (Cal. Penal Code § 632). When asked why he had recorded the conversation with the *Chronicle* reporter, Gerber said, "To me, it's useful to have a record."

Stephen Proctor, managing editor of the *Chronicle*, had a different viewpoint. "Obviously, it's troubling whenever someone is recording a phone call without your knowledge, particularly a person in that position — of being in the Attorney

General's office," he said.

Gerber was placed on administrative leave after he candidly admitted to his misconduct. In a statement issued the same day that the *Chronicle* reported the secret recordings, Brown's press secretary, Christina Gasparac, distanced the Attorney General from Gerber's actions. She said Brown was unaware that phone calls with reporters had been recorded, and that Gerber had taped the calls "in direct violation of explicit directions regarding office policy." Gerber resigned three days later.

It was later learned that Gerber had recorded five phone conversations between April and October 2009, including calls with reporters from the *Associated Press*, the *Chronicle* and the *Los Angeles Times*. He also recorded an in-person interview with the *Times* reporter. It was further discovered that Gerber had been instructed by his supervisor a year earlier not to record conversations.

On November 9, 2009, the Attorney General's office issued a report which found that no criminal charges would be filed against Gerber, as his conduct did "not warrant further investigation as a violation of the law." Although there was "no indication in any of the conversations that the reporter, the Attorney General, or any other [Department of Justice] participants were advised that Gerber was recording the call," the report concluded the conversations were "on-the-record" and thus meant to be public. ■

Sources: *Associated Press*, *San Francisco Chronicle*

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Prison Incident and Investigative Reports Must Be Disclosed Under Alabama's Open Records Act

by David M. Reutter

The Alabama Supreme Court affirmed a trial court's summary judgment order that held incident and investigative reports created by the Alabama Department of Corrections (ADOC) are subject to the state's Open Records Act.

Beginning in October 2006, the Southern Center for Human Rights (SCHR) began seeking incident reports regarding assaults and murders of several prisoners at the Donaldson Correctional Facility (DCF). Following considerable haggling, in April 2007 the ADOC finally provided the SCHR with a summary of certain incidents.

After prisoner Farron Barksdale died under unknown circumstances, his mother requested incident reports and other records regarding his death. The ADOC refused to produce the documents on the grounds they were part of a prisoner's file that could only be released by court order or to persons who are "criminal justice types."

The SCHR, representing six prisoners at DCF, along with Barksdale's mother, filed suit under the state's Open Records Act to compel disclosure of the documents. The trial court ordered production, allowing the ADOC to "redact sensitive information on a case by case basis if the [commissioner] reasonably believes the release of information will subject a person to specific threat or harm, or if the release will jeopardize a pending criminal investigation or the release will violate any state or federal law." The ADOC appealed.

The Alabama Supreme Court found the Open Records Act entitles a citizen to inspect a "public writing" and a "public record." The statute, § 36-12-40, Ala. Code 1975, is to be liberally construed in favor of disclosure.

The ADOC had a "blanket" policy of prohibiting disclosure of incident reports under the Open Records Act, and asserted a statutory exemption for investigative law enforcement records under § 12-21-3.1(b), Ala. Code 1975.

The Supreme Court disagreed with the ADOC's argument that incident reports generated by prison employees were exempt from disclosure. Such exemptions must be narrowly tailored,

the court said.

"In this case, the incident reports, which identify occurrences within a prison, must be compared to an investigative report prepared by the I & I (Intelligence and Investigation) division [of ADOC]," the court wrote. "An incident report documents any incident – from the mundane to the serious – whereas an investigative report by the I & I division reflects a close examination of an incident and a systematic inquiry and may lead to criminal prosecution."

The plaintiffs conceded that I & I investigative reports were protected under §

12-21-3.1(b). Despite that concession, the court held that under previous precedent, such investigative reports were subject to disclosure when they contain information that cannot be obtained from other sources without undue hardship. Further, the Supreme Court found that ADOC incident reports are not similarly protected under § 12-21-3.1(b).

Deciding that the trial court's order was proper and provided adequate protections, the Alabama Supreme Court affirmed the lower court's ruling. See: *Allen v. Barksdale*, ___ So.3d ___ (Ala. 2009); 2009 WL 2997601. ■

Indiana Indemnification Statute Not Retroactive; Prisoner's Estate Unable to Collect \$56.5 Million Judgment

by David M. Reutter

The Seventh Circuit Court of Appeals has held that a 2003 Indiana statute that requires indemnification of government employees under certain circumstances has prospective application only.

Before the Court was an appeal by the Estate of Christopher Moreland, which had filed a motion for a writ of execution to enforce a judgment against St. Joseph County, Indiana and its Board of Commissioners. The motion was denied by the district court.

In May 2002, Moreland's estate obtained a \$56.5 million damage award against St. Joseph County jail guards Erich Dieter and Michael Sawdon. \$29 million of the verdict was for compensatory damages. The Seventh Circuit noted that "Moreland's beating and subsequent denial of medical care spanned multiple floors of the jail, lasted several hours, and was ruthless." Moreland died in the jail's drunk tank after being "left for dead." [See: *PLN*, Dec. 2005, p.40; Feb. 2003, p.21].

The estate's motion was based on a 2003 amendment to Indiana Code § 34-13-4-1, which had two noteworthy features. "First, in certain cases and subject to a \$300,000 cap, the code requires a governmental entity to indemnify its public employees for

compensatory damages growing out of their noncriminal acts, where the governmental entity 'defends or has the opportunity to defend the public employee.'"

The second feature of the amended statute provides that "indemnification for punitive damages and settlements remains a matter of grace: the governmental entity must foot the bill only if the pertinent officer or governmental body 'determines that paying ... is in the best interest of the governmental entity.'"

The jury's verdict was entered in May 2002. However, because a co-defendant had a second trial, a final judgment was not entered until September 2003. In rejecting the estate's position that the 2003 Amendment should apply due to the timing of the final judgment in the case, the Seventh Circuit said accepting that position would "attach new legal consequences to" an event – the trial – which was "completed before [the Amendment's] enactment."

Next, the appellate court rejected the estate's argument that the Code itself explicitly spells out its intended retroactivity. "The 2003 Amendment added only the 'defends or has the opportunity to defend' language and mandated indemnification for compensatory damages," the Court of Appeals wrote. "The rest of the language

has been unchanged for decades.”

Moreover, the Indiana legislature did not include “the unambiguous language that Indiana courts require for a statute to be applied retroactively.” Nor was the 2003 Amendment remedial, for it was not a clarification of legislative intent, it was not passed on the heels of (and to abrogate) a judicial decision, nor was it modeled after federal laws understood to

have retroactive effect.

Retroactive application of the 2003 Amendment would necessarily deny governmental entities the choice to enter into settlements for less than \$300,000, and may result in a governmental entity owing more than it would have if the law had been allowed to function as anticipated by the amended statute, the Seventh Circuit held. As such, the 2003 Amendment only

applies prospectively.

For those reasons, the district court’s order denying the estate’s motion to enforce the judgment was affirmed. Consequently, it is now increasingly unlikely that Moreland’s estate will be able to collect much – if any – of the \$56.5 million judgment awarded for his wrongful death. See: *Estate of Moreland v. Dieter*, 576 F.3d 691 (7th Cir. 2009). ■

Prisoner Loses Excessive Force Case in 10 Minutes; Judge Deems Suit Frivolous, Orders \$3,000 Paid to Defendants

by Mark Wilson

Christopher Bookhart had a fool for a client when he represented himself in an excessive force suit he filed against a guard at the Multnomah County Detention Center (MCDC) in Portland, Oregon.

Bookhart, 45, had sued MCDC guard Steven Meyer, alleging that Meyer had punched him in the chest without provocation on August 13, 2006. Bookhart also alleged that on November 6, 2006, an unidentified guard had injured his wrist by cinching his handcuffs too tight, creating a 1-inch scar. He sued for \$11,110 in damages.

Bookhart represented himself during a two-day trial, during which he pointed his finger at witnesses as he questioned them and interrupted and argued with presiding Multnomah Circuit Court Judge Michael McShane.

The trial appeared to try McShane’s patience; he closed his eyes at times and breathed deeply while Bookhart repeat-

edly asked him what he should do next. There was a chorus of objections from the defense attorney.

Meyer admitted that he touched Bookhart, but insisted he had only tapped him lightly with a closed fist in a jovial manner. Another guard corroborated Meyer’s version of the incident. Meyer also claimed he wouldn’t have assaulted a prisoner when 15 to 20 other prisoners were present. “I would have got my head stomped in,” he said.

But Bookhart told jurors that the encounters had made him frightened of guards. “Even today, I still have a fear of being attacked,” he stated. Jurors didn’t buy his claims, returning a verdict in favor of the defendants in just 10 minutes. Fol-

lowing the verdict, things went from bad to worse as McShane called Bookhart’s suit frivolous and ordered him to pay the defendants \$3,000.

Lt. Vera Pool, who works at the jail, noted it was not uncommon for prisoners to represent themselves in civil suits. “But,” she added, “it’s not recommended.” See: *Bookhart v. County of Multnomah*, Multnomah County Circuit Court, Case No. 07-11-12830. ■

Source: *The Oregonian*

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Sweat Lodge Ban Does Not Violate RLUIPA

The Eighth Circuit Court of Appeals affirmed a lower court's determination that denial of a sweat lodge for Native American prisoners did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Missouri prisoner Clifford Fowler, a Native American, is serving life without parole at the maximum-security Jefferson City Correctional Center, which houses 2,000 prisoners who "have been convicted of committing serious felonies, or acts of violence while incarcerated."

Fowler requested that prison officials provide a sweat lodge for Native American prisoners to use at least 17 times a year – once each month, at each solstice and equinox, and for an annual celebration. Prison officials refused and Fowler filed suit, claiming the denial of a sweat lodge violated RLUIPA (42 U.S.C. §§ 2000cc-1).

The district court granted summary judgment to prison officials, concluding that it was bound by *Hamilton v. Schiro*, 74 F.3d 1545 (8th Cir. 1996), which found that the denial of a sweat lodge to another Missouri prisoner did not violate the Religious Freedom Restoration Act (RFRA), the predecessor of RLUIPA. The RFRA was struck down by the U.S. Supreme Court in 1997 for claims brought by state prisoners. [See: *PLN*, Dec. 1998, p.25; Sept. 1997, p.15]. Fowler appealed the district court's ruling.

The Eighth Circuit noted that prison officials did not question the sincerity of Fowler's request for a sweat lodge or deny that their decision substantially burdened the exercise of his religious faith. Rather, "numerous officials ... offered a myriad of reasons why they believe Fowler's request for a sweat lodge compromises security ... to an unacceptable degree."

The appellate court acknowledged that the RLUIPA and former RFRA standards were identical, and that neither requires the "accommodation of religious practices over an institution's need to maintain order and safety." The Court noted it had held in *Hamilton* that the RFRA did not mandate access to a sweat lodge, and that Fowler's challenge and the issue in *Hamilton* were "markedly similar." Missouri prison officials raised identical security concerns in both cases.

"Like the district court," the Eighth Circuit was "hard pressed to distinguish *Hamilton* By all appearances, *Hamilton* dictates the outcome." The Court

of Appeals found it "inconsequential" that *Hamilton* was decided under RFRA while Fowler relied upon RLUIPA. Other cases have reached the same result for religious claims brought under the First Amendment.

Finding that the record "well documents ... officers' legitimate fears surrounding a sweat lodge," the Eighth Circuit affirmed the district court's decision. The appellate court had "no difficulty concluding" that prison officials had "established, as a matter of law, that prohibiting a sweat lodge ... is in furtherance of a compelling governmental interest," and that "prohibiting a sweat lodge ... is the least restrictive

means" of furthering that interest. See: *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), *cert denied*.

Although not required by prison officials in the Eighth Circuit, a number of facilities nationwide provide sweat lodges for Native American prisoners – including the Crossroads Correctional Facility in Montana, FCI Butner in North Carolina, the Torrance County Correctional Facility in New Mexico, San Quentin in California and various state prisons in Nevada, among others. Those facilities evidently are able to accommodate security and safety concerns while making sweat lodges available to Native American prisoners for religious ceremonies. ■

1979 Jail Consent Decree Largely Gutted by PLRA; Reversed on Appeal

by Mark Wilson

On October 7, 2008, a federal court in New York terminated large portions of a sweeping 1979 consent decree related to conditions at 14 New York City jails. However, the Second Circuit Court of Appeals reversed that decision in November 2009, with instructions to afford the plaintiffs an opportunity to conduct discovery to determine whether there were continuing constitutional violations.

In 1979, a class of pretrial detainees entered into consent decrees with government officials to resolve litigation over conditions in New York City jails. See, e.g., *Benjamin v. Horn*, 2008 WL 2462027.

In 2000 the defendants moved to terminate the environmental health provisions of the consent decrees. The motion was granted in part by *Benjamin v. Fraser*, 161 F.Supp.2d 151 (S.D. NY 2001) and *Benjamin v. Fraser*, 2001 WL 282705 (S.D. NY 2001). However, an "Environmental Order, issued April 26, 2001, provided prospective relief for the constitutional violations that remained ongoing."

The defendants then moved, pursuant to the Prison Litigation Reform Act (PLRA), to terminate the remaining provisions of the Environmental Order, which governed sanitation and cleaning (Paragraphs 11 and 19); food storage containers (Paragraph 13); and temperature and temperature monitoring at the jails (Paragraph 14).

The district court followed "the weight

of authority among other circuits," and held that the "Plaintiffs [must] shoulder the burden of proving that the relevant provisions of the Environmental Order pass the need-narrowness-intrusiveness test" required by the PLRA, 18 U.S.C. § 3626 (a) (1)(A)(1996). See also: *Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003). Under this test, the plaintiffs were required to "show the deprivation of a basic human need ... and ... 'actual or imminent harm.'"

Applying this standard, the district court terminated the sanitation provisions of paragraphs 11 and 19 because while some dirty conditions were documented, "Plaintiffs have not carried their burden of showing an ongoing violation of their constitutional rights," and failed to prove that current conditions "will cause them imminent and substantial harm."

With respect to shower replacements which had been ordered but not yet completed, the court instructed the defendants to "submit a complete list of shower replacement schedules ... by December 1, 2008, with completion dates for the work not extending beyond December 1, 2009."

The court also terminated the temperature provisions of paragraph 14, "because Plaintiffs have failed to show an ongoing constitutional violation with respect to temperatures inside the jails." However, the termination did "not affect this Court's recent opinion and order concerning high temperatures and heat-sensitive detainees." The district court did

not address the food storage container provisions of paragraph 13, because it was the subject of a separate court order.

Finally, the district court rejected the plaintiffs' request for "prospective relief relating to the control of vermin, such as cockroaches, ants, bugs, drain flies and mice," concluding "that detainees' constitutional rights are not being violated and the relief would not be narrowly drawn nor the least obtrusive."

The plaintiffs and their experts were granted leave to inspect the jails again within 6 months of the order. "At that time," the court wrote, "if conditions encompassed by the April 26, 2001 Environmental Order are shown again to exist, this Court will reinstate any provision that meets the need-narrowness-intrusiveness test."

The parties agreed that the overcrowding and food preparation provisions in the consent decree must be lifted because they could no longer stand in the face of the PLRA and post-1979 U.S. Supreme Court rulings. In 2001, the court had terminated provisions in the consent decree related to prisoner correspondence, law libraries and vermin control. Ventilation, lighting and fire safety provisions remain in effect.

Defense attorney Michael A. Carodozo praised the decision as recognizing "the need, whenever the facts allow, to eliminate consent decrees" and "to return the management of city agencies back to the commissioners."

The Legal Aid Society and longtime *PLN* contributor John Boston have represented the plaintiff class since 1979. Class counsel Dale A. Wilker expressed disappointment with the decision, noting, "we presented the court with substantial evidence of ongoing violations in New York City jails and believe the need for strong oversight remains." See: *Benjamin v. Horn*, U.S.D.C. (S.D. NY), Case No. 75-cv-03073-HB; 2008 WL 4500689.

In a subsequent ruling on October 26, 2009, the district court affirmed the termination of the provision related to temperature monitoring ("Heat Orders"); however, the court specified that the defendants must submit a report before November 1, 2010 as to their "compliance with all aspects of the newly clarified Heat Orders during the 2010 Heat Season."

On November 12, 2009, the Second Circuit Court of Appeals vacated and remanded the district court's October 2008 order terminating various parts of the 1979 consent decree. The appellate court held that "Prospective relief awarded pur-

suant to the PLRA may not be terminated 'if the court makes written findings based on the record' that such relief 'remains necessary to correct a current and ongoing violation' of federal rights."

In this case, the district court "denied Appellants' requests for more extensive discovery, and limited the time period for discovery to approximately one month. The district court also declined to conduct an evidentiary hearing." Thus, the court did not allow the plaintiffs a meaningful opportunity to show current and ongoing constitutional violations that would have

precluded termination of the challenged provisions of the consent decree.

The Court of Appeals therefore vacated the district court's ruling and remanded the case for further proceedings, during which the lower court "need do no more than provide Appellants a reasonable opportunity to take discovery of current conditions, present evidence, and challenge Appellees' internal reports." See: *Benjamin v. Horn*, 2009 WL 3765920 (2d Cir. N.Y. 2009). ■

Additional source: *New York Law Journal*

Washington State Agrees to Pay \$15,000 to Probationer Whose Urine and Blood Were Forcibly Taken from Him

The State of Washington has agreed to pay \$15,000 to settle a suit over the forcible taking of urine and blood samples from a Washington probationer.

Matthew Arthur was arrested for DUI on November 30, 2005. Cowlitz County deputies took Arthur to a local hospital where Kevin Rentner, an employee of the Washington State Department of Corrections, asked Arthur to provide a blood and urine sample pursuant to his conditions of probation.

After Arthur refused, Rentner allegedly instructed the deputies to restrain Arthur and forcibly take blood and urine samples from him. While Arthur "protested and struggled,"

Arthur's complaint states, the deputies took "blood from him through a needle in [his] arm," and urine by "physically inserting a catheter into [Arthur's] penis." Arthur allegedly "contested this forcible violation of his body both verbally and physically throughout the entire encounter."

On March 3, 2008, the State agreed to settle the case for \$15,000. The State did not admit any liability or the truth of Arthur's allegations in settling the case.

Arthur was represented by Kevin G. Blondin of Reitsch, Weston & Blondin, a Longview, Washington firm. See: *Arthur v. Cowlitz County*, No. 07-2-02076-5 (Cowlitz County Sup. Ct.). ■

The American Friends Service Committee Prison Watch Project

is planning to update the Fall 2001 "Torture in US Prisons – Evidence of US Human Rights Violations." We are seeking testimonies from men, women and children relating to the use of extended isolation and devices of torture (use of force, chemical and physical restraints, living conditions, forced double celling in isolation, etc.). We will also be accepting drawings and photos. Our deadline is June 15th. We will only be able to acknowledge by form letter. Unless otherwise authorized the publication will use first name, last initial and facility only. Please send to Bonnie Kerness, AFSC, 89 Market St., 6th floor, Newark, NJ 07102. Without your input, this publication would not be possible. Our gratitude. Bonnie Kerness

Illinois Prison Doctor Liable for Failing to Treat Testicular Cysts

by David M. Reutter

The Seventh Circuit Court of Appeals remanded a civil rights action that claimed a prison doctor's care was deliberately indifferent to an Illinois prisoner's serious medical needs. The Court, however, affirmed dismissal as to non-medical prison officials who answered the prisoner's grievances.

Before the appellate court was the appeal of Floyd K. Hayes, who contended that Dr. William Hamby at the Hill Correctional Center did not treat his medical condition, but only observed and monitored it as it continued to worsen. The appeal came after an Illinois U.S. District Court granted summary judgment to the defendants on the merits and on qualified immunity grounds.

In the fall of 2000, Hayes was diagnosed with benign testicular cysts that required neither removal nor referral for a urology consult or biopsy. He began filing grievances and requests for medical care in March 2001 because the cysts had become larger. They caused spasms, which occurred at least once and often multiple times a day, compressing his left testicle and causing excruciating pain. It was not until September 2001 that Hayes was seen by Dr. Hamby.

Over the next several weeks, Hamby examined Hayes twice. Despite Hayes' complaints of pain, Hamby found he only suffered "tenderness" and "discomfort." Hayes saw another physician, Dr. Richard Shute, for the first of several visits on October 29, 2001. Shute wanted to refer Hayes to a urologist and prescribe prescription-strength pain medications, but Hamby refused to approve those treatments. Instead, he prescribed ibuprofen and ice packs to ease the pain.

As those remedies provided no relief, Hayes began filing grievances and writing letters to prison officials. Those officials denied relief based on information they received from Hamby. When Hayes was released from prison he went directly to an Illinois Veterans Administration (VA) hospital complaining of "testicular pain."

Because prison officials had called the VA to advise them that Hayes' "primary problems are psychiatric," he was placed in the psychiatry ward. Shortly after his discharge, Hayes went to the Lexington, Kentucky VA hospital near his home. A urologist diagnosed him with "cremasteric

muscle spasm with chronic pain and Peronie's disease," which is a connective tissue disorder involving the growth of fibrous scar tissue in the soft tissue of the penis. He was given opiates for pain relief.

In the discussion section of the Seventh Circuit's opinion, the Court found Dr. Hamby's attitude troubling and bizarre. First, the appellate court noted that Hayes had in fact suffered from a serious medical condition. Hamby disregarded Hayes' condition because the pain was self-reported, yet the Court of Appeals held that "is often the only indicator a doctor has of a patient's condition." Moreover, Hamby prevented Hayes from seeing a specialist, as a reasonable doctor would have done upon realizing a patient was trying to bring a serious condition to his attention.

Next, Dr. Hamby had flatly stated in his deposition "that *no* pain experienced by *any* prisoner ever warranted prescription-strength painkillers." Thus, the Court rejected Hamby's contention that he had not received paperwork requesting additional treatment for Hayes, as "he

probably would have done nothing differently." Finally, Dr. Hamby's deliberate indifference to Hayes' medical condition was exhibited when he stopped the minimal treatment he had prescribed after he learned that Hayes had grieved his medical treatment to prison officials.

The Seventh Circuit held that a jury could find Hamby was aware of Hayes' serious medical condition and either knowingly or recklessly disregarded it. For this reason qualified immunity did not apply, and a jury must resolve the disputed facts. As for the prison officials who responded to Hayes' grievances, the Court of Appeals found they were "entitled to defer to the professional judgment of the facility's medical officials on questions of prisoners' medical care...."

Thus, the district court's ruling was affirmed as to the non-medical officials but remanded as to the adequacy of Hamby's medical treatment. See: *Hayes v. Snyder*, 546 F.3d 516 (7th Cir. 2008). Following remand, the case settled in March 2009 under confidential terms. ■

Texas Court of Appeals Reverses Dismissal of Prisoner's Retaliation Suit; Second Dismissal Affirmed After Remand

by Matt Clarke

A Texas Court of Appeals reversed the dismissal of a prisoner's lawsuit alleging that he suffered retaliation for litigation activities. However, after the case was again dismissed following remand, the appellate court affirmed the dismissal based on untimely service of process.

William Espinoza Pena, a Texas state prisoner, filed suit in state district court under the Texas Tort Claims Act (TTCA), § 101.001 et seq., Texas Civil Practice & Remedies Code (TCP&RC), and 42 U.S.C. § 1983, alleging that while he was incarcerated at the Beto Unit, prison officials conspired to retaliate against him for his "prolific practice as an inmate-writ-writer / jailhouse lawyer."

Specifically, Pena claimed that Captain David W. McDowell ordered him to move his property from one part of the prison to another. He informed McDowell that he was a "Disabled ... veteran" and

would need assistance or the use of a cart to safely move his property, but McDowell ordered him to move it without assistance or a cart and threatened to mace him if he did not comply. Pena alleged he severely injured his back moving the property and that prison officials covered up the retaliation.

Without a hearing and prior to service of process, the trial court dismissed Pena's lawsuit as frivolous and malicious. He appealed.

Noting that the defendants had not even filed a brief, the Court of Appeals held that Pena's equal protection and due process claims under the Texas and U.S. Constitutions were not properly briefed and contained no citations, leaving nothing for review. The appellate court also rejected Pena's argument that the lower court had to hold a hearing before dismissing his suit as frivolous and malicious,

finding that a trial court may dismiss a prisoner's lawsuit without a hearing if it has no arguable basis in law.

The Court of Appeals upheld the dismissal of Pena's state-law-based claims against the prison system (TDCJ) and prison officials in their official and individual capacities due to sovereign immunity. It ruled there was no waiver of immunity under the TTCA because the threat to use mace did not constitute its use. The Court further held that the dismissal of Pena's claims extended to requests for declaratory and injunctive relief, as they were attempts to control the actions of the State. It also upheld the dismissal of his federal claims against the TDCJ and prison officials in their official capacities because they were not "persons" who could be sued under 42 U.S.C. § 1983.

However, Pena's claims against prison officials in their individual capacities for money damages and declaratory relief, for allegedly retaliating against him and covering up the retaliation, were facially valid causes of action which should not have been dismissed. Without expressing an opinion about the merits of the claims, the Court of Appeals held that the trial

court had abused its discretion when it dismissed those claims at such an early point in the proceedings.

Therefore, the appellate court upheld the dismissal of all of Pena's other claims and reversed the dismissal of the retaliation claims against prison officials in their individual capacities seeking monetary damages and declaratory relief. See: *Pena v. McDowell*, Tex.App.-Tyler, Case No. 12-05-00116-CV; 2007 Tex. App. LEXIS 2559.

The case was returned to the trial court for further proceedings and Pena was released from prison several months later. He moved for a *Spears* hearing, and the trial court conducted a status hearing on July 31, 2008. Citations (equivalent to summons) were issued to the defendants, who moved to dismiss based on untimely service of process. The trial court then dismissed Pena's suit with prejudice on Sept. 25, 2008, pursuant to TCP&RC, chapter 14. He again appealed.

The Court of Appeals considered Pena's arguments as to how the trial court had erred in dismissing his suit based on untimely service. "When a suit is timely filed, as in the case at hand, but the defendant is not served until after the

limitations period expires, the date of service relates back to the date of filing if the plaintiff exercised diligence in effecting service," the Court held. There was a 15-month delay between when the Court of Appeals issued its prior appellate ruling and when Pena had obtained service on the defendants following the status hearing before the trial court.

Pena presented evidence that he had been hospitalized during that time period. However, the Court of Appeals noted that "despite his hospitalization, Pena sought to obtain discovery from the office of the Attorney General and notified the court of changes of address. Yet, there is no indication from the record that Pena made any effort to have Appellees served with process."

Because he failed to demonstrate that he had exercised due diligence in having the defendants served, the appellate court affirmed the lower court's dismissal of Pena's suit in an October 30, 2009 ruling. As the statute of limitations had already expired, the Court of Appeals found that dismissal with prejudice was appropriate. See: *Pena v. McDowell*, Tex.App.-Tyler., Case No. 12-08-00407-CV; 2009 WL 3527508. ■

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Oregon Private Jail Guard is “Corrections Officer”; Prisoner’s Assault Conviction Upheld

by Mark Wilson

The Oregon Court of Appeals affirmed a prisoner’s conviction for assaulting a guard at a private jail, finding that the guard was a “corrections officer” under state law. Oregon’s Supreme Court upheld the decision on review.

Jeremy Tate was confined at the Northern Oregon Correctional Facility (NORCOR), a private regional jail. He overheard another prisoner complain about jail conditions and NORCOR guard Buchanan responded that he could solve the problem by not coming back to jail. Tate “said that another way to solve the problem would be to ‘kill the officers, kill the judges, and kill the cops.’”

Buchanan ordered Tate to go to his cell, but Tate stood up quickly and shook his head. A scuffle ensued and both Tate and Buchanan ended up beneath a table. Tate kicked Buchanan in the face before he was subdued by other guards. Buchanan suffered facial bruising and a severe headache, but returned to work.

Tate was prosecuted for assaulting a public safety officer under ORS 163.208(1), which includes “corrections officer” as a category of victim. Prior to trial, Tate asked the court to instruct the jury that ORS 181.610(5) defines “corrections officer” as a “member of a law enforcement unit”; NORCOR, a private corporation, was not a “law enforcement unit,” and therefore Buchanan was not a “corrections officer” within the meaning of ORS 163.208(1). The trial court denied Tate’s request, holding that “corrections officer” was defined by *Haynes v. State of Oregon*, 121 Or. App. 345, 854 P.2d 949 (1993), rather than by ORS 181.610(5).

When the prosecution rested, Tate “moved for judgment of acquittal, reiterating his argument that, because NORCOR was not a ‘law enforcement unit,’ Buchanan was not a ‘corrections officer.’ The trial court denied the motion.”

Upon resting his case, Tate “again asked the trial court to instruct the jury in accordance with his interpretation of ORS 163.208. The trial court declined ... and the jury convicted” Tate of assaulting a corrections officer. He appealed.

The Court of Appeals determined that Tate’s argument hinged upon the

proper definition of “corrections officer,” which was a matter of statutory interpretation. Concluding that Tate misunderstood *Haynes*, the Court examined *Haynes* and repeated “that ‘corrections officer,’ as a discrete victim category under ORS 163.208(1) has the meaning ascribed in *Haynes*; that is, ‘a person who primarily performs the duty of supervision or controlling an individual who is *confined* in a place of incarceration or detention.’”

As *Haynes* enunciated the applicable meaning of corrections officer as a specific category of victim under ORS 163.208(1), the Court of Appeals held “the state was not required to show that

NORCOR was a ‘law enforcement unit’ in order to prove that defendant assaulted a ‘corrections officer.’” Therefore, the appellate court concluded the trial court did not err in denying Tate’s motion for judgment of acquittal. See: *State v. Tate*, 223 Or.App. 636, 196 P.3d 1033 (Or. Ct. App. 2008).

Review was granted by the Oregon Supreme Court, and on November 19, 2009 the Court affirmed the appellate decision – and Tate’s felony conviction – based on “the plain meaning of the text of ORS 163.208(1) and the context provided by related statutes.” See: *State v. Tate*, 347 Ore. 318 (Or. 2009). ■

Virgin Island Officials Held in Contempt: Prisoner Mental Health Treatment Inadequate

by Matt Clarke

A federal district judge has held the Governor, Attorney General and Director of Corrections of the U.S. Virgin Islands and other prison officials in contempt for not correcting inadequate prisoner mental health treatment.

Virgin Island prisoners filed a class-action suit in 1994, “challenging inhumane and dangerous conditions at the Criminal Justice Complex (CJC) and CJC Annex in St. Thomas.” That same year the district court signed a consent decree ordering “specific improvements by dates certain to many aspects of prison operations and conditions.” The court issued numerous remedial orders related to shelter, environmental health, fire safety, physical plant, preventive maintenance, hygiene items, mattresses, medication distribution, legal access, telephones, security systems and Annex construction.

Since 2005, mental health issues have been the focus of additional orders, with the court noting that the “Defendants’ record of compliance with the Court’s remedial orders remains abysmal” even though they had been held in contempt four times for failing to make improvements.

In April 2005, forensic psychiatrist Jeffery Metzner inspected the CJC and issued a report which found mental health services for prisoners with serious mental illnesses were woefully inadequate. This included a lack of mental health care policies and procedures, inadequate mental health intake screening, a lack of health care leadership, insufficient contract hours for the prison’s psychiatrist, disorganized health records, and understaffing and overcrowding at the designated mental health unit, which was a maximum-security wing of the Annex and not a purpose-designed mental health facility.

The defendants had failed to take basic steps to construct and staff a desperately-needed and long-promised forensic mental health facility. Dr. Metzner stated that conditions for mentally ill prisoners were the worst he had seen in his 30-year career as an expert on prisoner mental health treatment. The defendants stipulated to the report’s findings. The described conditions had existed from the start of the litigation to the court’s issuance of a fifth contempt order on February 27, 2007.

Of special interest to the court was the

fate of four prisoners who had been found not guilty by reason of insanity yet remained locked down in maximum security with little or no mental health treatment. The prisoners suffered from psychosis, hallucinations, paranoia and delusions. One such prisoner, Jonathan Ramos, was arrested in 2002 for attempted theft of a bicycle. Due to dangerous, assaultive conduct resulting from his mental illness, he was kept in constant lockdown and rarely received any mental health care. Once, Ramos was treated in a low-security, free-world mental health facility and showed strong improvement before being returned to the prison a month later.

The defendants acknowledged that Ramos needed long-term treatment at a secure mental health facility, which was not available in the Virgin Islands. Nonetheless, they left him locked down for years without treatment. When the district court issued an order that he be treated, the defendants tried to circumvent the order by dropping the criminal charges against Ramos. The court said they could not avoid a responsibility they had shirked for years – and an order of the federal court – so easily.

The defendants claimed insufficient funding as an excuse for why they had failed to implement the court's orders. The district court didn't accept that explanation, noting that it had created a remedial account to provide the defendants with ready access to funds to improve operations and conditions at the CJC. If the funds were inadequate to cover the construction of a forensic unit, they could have been used to cover the expenses of stateside mental health care for the four prisoners. However, the defendants did not even put much effort into finding a stateside mental health facility, having contacted only 10 of over 400 stateside

mental health hospitals.

The district court found the defendants in contempt for failing to comply with the court's orders. However, because the current Governor, Attorney General and Bureau of Corrections director had taken office less than a month earlier, the court stayed contempt sanctions to give those officials an opportunity to comply. The court stated that it would retain the option to impose sanctions if the new officials did not show progress, ordering a follow-up inspection by Dr.

Metzner and a progress report from the defendants.

On November 10, 2008 the court ordered the defendants to pay the prisoners' counsel \$78,493.75 in attorney fees, and awarded an additional \$84,272.18 in attorney fees on December 15, 2009. The prisoners were represented by Benjamin A. Currence of St. Thomas and Eric Balaban with the National Prison Project of the ACLU. The case remains ongoing. See: *Carty v. Turnbull*, U.S.D.C. (D.VI), Case No. 3:94-cv-00078-SSB-GWB. ■

\$862,500 Settlement in Mentally Ill Ohio Jail Prisoner's Death

A settlement of \$862,500 has been reached in the death of a mentally ill prisoner who died at Ohio's Summit County Jail (SCJ).

While acting in a delusional and disoriented manner, Mark D. McCallaugh, 28, was arrested on August 7, 2006, by Akron police. Once he was booked into SCJ, his medical and mental health treatment was overseen and provided by the Psycho-Diagnostic Clinic, Community Support Services, Inc., and Summit County Alcohol, Drug Addiction and Mental Health Services Board.

For the next two weeks, McCallaugh was provided care for his mental illness that fell beneath the accepted standard of care. On August 20, McCallaugh was observed bleeding from a previously lacerated wrist injury and acting in an agitated manner in his cell.

Between 5:30 p.m. and 7:05 p.m., McCallaugh met the force of an extraction team. Over that time, he was forced to "undergo and endure physical beatings, 4 taser shocks, pepper spray, leg shackles, bilateral handcuffs behind his back, 4-

point restraints and injections of Geoden and Antivan. At 7:05, he was found to be in cardiopulmonary arrest, and was pronounced dead at a local hospital after resuscitation efforts failed.

The complaint filed in federal court alleged claims of excessive force, failure to train and supervise staff, and state law claims of assault and battery, negligence, wrongful death and survivorship. The matter settled on October 29, 2009. The McCallaugh estate was represented by Cleveland attorney David M. Paris.

See: *McCallaugh v. Office of County Executive Summit County*, USDC, N.D. Ohio, Case No. 5:07cv2341. ■

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Ninth Circuit: 42 U.S.C. § 233(a) Does Not Immunize Public Health Service Employees from *Bivens* Constitutional Tort Claims

by John E. Dannenberg

The Ninth Circuit U.S. Court of Appeals has held that 42 U.S.C. § 233(a), which at first blush seems to exempt officers and employees of the U.S. Public Health Service (PHS) from exposure to *Bivens* civil rights suits, in fact does not – so long as the suit involves a constitutional tort.

This complex question arose in the damages phase of a lawsuit involving the outrageously cruel denial of medical care to Francisco Castaneda, an illegal immigrant detainee who was held in the custody of Immigration and Customs Enforcement (ICE). [See: *PLN*, Sept. 2008, p.32]. PHS was implicated because medical care for ICE detainees falls under the aegis of PHS.

The issue raised in the U.S. District Court, *Castaneda v. United States*, 538 F.Supp.2d 1279 (C.D. Cal. 2008), was whether the ability of Castaneda's survivors to bring suit under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) – a federal civil rights claim – was foreclosed due to language in 42 U.S.C. § 233(a) that immunizes employees of PHS from suit. The district court held that § 233(a) did not foreclose a *Bivens* claim in narrow cases, such as this one, where the complaint was for a violation of constitutionally protected rights. In so ruling, the court disagreed with an out-of-circuit precedent in *Cuoco v. Morisugu*, 222 F.3d 99 (2nd Cir. 2000) [*PLN*, July 2001, p.28]. The defendants appealed this question as one of first impression in the Ninth Circuit.

The Court of Appeals proceeded to reanalyze *Cuoco*. They found *Cuoco* wanting because it did not properly distinguish between general torts and constitutional torts as to the immunity from suit provided by § 233(a). The Ninth Circuit instead followed *Carlson v. Green*, 446 U.S. 14 (1980), which held that unless Congress provided an “equally effective” remedy for recovery, the option to pursue a *Bivens* suit must remain available.

Here, the appellate court found that the alleged “alternative” – the Federal Tort Claims Act (FTCA) – was not equally effective because, as it did not provide a jury trial, it lacked deterrent effect through punitive damages. Moreover, Congress never explicitly declared the FTCA to

be a substitute for *Bivens* actions in regard to constitutional torts. It was the “substitute remedy” and the “equally effective” analyses that the Ninth Circuit used to distinguish and disparage *Cuomo*. Moreover, a third escape mechanism, one recognizing “special factors,” was not met by the statutory provisions of the FTCA so as to preclude *Bivens* relief.

Consequently, the Court of Appeals concluded that federal constitutional tort suits that rise to the level of potential punitive damage claims would lack the intended deterrent effect of *Bivens* litigation if they were restricted to the more limited remedies available under the FTCA. Since Congress never expressly stated it intended such immunization from constitutional torts, the appellate court rejected the defendants' argument that Castaneda should be restricted from bringing claims under *Bivens*.

Accordingly, the Ninth Circuit affirmed the district court's ruling that the PHS defendants were not entitled to absolute immunity from constitutional torts. See: *Castaneda v. Henneford*, 546 F.3d 682 (9th Cir. 2008).

The U.S. Supreme Court granted certiorari to review the Ninth Circuit's

decision on September 30, 2009, and oral argument was held on March 2, 2010. The Obama administration argued that PHS officials were immune from being held personally liable for medical negligence, and urged the Supreme Court to reverse the appellate ruling.

“Congress has decided that it would rather protect the PHS, make sure that causes of action and liability aren't hanging over the heads of PHS officers, even if that means some individuals don't get recovery against certain specific PHS personnel,” counsel for the PHS defendants contended.

Vanita Gupta, an attorney with the American Civil Liberties Union, said the government's position was contrary to federal officials' “stated commitment to overhauling the immigration detention system and bringing to it more transparency and accountability.” The ACLU had filed an amicus brief in *Castaneda*.

According to news reports, the Supreme Court justices “seemed receptive” to the government's argument that PHS officials should be immune from suit. *PLN* will report the outcome in this case. ■

Additional source: *New York Times*

NY DOCS Lacks Authority to Administratively Impose PRS – But State's Liability Uncertain

by Mark Wilson

New York prison officials lack the authority to require prisoners to serve Post-Release Supervision (PRS) that was not ordered by the sentencing court, according to the Second Circuit Court of Appeals and the Appellate Division of the New York Supreme Court.

In February 2000, Sean Earley pleaded guilty to burglary in New York and was sentenced to six years in prison, but did not receive any PRS. Earley, his attorney, the prosecutor and the judge were all unaware, however, that NY Penal Law § 70.45 had recently been enacted, which mandated the imposition of PRS.

In February 2002, Earley first learned

that at some point after his sentencing the New York Department of Correctional Services (DOCS) had administratively added a five-year PRS term to his sentence without informing him.

After unsuccessfully exhausting his administrative remedies, Earley filed a motion with the trial court for resentencing. He argued that DOCS' modification of his sentence deprived him of due process of law and effective assistance of counsel. The court denied Earley's motion, finding that because PRS was mandatory, his request to remove it from his sentence could not be granted. The court did not comment on the lack of notice and denied

Earley's assistance of counsel claim, finding a lack of prejudice.

The state appellate courts denied leave to appeal, and Earley filed a federal writ of habeas corpus petition. The U.S. District Court denied his petition and he appealed to the Second Circuit.

The Court of Appeals acknowledged that in 1936, "the Supreme Court established that the sentence imposed by the sentencing court is controlling; it is this sentence that constitutes the court's judgment and authorizes the custody of a defendant." *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760 (1936). Following *Wampler*, the Second Circuit concluded that "the only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect."

The appellate court noted that Earley's "judgment authorized the state to incarcerate him for six years and no more." However, after his release he "was reincarcerated for violating the terms of his PRS and is currently in prison."

The Court of Appeals rejected the state's argument "that a five-year PRS was mandated by statute and therefore necessarily part of Earley's sentence by operation of law." Rather, "when DOCS discovered the oversight made by Earley's sentencing judge, the proper course would have been to inform the state of the problem, not to modify the sentence unilaterally. The state then could have moved to correct the sentence through a judicial proceeding, in the defendant's presence, before a court of competent jurisdiction."

This course of action was required because DOCS "has no more power to alter a sentence than did the clerk of the court in *Wampler*.... The additional provision for post-release supervision added by DOCS is a nullity.... The penalty administratively added by the Department of Corrections was, quite simply, never a part of the sentence." See: *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006).

On February 20, 2008, the Appellate Division of the New York Supreme Court followed the ruling in *Earley* to reach the same conclusion in two other cases.

Sidney Burch was sentenced in 2004 to two years in prison. The court did not impose PRS, but DOCS administratively added a three-year PRS term during Burch's confinement. He was released in May 2005 but returned to prison several

months later due to a PRS violation, where he remained for almost three years.

Relying on *Earley*, the Appellate Division agreed "that in the event that a court does not impose a period of post-release supervision as part of a defendant's sentence, the sentence has no post-release supervision component." The appellate court overruled its earlier decisions in *People v. Hollenbach*, 307 A.D.2d 776, 762 N.Y.S.2d 860 (N.Y.A.D. 4 Dept. 2003) and *People v. Crump*, 302 A.D.2d 901, 753 N.Y.S.2d 793 (N.Y.A.D. 4 Dept. 2003), to the extent they held that PRS need not be expressly imposed by the sentencing court.

The Appellate Division entered a similar ruling in a case involving New York state prisoner William Eaddy, who was sentenced to six years, had a five-year PRS term added by DOCS, and was reincarcerated after violating the PRS. See: *People ex rel. Burch v. Goord*, 48 A.D.3d 1306, 853 N.Y.S.2d 756 (N.Y.A.D. 4 Dept. 2008), *appeal denied*; and *People ex rel. Eaddy v. Goord*, 48 A.D.3d 1307, 855 N.Y.S.2d 314 (N.Y.A.D. 4 Dept. 2008), *appeal denied*.

Burch later filed a wrongful confinement claim with the New York Court of Claims, arguing that prison officials had "unlawfully added a period of mandatory post-release supervision (PRS) onto claimant's sentence of incarceration even though the PRS term was never imposed by the sentencing judge." As a result of the illegal PRS term, Burch was held in "unlawful confinement for nearly three years."

The state conceded that the facts related to Burch's PRS term and wrongful confinement were not in dispute, but argued that its actions "were privileged as being judicial, quasi-judicial or discretionary determinations ... and therefore defendant is immune from liability for such actions."

The Court of Claims rejected that argument and granted partial summary judgment against the state on July 24, 2009. "Because the imposition of post-release supervision on claimant by defendant was a legal nullity, claimant was unlawfully confined by its terms and could

not be lawfully imprisoned for violating its terms," the court wrote. "Any period of claimant's confinement caused by DOCS' unlawful and extra-jurisdictional imposition of the post-release supervision is not privileged and is actionable by claimant." See: *Burch v. State of New York*, 24 Misc.3d 1242(A); 2009 WL 2710245.

The Court of Claims ordered a damages trial in *Burch*; however, the case is being held in abeyance pending a determination by the appellate court as to whether prisoners who had PRS terms unlawfully added by DOCS are entitled to damages. In one case, the Appellate Division found the state was not liable for imposing PRS terms on prisoners who were not sentenced to PRS. See: *Collins v. State*, 69 A.D.3d 46, 887 N.Y.S.2d 400 (N.Y.A.D. 4 Dept. 2009). However, in *Burch* and other cases, including *Donald v. State*, 24 Misc.3d 329, 875 N.Y.S.2d 435 (NY 2009), the Court of Claims found the state liable. *Donald* is presently on appeal.

Until the issue is resolved, it is unknown whether New York prisoners who had PRS terms unlawfully added to their sentences by DOCS – and who were reincarcerated for PRS violations in some cases – will receive damage awards for the illegal conduct of state prison officials. Burch is represented by attorney Joel Berger, a *PLN* subscriber and founder of the NYC Legal Aid Society's Prisoners' Rights Project, who also represents a number of other prisoners raising similar wrongful confinement claims. ■



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California Prison Officials Settle Deliberate Indifference Suit for \$12,000

by Michael Brodheim

Following mediation in July 2008, Peter Cockcroft, proceeding pro se, agreed to a \$12,000 settlement of his § 1983 suit for damages alleging Eighth Amendment violations that transpired between March 2004 and January 2006, when he was a prisoner housed in the Psychiatric Services Unit (PSU) at Pelican Bay State Prison.

Cockcroft's amended complaint alleged that the Pelican Bay PSU toilets "backflushed," causing sewage to rise up in his cell when the toilet in the adjoining cell was flushed; that the backflushing was due to a plumbing design problem which the defendant prison officials knowingly failed to correct; that prison officials also refused to give him adequate cleaning supplies to deal with the backflushing problem; and that, as a result, he developed an infection with sores on his buttocks.

Cockcroft also alleged that one particular prison official, defendant Linfor, had been deliberately indifferent to his safety when he disclosed to Cockcroft's enemies a memo that stated Cockcroft had identified them as having threatened him.

After Cockcroft filed for damages and injunctive relief, the defendants filed a motion to dismiss which was granted in part. Addressing several points of interest to prisoners, U.S. District Court Judge Marilyn Hall Patel explained that by failing to take action to remedy an ongoing safety/health problem to which they are alerted, supervisors who do nothing more than sign off on an appeal denial may nonetheless be held liable for an Eighth Amendment violation. Further, the court held that the transfer of a prisoner generally moots a claim for injunctive relief; that to survive a motion to dismiss, recent U.S. Supreme Court case law requires a plaintiff to proffer "enough facts to state a claim to relief that is plausible on its face"; that, while 42 U.S.C. § 1997e(e) requires "a prior showing of physical injury," the Ninth Circuit has construed that limitation to apply only to claims for mental and emotional injuries; and that, by contrast, the violation of a constitutional right is compensable regardless of the extent of physical or emotional injuries.

Thus, with respect to Cockcroft's

claim against Linfor, Judge Patel found that the lack of physical injury (as a result of Linfor's alleged disclosure) might make Cockcroft's Eighth Amendment claim have very little financial value, but "does not make the claim non-existent."

The court also rejected the defendants' assertions of qualified immunity. In one argument, the defendants asserted

that, not being plumbers, they could not be held liable for the backflushing toilets. This "blame-it-on-the-plumber argument" failed, Judge Patel ruled, because the problem was allegedly systemic and the defendants held the purse strings for the needed toilet retrofit project. See: *Cockcroft v. Kirkland*, 548 F.Supp.2d 767 (N.D. Cal. 2008). ■

The Real Cost of Prisons Comix, by Lois Ahrens, PM Press, 90 pages

Reviewed by Gary Hunter

Three stories, 90 pages, and infinite information about how rampant prison construction is destroying America. That's what *The Real Cost of Prisons Comix* brings to the table.

The impact of unchecked prison construction has been a blight on American society for the past three decades. From 1975 to 2005, the number of citizens imprisoned in this country rose from under 300,000 to over 1.5 million. With 2.3 million men and women currently behind bars, "...the U.S. incarcerates residents at almost seven times the rate that Canada sends people to prison, 5.8 times the rate of Australia, 8.6 times the rate of France and 11.9 times the rate of Japan." These are just some of the staggering statistics that have the U.S. simmering at critical mass both socially and economically. All of this information is found on just the first page of the introduction to *The Real Cost of Prisons Comix*.

Before the 1980s, small towns mostly eschewed proposals to build prisons in their areas. Large-scale political and social mismanagement coupled with tough-on-crime policies now have small towns offering incentives to prison builders. These towns are led to believe that prisons are a good source of jobs and economic stability. In truth, "80% of new prison jobs go to folks who don't live, or pay taxes, in the prison town." Seldom do imported prison workers buy homes in the towns where they work. Divorce rates climb. Juvenile jails tend to grow, and local populations sometimes suffer shortages as prisons take priority in water

and electrical consumption.

Large cities don't fare much better. Parts of Brooklyn, New York cost the government \$1 million a year on law enforcement alone. Non-violent drug offenders account for 58% of all U.S. prisoners. Eighty-seven percent of U.S. prisoners are people of color. A picture-graphic pie chart unfolds the chilling reality of how blacks compose 13% of the U.S. population, account for 13% of all drug use, 35% of all drug arrests, 55% of all drug convictions and 74% of drug-related prison sentences.

The Real Cost of Prisons Comix reveals how nearly two-thirds of female prisoners have children. More than 50% have been physically or sexually abused or both. In the state of New York, 79% of the female prisoners are black or Hispanic and 93% of the women incarcerated for drugs are black or Hispanic. Yet blacks and Hispanics, male and female, make up only 33% of the state's population.

One in every 50 black women in the U.S. has permanently lost the right to vote due to a past criminal conviction. In some studies the mental illness rate for incarcerated women is as high as 25%.

From a political standpoint, no administration or political party is guiltless. From the Rockefeller laws in New York to former Governor Pete Wilson's 3-strikes law in California, politicians of every ilk have infected our society with a malignant lock-em-up mentality. From Reagan to Clinton, our highest elected leaders have marginalized minorities and eroded human and constitutional rights with the

hue and cry of the “war on drugs” and the “war on crime.”

The Real Cost of Prisons Comix also educates readers as to how sentencing alternatives have been effective at reversing the rampant deterioration inflicted by tough-on-crime politics.

Placing juveniles in community service and allowing communities to determine how funding is distributed in their neighborhoods has had a positive impact on what were previously high-crime areas.

Lois Ahrens had a vision. Use “comic books ... and plain language to explain complex ideas.” Her concept ushers in a

visionary view for impacting social dynamics. People scurrying day-to-day to earn a living have little time to invest in ongoing formal education. Leisure hours are spent relaxing, not trying to change the world. Few people spend free time reading sociology books, but a comic book can be read in minutes. Give that comic book some teeth and those minutes might translate into major social change. In short order, ordinarily disinterested people become armed with life-changing information.

In *The Real Cost of Prisons Comix*, writers Ruth and Craig Gilmore, Sabrina

Jones, Ellen Miller-Mack, Susan Willmarth and author/artist Kevin Pyle help Ahrens bring elementary explanations of extremely complex social systems to ordinary people. This is because real-world solutions require intervention by real people, and such intervention can't be born from ignorance.

The Real Cost of Prisons Comix offers a substantive and sensible response to a troubling trend of incarceration and social injustice. Knowledge is power. Empower yourself. ■

Source: www.realcostofprisons.org

Iowa Good Time Statute Violates Ex Post Facto Clause

by Brandon Sample

A 2005 amendment to Iowa's good time statute making participation in a sex offender treatment program (SOTP) a prerequisite to earning good time may not be applied to sex offenders convicted before the amendment's effective date, the Supreme Court of Iowa decided on January 23, 2009.

Denny Propp, an Iowa prisoner, was convicted of third degree sexual abuse in 1997 and sentenced to 25 years imprisonment. At the time Propp was sentenced, Iowa prisoners were eligible to earn one day of good time for each day of good conduct. In addition, prisoners could earn five extra days of good time each month for participating in various activities and programs.

In 2005, the legislature amended the state's good time statute. The amendment, effective July 1, 2005, requires sex offenders to participate in sex offender treatment in order to receive good time.

Propp initially participated in sex offender treatment, but was later removed from the treatment program for misconduct. He was deemed ineligible for further good time awards as a result of his removal. This caused Propp's prison term to be extended by approximately four months.

Propp filed a postconviction relief action, arguing that his loss of good time eligibility violated the Ex Post Facto Clause of the U.S. and Iowa constitutions. The district court agreed, holding that the amended good time statute could not be applied to offenders convicted before its effective date. The state sought certiorari from the Supreme Court of Iowa.

The Supreme Court affirmed. “A person in Propp's position [at the time of

sentencing] would have had the expectation that, if he simply complied with institutional rules, he could cut his sentence in half. That is not the case under the current statutory scheme for earned-time credits,” the Court wrote. “Even if Propp complies with institutional rules, he will not earn any reduction in his sentence

unless he also satisfactorily participates in the SOTP.”

This change, the Court concluded, made the punishment for Propp's crime “more onerous in violation of the Ex Post Facto Clause.” See: *State v. Iowa District Court for Henry County*, 759 N.W.2d 793 (Iowa 2009). ■

Over 10 Million in Prison Worldwide

by David M. Reutter

There are more than 10.65 million people in prisons worldwide. That figure includes 850,000 in “administrative detention” in China. Almost half of all prisoners are held in only three countries: Russia, China and the United States.

Those conclusions were published in the eighth edition of the World Prison Population List issued by the International Centre for Prison Studies in London. The list details the number of prisoners in 218 countries, utilizing data available as of early December 2008.

According to the list, the U.S. has the highest prison population rate in the world, at 756 per 100,000 population, followed by Russia (629), Rwanda (604), St. Kitts and Nevis (588), Cuba (c. 531), U.S. Virgin Islands (512), British Virgin Islands (488), Palau (478), Belarus (468), Belize (455), Bahamas (422), Georgia (415), American Samoa (410), Grenada (408) and Anguilla (401).

Almost three-fifths (59%) of the countries profiled have rates below 150 per 100,000 population. Considerable variation of rates occurs in different regions of the world and by continent.

For example, for countries in western Africa the average rate is 154, but in southern Africa the rate is 324.5. South central Asian countries have a rate of 53 while in central Asian countries the rate is 184. A rate of 95 was found in southern and western Europe, whereas nations that span Europe and Asia have an average rate of 229.

The prison population continues to increase in many parts of the world. Compared to previous editions of the list, prison populations have grown 71% worldwide. Breaking it down by region, the list found the following growth rates: Africa, 64%; the Americas, 83%; Asia, 76%; Europe, 68%; and Oceania, 60%.

More recently the state prison population in the U.S. was found to have decreased slightly in 2009, according to a report by the Pew Center on the States released on March 17, 2010. The decrease among state prisoners – by an average of .3% – was the first recorded drop since 1972.

The World Prison Population List is available on PLN's website. ■

News in Brief:

Arkansas: On February 22, 2010, Little Rock attorney Jack Kearney, a former director of the Arkansas Ethics Commission, was arrested and charged with furnishing \$1,300 in cash to a Pulaski County jail prisoner. A Sheriff's report stated the unnamed prisoner was discovered with the contraband cash and named Kearney as its source. Kearney, who adamantly denied the allegations, was released without bail.

Arkansas: Three juvenile prisoners allegedly beat guard Leonard Wall to death during an escape from a Pine Bluff detention center on January 31, 2010. The juveniles then stole a car, but later abandoned it in a nearby town. Two of the escapees, Nicholas Dismuke, 15, and Christopher Beverage, 16, were captured the next day in Fort Smith. The third escapee, Brandon Henderson, 18, was caught in Oklahoma a few days later. Wall died as a result of head trauma suffered during the beating; another guard, Gloria Wilburn, was assaulted and injured during the escape.

California: Fresno County Jail guard Alfonso Alanis was charged with stealing property from prisoners on January 12, 2010. Alanis, who was responsible for processing the property of prisoners scheduled for release, allegedly took money and other items. He was arrested and released on \$50,000 bail pending trial.

California: In February 2010, June Ann Lucena, formerly a guard at Folsom Prison, was ordered to pay nearly \$400,000 in restitution in connection with her 2007 conviction for insurance fraud. Lucena began collecting disability pay and workers' compensation after surgery for a work-related fall in 2000. She claimed she was disabled and unable to work, but investigators filmed her in 2002 on a jet ski at Folsom Lake and riding water slides at a water park. She was already serving a seven-year prison sentence for the fraud conviction when the restitution was ordered.

California: Nearly 140 health care employees at two jails in Alameda County went on strike on March 9, 2010 to protest

stalled contract negotiations and unfair labor practices. Workers from the Santa Rita Jail in Dublin and the North County Jail in Oakland participated in the one-day strike. All were employees of Prison Health Services (PHS). The company has a contract with Alameda County to provide medical employees and related services for both jails. PHS threatened to lock out the striking workers if an agreement was not reached. The main sticking point is PHS's decision to increase the amount that employees must contribute toward their health insurance benefits by as much as 30%.

Florida: In January 2010, Apalachee Correctional Institution prisoner Michael W. Joseph III was charged with various offenses related to filing false tax returns on behalf of other prisoners. Joseph's mother, Deloris Werner, was charged as a co-conspirator and agreed to cooperate with authorities. Joseph, a jailhouse lawyer who was known as "H&R Block," filed tax returns on behalf of other prisoners, sometimes without their knowledge. The money was deposited into accounts established by Werner, who then mailed a portion of the funds into various prisoners' canteen trust accounts. Investigators determined that most of the prisoners had no idea that Joseph's actions were illegal. If convicted, Joseph faces up to 90 years in prison. He was nearing release when the tax scam was discovered by prison officials.

Florida: Michael Jamal Rigby, 21, escaped from the Osceola County Jail on February 19, 2010. In a scheme reminiscent of the film *The Shawshank Redemption*, Rigby tore out the toilet in his maximum-security cell, crawled through the hole behind it, breached a concrete wall and managed to get past two fences without being detected. Both Rigby's father, Brian Rigby, and his grandmother, Regina Ralph, were arrested and charged with providing aid to Rigby after his escape. He was still at large as of early March 2010. It was later determined that 20 jail employees had violated rules that contributed to the escape, such as not performing cell searches.

Georgia: On January 21, 2010, a federal jury convicted former Fulton County sheriff's deputy Mitnee Markette Jones of obstructing an FBI investigation. Jones was found guilty of lying in reports and giving false statements in connection

with a federal investigation into the death of Richard Glasco, a mentally unstable prisoner who died in his cell on March 18, 2008. Jones was one of four guards who entered Glasco's cell after he had been screaming and banging on his cell door for hours. Witnesses testified that Glasco fell silent shortly after the guards visited his cell, and that blood and skin could be seen on the shattered window of the cell door. [See: *PLN*, Dec. 2009, p.34]. One of the other jail guards involved in Glasco's death, Derontay Langford, pleaded guilty to obstruction charges and testified against Jones. A third guard, Curtis Jerome Brown, Jr., is awaiting trial on similar charges plus felony civil rights violations.

Illinois: Elizabeth Hudson, a former Cook County Jail supervisor, was sentenced on March 3, 2010 to six years in prison after she pleaded guilty to stealing hundreds of thousands of dollars from prisoners. She was responsible for depositing cash collected from prisoners booked into the jail, and was charged in 2008 after authorities discovered \$370,000 missing from the Inmate Trust Fund over a four-year period. Hudson resigned from her position at the jail during the investigation.

Kentucky: March 2, 2010 was the first full day of operations for the new Adair County courthouse and its staff. Sheriff's Deputy Charles Wright was working as a court security officer when he accidentally locked himself in a basement holding cell. Wright, who apparently suffers from claustrophobia, panicked and tried to shoot his way out of the cell. Fortunately no one was injured, but the incident created quite a commotion at the new courthouse. Locals have jokingly begun referring to Wright as "Barney Fife." The incident, however, is not a laughing matter for Wright, who was fired and will have to pay for repairs to the cell damaged by his gunfire.

Kentucky: On March 7, 2010, 20-year-old Ashley Cox was visiting prisoner Justin Bell at the Roederer Correctional Complex when she abruptly left the visitation area and disappeared into the women's restroom. Guards checked on her about ten minutes later and found her bleeding. She was transported to a nearby hospital, where doctors discovered she had just given birth. A search of the restroom revealed an infant's dead body in

Hepatitis & Liver Disease
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By Dr. Melissa Palmer
See page 53 for order information

a trash can. Cox had apparently killed the newborn by stuffing its mouth with paper towels. She was charged with murder and concealing the birth of an infant, and is being held on \$2.5 million bond. Her family released a statement saying that no one, including Cox herself, knew she was pregnant.

Maryland: Raymond Taylor, 26, a prisoner at the Maryland Correctional Adjustment Center in Baltimore, was erroneously released after he impersonated his cellmate on February 25, 2010. Taylor was serving three consecutive life sentences at the time. He simply presented himself to guards claiming to be his cellmate, who was scheduled for release, and recited his cellmate's ID number from memory. He was then escorted out of the prison. The error was discovered later that evening when the cellmate began demanding to be released. Corrections officials had no explanation as to how guards could have been so easily duped into releasing the wrong prisoner. Taylor was captured in West Virginia one day after he was mistakenly set free.

Netherlands: On February 5, 2010, the Netherlands government announced it will lease 500 prison beds to Belgium. Belgian officials will pay just over \$40 million a year for three years for the additional bed space. The Netherlands has about 2,000 unused prison beds, while Belgian prisons are overcrowded and in need of major structural repairs. This is the first time in modern history that one European country has rented prison beds to another nation. As reported extensively in *PLN*, that practice has been commonplace for many years among states in the U.S.

Pennsylvania: Kito Dixon, 30, a former Cornell Abraxas mental-health aide at a secure residential treatment facility in Erie, pleaded no contest on March 5, 2010 to charges that he had indecent contact with a 14-year-old female resident at the facility. The girl claimed Dixon made inappropriate comments and touched her breast as she was getting ready for bed. Surveillance footage showed Dixon lingering outside the girl's room and then entering. He will be sentenced on April 21.

Pennsylvania: On January 7, 2010, Charles L. Walker, 39, a former guard at the Allegheny County Jail, was charged with sexually assaulting a female prisoner. Walker allegedly forced the prisoner to touch his genitals several times and

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News in Brief (cont.)

perform a sex act on him on December 27, 2009. In his defense, Walker said he allowed the female prisoner to touch his penis after she tried to kiss him, but denied sexually assaulting her. He was fired following his arrest.

Texas: Five prisoners attempted to escape from the Polunsky Unit after church services on the evening of January 29, 2010. Three of the five men were shot by guards while trying to scale the prison's perimeter fence; the other two were injured by razor wire. The prisoners were treated at a local hospital and are expected to make full recoveries. All five of the would-be escapees are serving life sentences. They were placed in solitary confinement and will face additional

charges of attempted escape.

Texas: On February 4, 2010, Jeffrey Cole, 31, a former guard with the Texas Department of Criminal Justice who worked at the Stiles Unit, pleaded guilty to one count of manslaughter for beating a neighbor to death with his bare hands in 2008. No motive was given for the killing. Cole was sentenced to 10 years in prison on March 4.

United Kingdom: Amit Kajla, 22, claimed she was forced to quit her job at the Brinsford Young Offenders Institution near Wolverhampton after she was criticized for being "too attractive." Kajla, who worked at the facility from July 2007 to May 2008, said she suffered harassment and discrimination for being a young, attractive female working in a predominantly male environment. One co-worker referred to her as a "stupid little girl" who

knew "nothing about jailcraft." Another made demeaning comments about her snug-fitting uniform. Kajla won an employment discrimination claim against Her Majesty's Prison Service in 2009, and was scheduled for a damages trial on February 25, 2010. The case settled for an undisclosed sum on that day.

Washington: On February 9, 2010, William Larry Findley, 66, a bookkeeper at the King County Jail, was charged with 22 counts of embezzlement for stealing funds from prisoners between February and August 2007. Investigators identified a total of 66 suspicious transactions dating back to 2006, but most of those incidents fell outside the 3-year statute of limitations for theft prosecutions. Findley allegedly stole over \$28,000. He was fired but remains free pending trial, and has filed for bankruptcy. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

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California: Demand for Speedy Trial Applies to Probation Violation Detainers

by John E. Dannenberg

In two rulings in the same case, the California Court of Appeal distinguished the speedy trial rights versus the waiver-of-appearance rights of state prisoners who are facing detainers for probation violations.

Although California prisoners may waive their right to appear so as to speed up the process whereby their probation violation sentence may begin to run concurrent with their existing prison sentence (under Penal Code § 1203.2(a)), they are nonetheless entitled to a speedy trial on any newly-lodged detainer or warrant pursuant to Penal Code § 1381.

Submitting a demand for a speedy trial to the district attorney's office triggers a 90-day period to bring the defendant physically to court. Otherwise the charges must be dismissed. However, an apparent conflict exists when the detainer is not for a new offense but for a probation violation for an already tried offense.

In the instant case, state prisoner Braulio P. Gonzalez filed a § 1381 de-

mand for a speedy trial as to his alleged probation violation. The court denied his request because he had already been convicted of the underlying offense, with the sentence suspended, and was only waiting to have the sentence imposed. At issue was whether the remedy under a § 1381 demand was dismissal of the underlying offense that Gonzalez had already been convicted of, or only dismissal of his subsequent probation violation.

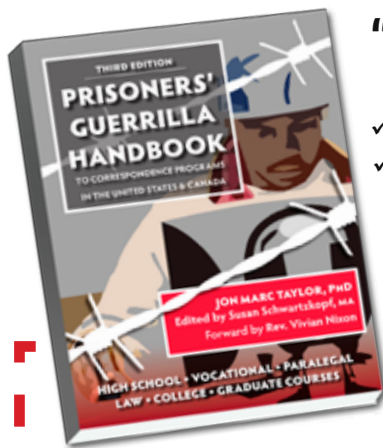
The Court of Appeals noted there was inconsistent precedent – and indeed that the California Supreme Court had recently accepted the question for review in another case, *People v. Wagner*. Nonetheless, the appellate court addressed Gonzalez's habeas corpus petition by construing it as a petition for writ of mandate. It further found that the proper disposition in cases where a speedy trial of an alleged probation violation had not occurred was to vacate any determination of guilt of the violation already made without the presence of the prisoner. Accordingly, the court granted

the writ of mandate, vacated the lower court's probation revocation order, and ordered the warrant and detainer recalled. See: *Gonzalez v. Superior Court of Orange County*, 166 Cal. App. 4th 922 (Cal. App. 4th Dist. 2008).

However, the case was later transferred to the Third Appellate District on May 13, 2009, with instructions to reconsider the ruling in light of *People v. Wagner*, 45 Cal.4th 1039, 201 P.3d 1168 (2009).

On June 19, 2009, the Court of Appeal revisited its prior decision and concluded "that our earlier opinion was consistent with the decision of the Supreme Court in *Wagner*; we therefore reach the same conclusion as in our previous opinion."

Accordingly, the trial court was ordered to vacate its probation revocation order and to direct the Orange County Sheriff to recall the detainer filed against Gonzalez. See: *Gonzalez v. Superior Court of Orange County*, 2009 WL 1699672 (Cal. App. 4 Dist. 2009). ■



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Dedicated to Protecting Human Rights

May 2010

The History of *Prison Legal News*

by Paul Wright

In May 1990, the first issue of *Prisoners' Legal News (PLN)* was published. It was hand-typed, photocopied and ten pages long. The first issue was mailed to 75 potential subscribers. Its budget was \$50. The first 3 issues were banned in all Washington prisons, the first 18 in all Texas prisons. Since then we have published 244 consecutive issues, grown to offset printing of 56-page issues, and now have almost 7,000 paid subscribers in all 50 states as well as numerous other countries. This is how it happened.

In 1987 I entered the Washington state prison system with a 304-month prison sentence. In 1988 I met Ed Mead, a political prisoner and veteran prison activ-

ist, at the Washington State Reformatory (WSR) in Monroe, Washington. Ed had been imprisoned since 1976. In that period he had been involved in organizing and litigating around prison conditions and issues. He had also started and published several newsletters, including *The Chill Factor*, *The Red Dragon* and *The Abolitionist*. By late 1988, Ed and I were jointly involved in class action prison conditions litigation and other political work.

As the 1980s ended it became readily apparent that collectively prisoners were in a downhill spiral. Prisoners were suffering serious setbacks on the legislative, political, judicial and media fronts. Prisoners and their families were the people most affected by criminal justice policies, but were also the ones almost entirely absent from what passed as debate. There was a lack of political consciousness and awareness among prisoners, and widespread ignorance about the realities of the prison system among those not incarcerated.

Ed and I decided to republish *The Red Dragon* as a means of raising political consciousness among social prisoners in the U.S. We planned to model the new *Red Dragon* on the old one: a 50-60 page Marxist quarterly magazine that Ed had previously published. We eventually put together a draft copy, but it was never printed for distribution. The main reason was the lack of political and financial support on the outside. We lacked the money to print a large quarterly magazine, and were unable to find volunteers outside prison willing to commit the time involved in laying out, printing and mailing a big publication. Additionally, in 1989 I was subjected to a retaliatory transfer to the

Penitentiary at Walla Walla, due to success in the WSR overcrowding litigation. Prison officials also wanted to ensure that the *Red Dragon* never got published. The transfer meant that Ed and I were relegated to communicating by heavily censored mail.

We scaled back our ambitions and instead decided to publish a small, monthly newsletter focusing on prison issues in Washington. If the support was there it would grow. Originally named *Prisoners' Legal News*, we set out with the goal of publishing real, timely news that activist prisoners could use.

With the social movements that had traditionally supported the prison movement in this country at a low ebb (i.e., civil rights, women's liberation and anti-war movements), we saw *PLN's* objective as one that would emphasize prisoner organizing and self-reliance. Like previous political journalists who had continued publishing during the dark times of the 1920s and 1950s, we saw *PLN's* role as being similar. From the outset, *PLN* has striven to be an organizing tool as much as we are an information source. When we started we had no idea that things would get as bad as they have in our nation's criminal justice system.

In 1990 I was transferred to the Clallam Bay Corrections Center, a then-new Washington prison. In May 1990, the first issue of *PLN* appeared. Ed and I each typed up five pages of *PLN* in our respective cells. Columns were carefully laid out with blue pencils and graphics applied with a glue stick. We sent the proof copy to Richard Mote, a volunteer in Seattle, who copied and mailed it. Ed contributed

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**NOTICE OF PENDENCY OF CLASS ACTION CIVIL RIGHTS COMPLAINT
AGAINST TRANSCOR AMERICA, LLC.**

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If you were transported by TransCor America, LLC, from a jail, prison, or state hospital in restraints, remained in the vehicle for more than 24 hours, and were deprived of overnight sleep in a bed between February 14, 2006, and the present, you are a member of this national civil rights class action now pending in federal court in San Francisco, California.

PLEASE READ THIS COURT-ORDERED CLASS-ACTION NOTICE

WHAT IS THIS CASE ABOUT? There is now pending in the District Court for the Northern District of California a class action entitled *Kevin M. Schilling, John Pinedo, William Tellez, on Behalf of Themselves and All Those Similarly Situated v. TransCor America, LLC, Sgt. John Smith, Officer Blanden, and Does 1 through 100*, Cause No. 3:08-cv-00941 SI. This Notice explains the nature of the litigation and informs you of your legal rights and obligations.

Plaintiffs are pre-trial detainees and sentenced prisoners who were transported by TransCor America, LLC, a private prisoner transport company, who remained in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class includes all pretrial detainees and prisoners who were transported by TransCor, for more than twenty-four (24) hours continuously, except pretrial detainees and prisoners who were transported on behalf of a federal agency.

Plaintiffs have sued TransCor America, LLC, for damages for cruel and unusual punishment for keeping them on the vehicles for twenty-four (24) hours or more and depriving them of overnight rest in a bed.

Plaintiffs allege that conditions on the transport vehicles violated the United States Constitution and the California State Constitution applicable to persons transported in California. Defendant denies that the conditions under which the company transported prisoners and pre-trial detainees violated their rights. The District Court Judge has issued an Order certifying this case to proceed as a national class action.

WHO IS IN THE CLASS? Plaintiffs filed this action on behalf of themselves and all other persons similarly situated. The Court has certified a class consisting of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who remained in restraints in the transport vehicle for more than twenty-four (24) hours continuously without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than twenty-four (24) hours. The class does not include pretrial detainees and prisoners who were transported by TransCor on behalf of a federal agency.

MUST I DO ANYTHING TO REMAIN IN THE CLASS? If you are a member of the class described above, you do not have to do anything to remain in the class. If you do not request exclusion from the class, you will remain a class member. If you wish to exclude yourself from the class, you must follow the procedure set forth in the following paragraph.

MAY I EXCLUDE MYSELF FROM THE CLASS? If you do not wish to be considered a member of this class, or do not wish to be represented by the plaintiffs in this action, you may be excluded from the action by mailing a letter which must be postmarked on or before August 16, 2010, requesting exclusion from the class and addressed to either:

Attorneys for Plaintiffs:

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The letter should include the name and number of the case, *Schilling et al. v. TransCor America, LLC, et al.*, Case No. C 08-941 SI, your name and address, and a clear statement that you do not wish to be considered a member of the class and do not wish to be bound by the judgment in the action.

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A one year subscription is \$24 for prisoners, \$30 for individuals, and \$80 for lawyers and institutions. Prisoner donations of less than \$24 will be pro-rated at \$2.00/issue. Do not send less than \$12.00 at a time. All foreign subscriptions are \$100 sent via airmail. *PLN* accepts Visa and Mastercard orders by phone. New subscribers please allow four to six weeks for the delivery of your first issue. Confirmation of receipt of donations cannot be made without an SASE. *PLN* is a section 501 (c)(3) non-profit organization. Donations are tax deductible. Send contributions to:

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Article submissions should be sent to - **The Editor** - at the above address. We cannot return submissions without a SASE. Check our website or send a SASE for writers guidelines.

Advertising offers are void where prohibited by law and constitutional detention facility rules.

PLN is indexed by the *Alternative Press Index*, *Criminal Justice Periodicals Index* and the *Department of Justice Index*.

The History of *PLN* (cont.)

PLN's start-up budget of \$50.

The first three issues of *PLN* were banned in all Washington prisons on spurious grounds. Ed was infractioned by WSR officials for allegedly violating copyright laws for writing law articles. Officials at Clallam Bay ransacked my cell and confiscated my writing materials, background information and anything that was *PLN*-related. Ed's infraction was eventually dismissed and my materials were later returned.

Just as we were on the verge of filing a civil rights lawsuit challenging the censorship of *PLN*, the Washington DOC capitulated and allowed *PLN* into its prisons. Jim Blodgett, then the warden at the Penitentiary in Walla Walla, told me that *PLN* would never last because its politics were "harmless and outmoded," and prisoners were too "young and immature to be influenced" by our ideas. The reprisals had been fully expected, given prison officials' historic hostility to the concept of free speech.

Then disaster struck: Richard Mote turned out to be mentally unstable. He refused to print and mail *PLN*'s second issue because he took offense to an article by Ed calling for an end to the ostracization of sex offenders. Mote took off with all of *PLN*'s money that contributors had sent, about \$50, the master copy of the second issue and our mailing list. For several weeks it looked like there would be no second issue of *PLN*. Fortunately we located a second volunteer, Janie Pulsifer, who was willing to print and mail *PLN*. Ed and I sent Janie another copy of the issue, which she copied and mailed. We were back on track.

The Presses Keep Rolling

Ed's then-partner, Carey Catherine, had agreed to handle *PLN*'s finances and accounting, such as they were, after Mote jumped ship. This was short-lived, because by August 1990 she was preparing to go to China to study. The only person we knew who had a post office box who might be able to take care of *PLN*'s mail, mainly to process donations, was my father, Rollin Wright. He lived in Florida but generously agreed to handle *PLN*'s mail for what Ed and I thought would be a few months at most, until we found someone in Seattle.

PLN's support and circulation slowly began to grow. In January 1991, *PLN*

switched to desktop publishing. Ed and I would send our typed articles to Judy Bass and Carrie Roth, who would retype them and lay them out. Ed and I would then proof each issue before it was printed and mailed. In 1991 *PLN* also obtained 501(c)(3) status from the IRS so we could use lower postage rates. *PLN*'s circulation had stabilized at around 300 subscribers. We purposely did not seek further growth because we did not have the infrastructure to sustain it. Once we had non-profit status and postal permits from the post office, we were ready to grow.

In the summer of 1992 we did our first sample mailing to prison law libraries. Since *PLN*'s reader base had grown, and changed, we decided to reflect this change by renaming the magazine *Prison Legal News*, as *PLN* wasn't just for prisoners anymore. *PLN* was now being photocopied and mailed each month by a group of volunteers in Seattle.

When *PLN* started out in 1990, Ed and I had decided it would be a magazine of struggle, whether in the courts or elsewhere, and everything would be chronicled. At a time when the prisoner movement was overcome by defeatism and demoralization, we thought it important to report the struggles and the victories as they occurred to let activists know theirs was not a solitary struggle.

A mainstay of *PLN*'s coverage from the beginning has been the issue of prison slave labor. This is where the interests of prisoners and free world workers intersect at their most obvious. If people outside prison didn't think criminal justice policies affected them, *PLN* would make prisons relevant by showing how prison slave labor took their jobs and undermined their wages. This coverage was helped by the fact that Washington was a national leader in the exploitation of prison slave labor by private businesses.

PLN has broken stories on how corporations like Boeing, Microsoft, Eddie Bauer, Planet Hollywood, Starbucks and Nintendo, plus U.S. congressman Jack Metcalf, have all used prison slave labor to advance their interests. These stories were picked up by other media, increasing *PLN*'s exposure. While *PLN* continues to be the leader in reporting on prison slavery, my own views on the subject have changed. Influenced by the writings of Bruce Western, I came to realize the big story wasn't the 5,000 prisoners who work for private companies or the 60,000 who work for prison industries – and those only because

The History of *PLN* (cont.)

of the massive government subsidies that prison industries receive – but the 2.3 million prisoners who have been removed from the U.S. labor market completely.

In June 1992, I was transferred back to WSR where Ed and I could collaborate on *PLN* in person for the first time since the magazine started. I had been infractioned by Clallam Bay prison officials in 1991 for reporting in *PLN* the racist beatings of prisoners by gangs of white guards. Unable to generate attention for the beatings themselves, my punishment for reporting the attacks generated front-page news in the *Seattle Times*. Eventually the disciplinary charges were dropped, but not before I had spent a month in a control unit for reporting the abuses. The presses kept rolling.

PLN Becomes a Magazine

On *PLN*'s third anniversary in May 1993, we made the big leap. We switched to offset printing instead of photocopying, and permanently expanded our size to 16 pages. *PLN* was no longer a newsletter; we were now a magazine. *PLN* had 600 subscribers.

In October 1993, Ed was finally paroled after spending 18 years in prison. The state parole board, no doubt unhappy at *PLN*'s critical coverage of their activities, imposed a “no felon contact” order on Ed. This meant Ed could have

no contact, by mail or phone, with me or any other felon. The parole board made it very clear that this was for the purpose of preventing Ed's involvement with *PLN*. If Ed were involved in publishing *PLN* in any way, he would be thrown back in prison.

The ACLU of Washington filed suit on our behalf to challenge the rule as violating Ed's right to free speech as well as my own. In an unpublished ruling, Judge Robert Bryan in Tacoma dismissed our lawsuit, holding that it was permissible for the state to imprison someone for publishing a magazine while they were on parole. The Ninth Circuit Court of Appeals would eventually dismiss our suit as moot when, after three years on state parole, Ed was finally discharged from the parole board's custody. In the meantime, Ed had tired of *PLN* as he had with his previous publishing efforts, and got on with his life and moved to California. Washington state prisoner Dan Pens was *PLN*'s co-editor from 1994 to 2001.

PLN switched to an East coast printer that offered significant savings over Seattle printers. This allowed *PLN* to expand to 20 pages. Within the year *PLN* was no longer being mailed by volunteers; our printer did the mailing for us.

In January 1996, *PLN* hired its first staff person, Sandy Judd. *PLN*'s needs and circulation had grown to the point that volunteers were simply unable to do all the work that needed to be done. With some 1,600 subscribers, data entry, layout, accounting and other tasks required full-time attention. In 2001, former Washington prisoner Don Miniken became *PLN*'s executive director. Sandy also returned as *PLN*'s data manager and layout person, and *PLN* began its employment of work study students and local volunteers for office tasks. Hans Sherrer, a former prisoner and expert on wrongful convictions, became *PLN*'s circulation manager until October 2004, when he went to work full-time for *Justice Denied*, a magazine specializing in wrongful convictions.

Our May 2010 issue marks *PLN*'s 20-year anniversary and 244th issue of publishing. We now have around 7,000 subscribers in all 50 states.

PLN goes into every medium and maximum security prison in the U.S. and many of the minimum security facilities and jails as well. *PLN*'s subscribers include prisoners, judges, lawyers, journalists, academics, prison and jail officials, activists and concerned citizens.

The bulk of each issue of *PLN* is still written by prisoners and former prisoners. In 1999, the Washington DOC banned correspondence between prisoners. The resulting breakdown in communication made coordinating *PLN* difficult, to say the least, between myself and *PLN*'s imprisoned contributing writers.

Upon my release in 2003, I was able to do a lot more in the way of research and advocacy as *PLN*'s editor than I had while imprisoned. In 2005 we were able to hire Alex Friedmann as *PLN*'s associate editor. Alex had been imprisoned in Tennessee when he first began writing for *PLN* in 1996 as a volunteer contributing writer. Alex's invaluable skills as a researcher and editor vastly improved the content of *PLN* and the depth and breadth of our coverage.

My first day out of prison illustrates the transition from prisoner editor to non-prisoner editor. I was picked up at the Monroe Correctional Complex at 8:30 AM on December 16, 2003 by Don Miniken and Hans Sherrer, *PLN*'s executive director and circulation manager, respectively. By 10:30 AM we were in *PLN*'s Seattle office and I was learning to use the Internet and e-mail, my first experience with both. At noon we had lunch with Jesse Wing and Carrie Wilkinson, part of the McDonald, Hogue and Bayless legal team that successfully represented *PLN* in *PLN v. Lehman*, a censorship suit against the Washington DOC. At 2:30 PM I was back in *PLN*'s office doing a television interview with *Fox News* on prison slave labor. It hasn't stopped since.

We would also like to thank all those people who have served on our board as first Prisoners' Legal News and now as the Human Rights Defense Center over the years. Our current and former directors are: Dan Axtell, Rick Best, Bell Chevigny, Scott Dionne, Judy Greene, Tara Herivel, Sandy Judd, Ed Mead, Janie Pulsifer, Sheila Rule, Ellen Spertus, Peter Sussman, Silja Talvi, Bill Trine, Josephine Wigginton and Rollin Wright.

Over the years we have had a number of contributing writers across the country who contribute articles and reporting to *PLN*. Our first contributing writer was James Quigley, then a Florida prisoner, who began writing for *PLN* in 1995. James killed himself in a Vermont prison control unit in 2003. Our other contributing writers have included, in no particular order: Willie Wisely, Alex Friedmann, Matt Clarke, Mark Wilson, Julia Lutsky, Daniel

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Then there is the design of the magazine itself. Since we went to computerized layout in 1991 the magazine has been designed and laid out by: Ed Mead, Judy Bass, Dan Axtell, Sandy Judd, Thomas Sellman, Don Miniken and Lance Scott. Our printers have been Consolidated Printing in Seattle, Prompt Press in Camden, New Jersey and Oregon Lithograph in McMinnville, Oregon.

In 1998 Common Courage Press published our first book, *The Celling of America: An Inside Look at the U.S. Prison Industry*. Edited by Daniel Burton-Rose,

Dan Pens and myself, the book is a *PLN* anthology. *Celling of America* lays out in one place the reality and politics of the prison industrial complex in the mid 1990s. Now in its third printing, the book has received critical acclaim and helped boost *PLN*'s profile. Between 1998 and 2000, I did a weekly radio show on KPFA's Flashpoints program called "This Week Behind Bars." The show aired on Fridays and consisted of news reports from *PLN* about what was happening in American prisons and jails. Hans Sherrer, Alex Friedmann and I have done hundreds of radio interviews on *PLN*'s behalf advocating for the rights of prisoners. In addition, *PLN* is frequently quoted on prison issues by other publications.

In 2003, Routledge Press published *Prison Nation: The Warehousing of America's Poor*, a book edited by attorney Tara Herivel and myself that made the connection between mass imprisonment and under-funded indigent defense systems. Now in its third printing and winner of the 2003 Gustavus Myers Outstanding Book award, it has been well received.

In 2008, the New Press published *Prison Profiteers: Who Makes Money from Mass Incarceration*. An anthology edited by Tara Herivel and myself, in this volume we set out to explore who benefits from the U.S. policies of mass imprisonment that make the U.S. the world's leader in putting people in prison.

This trilogy of *PLN* anthologies, spanning a decade, does an impressive job of laying out the political landscape of the 1990s that cemented the most repressive policies of mass imprisonment, the conveyor-belt judiciary that ensures poor people accused of a crime are more likely to wind up in prison than their wealthy counterparts accused of crimes, and the economic and political beneficiaries of these policies

and who is harmed by them.

The Prison Legal News website, www.prisonlegalnews.org, is now the largest prison and jail news site on the Internet, with all *PLN* back issues in PDF format as they appeared when published, a searchable database with over 22,000 articles and 10,000 court cases, and a publications library and brief bank. It is the premier prison news and litigation research site. Our website receives over 100,000 visitors a month and is frequently cited as a resource and source of information by journalists, lawyers and courts, among others.

In addition to our printed and online publications, *PLN* has provided an extensive source of advocacy in the media, legislatures and the courts. Alex Friedmann and I regularly speak on the topic of prisoners' rights at conferences, conventions and law schools. We do dozens of media

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The History of *PLN* (cont.)

interviews a year and provide background information on prison and jail topics to journalists and producers. Alex has testified before the U.S. Congress and state legislatures on prison-related topics. We have submitted comments to public agencies including the Federal Communications Commission, the National Prison Rape Elimination Commission and the Civil Rights Commission.

PLN remains unique in many respects. First, *PLN* is the only independent, uncensored nationally-circulated magazine edited and produced largely by prisoners and ex-prisoners anywhere in the U.S., if not the world. It is also the longest lived in U.S. history. Second, *PLN* is one of the few publications that offers a class-based analysis of the criminal justice system. No other publication has the depth and breadth of coverage of detention facility litigation and news that *PLN* does.

For the past twenty years *PLN* has relied almost exclusively on donations sent by subscribers. In recent years, advertising income has helped offset *PLN*'s costs as well. In 1998 *PLN* began distributing

books with the release of our first anthology, *The Ceiling of America*. Our book list has expanded as a way to both augment our public education mission and provide prisoners with the means to help themselves, and to help contribute to *PLN*'s continued existence. Until *PLN* had to hire a staff person we operated on a break-even basis. As late as 1995, we were giving away up to 48% of our subscriptions to prisoners who could not, or claimed they couldn't, afford to subscribe. With the expense of a staff person we had to dramatically limit the number of free subscriptions. Over the years *PLN* has received generous support from the Open Society Institute, the Public Welfare Foundation, the Sonya Staff Foundation, the Art Appreciation Foundation, the Solidago Foundation, Resist, AFSCME, the Southern Poverty Law Center and the Funding Exchange, all of which enabled *PLN* to grow and professionalize.

A free press doesn't come cheap. Neither does free speech. From the very first issue to this day, *PLN* has been censored in prisons and jails across the country. In many cases we have been able to resolve censorship issues administratively. In cases where that was not possible, we filed suit and resolved the matter in court. The

sidebar to this article gives a rundown on *PLN*'s extensive litigation history. Whether as a reflection of the times or a comment on *PLN*'s effectiveness, we are facing more attempts at censorship nationally than at any time in the past twenty years. *PLN* may well be the most censored publication in America.

PLN in the Next Decade

A question I have been asked is whether *PLN* is "successful." Success is a relative term. When a French journalist asked Mao Tse-Tung in the 1960s if he thought the French Revolution in 1789 had been successful, Mao reportedly replied "It's too soon to tell." So too with *PLN*. The prison and jail population in the U.S. has more than doubled to well over 2.3 million people just in the time we have been publishing, and it continues to grow. By any objective standard, prison conditions, overcrowding and brutality are now far worse than at any time in the past 40 years. Draconian laws criminalize more behavior and impose harsher punishment in worse conditions of confinement than at any time in modern world history.

With 5 percent of the world's population, the U.S. has 25% of the world's prisoners. The legal rights of American prisoners are diminishing daily under coordinated attacks from conservative courts, yellow journalists and reactionary politicians. The corporate media and politicians alike thrive on a daily diet of sensationalized crime and prisoner bashing, while prisons and jails consume ever-increasing portions of the government budget to the detriment of everything else. The economic downturn has led some states to diminish their prison populations but nationally the number of prisoners continues to grow.

PLN has duly chronicled each spiral in this downward cycle of repression and violence. We have provided a critique and analysis of the growth of the prison industrial complex and have exposed the human rights abuses which are the daily reality of the American gulag at the beginning of this century. When some people purported to be shocked when the American torture chambers in Iraq were first exposed in the Abu Ghraib pictures, we could sadly point out that *PLN* had been reporting similar occurrences in American prisons since our inception in 1990, and still do. In that sense, I believe *PLN* has been successful. Even if we didn't stop the evils of our time, at least we struggled against them and did the best

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we could under the circumstances. That we have managed to publish at all under these circumstances is a remarkable success. When I started *PLN*, I never thought I would be writing this retrospective twenty years later in the same magazine after being released from prison.

But not all is gloom and doom. *PLN* has helped stop some of the abuses that are legion in the American gulag. We have also borne witness to what is happening and duly documented it. Recent years have seen an increase in interest and support for prison issues and human rights in the United States. Many of *PLN*'s critiques of prison slave labor and other issues have been picked up and adopted by labor groups and even some elements of the corporate media. Our censorship litigation has helped secure the rights of prisoners and publishers alike in many states, and our public records litigation has helped to ensure government transparency.

I believe that ultimately *PLN*'s success will be measured by its usefulness to the prisoners, activists, journalists, attorneys and citizens who tried to make a difference for the better. We have tried our best to provide timely, accurate, helpful information that people can use in their daily struggle for justice. *PLN* also serves as a useful, contemporaneous account of prison issues for later historians.

The main obstacles that *PLN* faces are those faced by all alternative media in the U.S.: under-funding and the corresponding inability to reach more people with our message. Absent relatively (for *PLN*) large-scale funding from outside sources to do outreach work, this will continue to be a problem for the foreseeable future. The other primary problems facing *PLN* are prisoner illiteracy (depending on the state, between 40 to 70% of the prison population is functionally illiterate), and political apathy. Despite that situation, *PLN* has survived and steadily grown. The need that led to *PLN*'s creation has only increased.

Corporate media coverage of prison and criminal justice issues tends to be abysmal. Most media coverage is little more than press-release journalism. Input from prisoners or activists is rarely sought. Since its inception, *PLN* has ensured that the voices of class conscious prisoners are heard. We are proud of the fact that over the years many stories originally broken or developed by *PLN* have been picked up by other news sources, including the corporate media. We are heartened by the fact that prisoners in other states started

similar publications to deal with their local issues. This includes *Florida Prison Legal Perspectives*, *Southland News and Prison Information Network*, among others.

After two decades of publishing it must be emphasized that *PLN* has always been very much a collective effort. *PLN* has had editors who bore the brunt of our captor's displeasure for speaking truth to power, but the reality is that *PLN* would never have been possible if it were not for the many volunteers and supporters who have so generously donated their time, energy, skills, labor, advice and money. The cause of prisoner and human rights has never been very popular in this country. In today's political climate it takes extraordinary courage and commitment to support a project like *PLN*.

The volunteers and employees, without whose support *PLN* would not exist today, include, in no particular order: Dan Axtell, Dan Tenenbaum, Rollin Wright, Zuraya Wright, Allan Parmelee, Judy Bass, Carrie Roth, Janie Pulsifer, Jim Smith, Jim McMahon, Scott Dione, Cathy Wiley, Ellen Spertus, Sandy Judd, Wesley Duran, the late Michael Misrok, Shannon Hall, the late Thomas Sellman, Linda Novenski, Jo Wigginton, Jennifer Umbehoeker, Zina Antoskow, Martin and Rebecca Chaney, Bob Fischer, Latoya Anderson, Sue Hartman, Susan Schwartzkopf, Samuel Schwartzkopf, Don Miniken, Mel Motel, Ryan Barnett, Sam Phillips, Sam Rutherford, Danielle Fuskerud, Christine McManich, Ron Podlaski, Zachary Phillips, Chris St. Pierre and many others.

The lawyers who have advised and represented *PLN* on matters as diverse as Internet law and censorship litigation over the years include, in no particular order: Bob Cumbow, Mickey Gendler, Bob Kaplan, Joe Bringman, Leonard Schroeter, Dan Manville, Rhonda Brownstein and the Southern Poverty Law Center, the Washington ACLU and the Oregon, Kansas, Colorado, Tennessee, Pennsylvania, Kansas & Western Missouri, Arizona and Nevada ACLUs, Mac Scott, Darren Nitz, David Fathi and the ACLU National Prison Project, Lee Tien and the Electronic Frontier Foundation, J. Patrick Sullivan, Randy Berg, Peter Siegel, Cullin O'Brien, Jognwon Yi, Darrell Cochran, Bruce Plenk, Max Kautsch, Alison Howard, Andy Mar, David Bowman, Jesse Wing, Tim Ford, Carrie Wilkinson, Sandy Rosen, Janet Tung, Janet Stanton, Susan Seager, Bill Trine, Alison Hardy, Marc Blackman, Frank Cuthbertson, Mike Kipling, Brian

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Ultimately, the people who have contributed articles, donated money and subscribed are those who have made *PLN* possible today. Without all of these contributions to *PLN*'s collective effort – and

there are far too many to name here – we would have met the fate of the vast majority of alternative publications: we would have folded within a year. Instead, we have lasted two decades.

In 2009 we changed the name of our non-profit to the Human Rights Defense Center to better reflect our activities. This includes book publishing. We published our first book last year, *The Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada*. Written by Missouri prisoner Jon Marc Taylor and edited by *PLN* staff member Susan Schwartzkopf, it reflects our desire to publish and distribute self-help, non-fiction reference books that prisoners can use to help themselves. Our next book, *The Habeas Citebook*, by federal prisoner Brandon Sample, is in production now. We also added a staff attorney position and hired Dan Manville as our first general counsel to represent *PLN* in censorship litigation and selected catastrophic injury cases around the country. *Prison Legal News* the maga-

zine is published as an HRDC project.

In March 2010 we closed our Seattle office and moved all HRDC operations to Brattleboro, Vermont, where I have been based since I was released from prison in 2003. We did this to cut costs and improve efficiency by consolidating our employees and operations in one location. Don Miniken, our executive director since 2001, stepped down and I have assumed that position.

Continued advocacy on behalf of prisoners and their families on all fronts and ensuring the right of prisoners to receive *PLN* are all daily projects for us. Expanding *PLN*'s book distribution list, further increasing *PLN*'s size to bring readers more news and information, and expanding our circulation are all goals for the immediate future. Going into the next decade, 21st century *PLN* will still be here, giving voice to the voiceless and providing the best news and analysis on prison and jail-related issues around.

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Twenty Years of *PLN* in Court

Since *PLN* was founded in 1990 we have been censored in prisons and jails around the country. We have always tried to resolve censorship issues administratively, but in cases where the goal of prison officials was to ban *PLN* or our books, that obviously wasn't possible. *PLN* has aggressively challenged censorship across the nation and we have won the vast majority of our court battles. We have also litigated a number of public records cases involving prisons and jails, in which the requested records or fee waivers were denied.

We would like to thank all of the fantastic and dedicated attorneys who have represented *PLN* in our various legal actions over the years. Thanks also go to those attorneys who volunteered to represent us in lawsuits that we ended up not having to file. A summary of *PLN*-related litigation over the past two decades includes the following cases.

Concluded Cases

Washington Parole Suit: In 1994, *PLN* co-founders Ed Mead and Paul Wright sued the Washington Indeterminate Sentencing Review Board, challenging the Board's order that Ed have no contact with any felons after his release for the purpose of publishing *PLN*. In an

unpublished ruling, Judge Robert Bryan of Tacoma upheld the ban. The case was dismissed as moot by the Ninth Circuit in 1997 when, after three years, Ed was discharged from ISRB supervision. The lawsuit was sponsored by the ACLU of Washington; Frank Cuthbertson and Mike Kipling represented the plaintiffs. See: *Mead v. ISRB*, U.S.D.C. (W.D. Wash.), Case No. 3:94-cv-05293.

Washington Bulk Mail Ban: When Airway Heights Corrections Center opened in 1994, it banned all third- and fourth-class mail. *PLN* subscribers Don Miniken and Don MacFarlane filed suit against the practice in 1996. In *Miniken v. Walter*, 978 F.Supp. 1356 (E.D. WA 1997), the ban was struck down as unconstitutional. In another, unpublished ruling in a separate case, the ban also was struck down. See: *MacFarlane v. Walter*, U.S.D.C. (E.D. Wash.), Case No. 2:96-cv-03102-LRS. Mickey Gendler represented Don Miniken – who later served as *PLN*'s executive director – on behalf of the Washington ACLU. In addition to an injunction, the court awarded attorney fees, costs and damages.

Utah Jail Publication Ban: A *PLN* subscriber was transferred to the Box Elder county jail in Utah, which banned all publications. *PLN* and another publisher

filed suit challenging the ban in 1998. The jail settled soon after the lawsuit was filed, paying damages and attorney fees and changing its policy. Brian Barnard represented *PLN* in this case. See: *Catalyst v. Box Elder County*, U.S.D.C. (D. Utah), Case No. 1:98-cv-00130.

Michigan Book Ban: In 1998, the Michigan DOC banned *PLN*'s book, *The Celling of America: An Inside Look at the U.S. Prison Industry*, from all of its prisons, claiming it incited violence. *PLN*, Common Courage Press (the book's publisher) and two prisoners filed a class action suit challenging the ban in 1999. Michigan prison officials settled the case soon afterwards, paying damages, costs and attorney fees, removing the book from their banned book list, and revamping their censorship procedures. The plaintiffs were represented by attorney Dan Manville, who was later hired as *PLN*'s general counsel. See: *PLN v. Ransom*, U.S.D.C. (E.D. Mich.), Case No. 2:99-cv-70523.

Washington Gift Subscription Ban: Beginning in the mid 1990's, the Washington State Penitentiary in Walla Walla required that prisoners purchase all books and publications using funds in their prison trust accounts. *PLN* was among the publications censored under this policy. Washington prisoner Clayton Crofton

challenged the policy pro se, and obtained two injunctions requiring delivery of his *PLN* subscription even though it was not purchased from his trust account. The injunctions were upheld on appeal, where Crofton was represented by attorney Mickey Gendler. See: *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999).

Washington Censorship Litigation: In 1997, *PLN* and other publishers and prisoner plaintiffs filed suit, challenging the Washington DOC's ban on third-class mail, gift subscriptions, bans on magazine articles, photocopies and court rulings, and limits on newspaper articles, sexually explicit materials, etc. The Washington DOC settled the case in early 2000 by changing its mail censorship policies and paying the plaintiffs' attorney fees and costs. The suit was sponsored by the ACLU of Washington, and the plaintiffs were represented by attorneys Mickey Gendler and Joe Bringman. See: *Humanists of Washington v. Lehman*, U.S.D.C. (W.D. Wash.), Case No. 3:97-cv-05499-FDB-JKA.

Alabama Gift Subscriptions: The Alabama DOC prohibited prisoners from receiving gift subscriptions; instead, prisoners were forced to buy subscriptions from their prison trust accounts, and publishers were not notified when their publications were censored. *PLN* filed suit in 1999, challenging the practice. The case settled in 2000 while a ruling was pending on the parties' cross motions for summary judgment. Under the terms of the settlement, the Alabama DOC changed its policies to allow prisoners to receive subscriptions and to provide notice to

the sender if mail was censored. *PLN* was represented by Rhonda Brownstein and Catherine Smith of the Southern Poverty Law Center. See: *PLN v. Haley*, U.S.D.C. (M.D. Ala.), Case No. 2:99-cv-00486.

Nevada DOC Censorship: The Nevada prison system banned all copies of *PLN* in 2000, claiming the publication constituted "inmate correspondence." *PLN* filed suit and obtained a preliminary injunction requiring delivery of *PLN* subscriptions and mail to Nevada prisoners. The defendants entered into a consent decree in Sept. 2000, agreeing to deliver *PLN* and paying damages, and the district court awarded attorney fees. *PLN* was represented by David Fathi of the ACLU National Prison Project and Don Evans of Reno, Nevada. See: *PLN v. Crawford*, U.S.D.C. (D. Nev.), Case No. 3:00-cv-00373-HDM-RAM.

Utah Jail Censorship: In 2001, *PLN* filed suit against Millard County, Utah based on a policy or practice by the county jail to deny prisoners access to *PLN* subscriptions. The case settled, with the county paying *PLN*'s attorney fees and costs and agreeing to make policy changes. *PLN* was represented by Brian Barnard. See: *PLN v. Millard County*, U.S.D.C. (D. Utah), Case No. 2:01-cv-00580-TS.

Oregon Bulk Mail Ban I: From 1991 until 2001, the Oregon DOC banned third-class mail. *PLN* filed suit in 1998 challenging the ban. The case

lost in the district court and *PLN* appealed to the Ninth Circuit, which reversed in *PLN v. Cook*, 238 F.3d 1145 (9th Cir. 2001). The Court of Appeals instructed the lower court to enter injunctive relief in *PLN*'s favor, holding that the ban on bulk mail, and absence of due process when such mail was censored, violated the constitution. The district court entered an injunction and awarded attorney fees in 2001. *PLN* was represented in the district court by Alison Hardy and Marc Blackman of Portland, Oregon, and on appeal by Sam Stiltner and Janet Stanton of Seattle. See: *PLN v. Cook*, U.S.D.C. (D. Ore.), Case No. 3:98-cv-01344-MFM.

Oregon Bulk Mail Ban II: Despite the injunction in *PLN v. Cook*, the Oregon DOC continued to ban mail sent by *PLN* to Oregon prisoners via standard rate mail. Prison officials also enacted bans on catalogs and gift subscriptions, and failed to provide notice to the sender. *PLN* filed a second suit in 2002 challenging these practices. The DOC settled the case in 2003 by entering into a consent decree, revising the challenged policies, and paying damages and attorney fees. *PLN* was represented by Mickey Gendler of Seattle and Marc Blackman of Portland, Oregon.

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20 Years of *PLN* in Court (cont.)

See: *PLN v. Schumacher*, U.S.D.C. (D. Ore.), Case No. 3:02-cv-00428.

Washington Nazi Guard Censorship:

The May 1999 issue of *PLN* was censored in all Washington state prisons because it contained an investigative exposé of Nazi and white supremacist guards employed by the Washington DOC. *PLN* filed suit in late 1999, and the district court dismissed the case soon afterwards. In an unpublished decision, the Ninth Circuit reversed and remanded for consideration of equitable relief claims. See: *PLN v. Washington DOC*, 11 Fed.Appx. 729 (9th Cir. 2001). On remand the district court dismissed the case on the merits, disregarding *PLN*'s evidence that the censorship was a self-serving ploy by the DOC to keep racist guards on the payroll. The Ninth Circuit affirmed the dismissal in an unpublished decision in 2003. *PLN* was represented by Frank Cuthbertson (now a Pierce County superior court judge), Darrell Cochran and Jongwon Yi of Gordon Thomas Honeywell in Tacoma, Washington. See: *PLN v. Washington DOC*, 71 Fed.Appx. 619 (9th Cir. 2003).

Censorship by U.S. Military Prison:

The U.S. Disciplinary Barracks at Ft. Leavenworth, Kansas censored an issue of *PLN* in 2003 due to our advertising content. A federal district court held that the censorship was unconstitutional, and ordered the *PLN* issue to be delivered to prisoner Craig Waterman, who litigated the case pro se. See: *Waterman v. Commandant*, 337 F.Supp.2d 1237 (D. KS 2004).

Washington Public Records Case I:

In the course of investigating stories, *PLN* frequently files Public Disclosure Act (PDA) requests with various state agencies. The Washington DOC has a long record of refusing to comply with state disclosure laws in its attempts to cover up malfeasance and misconduct. After being denied documents related to staff misconduct and a prison industry program, *PLN* filed suit. In this first PDA case, the superior court ordered the DOC to produce documents related to the closing of a prison industries telemarketing company, and awarded attorney fees and statutory penalties. *PLN* was represented by David Bowman of Davis, Wright & Tremaine. See: *PLN v. Washington DOC*, Superior Court for Thurston County (WA), Case No. 00-2-00432-7.

Washington Public Records Case

II: In *PLN*'s second PDA case, a Pierce County superior court judge ordered the Washington DOC to provide *PLN* with records related to the misconduct and drug-related death of an employee at the McNeil Island Corrections Center, as well as the facility's safety inspection documents. The DOC was ordered to pay *PLN*'s attorney fees and costs, as well as statutory penalties. *PLN* was represented by Shelley Hall of Davis, Wright & Tremaine. See: *PLN v. Washington DOC*, Superior Court of Pierce County (WA), Case No. 00-2-13344-3.

Washington Public Records Case

III: In 2000, *PLN* filed a public records request seeking documents related to discipline involving Washington DOC medical staff who maimed or killed prisoners through medical neglect, as well as documents related to medical staff who had suspended licenses or other medical disciplinary records. The DOC refused to provide the information, claiming that doing so would hinder its law enforcement functions. *PLN* filed suit and lost at the trial and appellate court levels. See: *PLN v. Washington DOC*, 118 Wash. App. 1069 (Wash.App. Div. 2, 2003). The Washington Supreme Court reversed and remanded the case in 2005, ordering production of the requested records and awarding attorney fees, costs and statutory penalties. *PLN* was represented by Andy Mar, Michelle Earle Hubbard and Alison Howard of Davis, Wright & Tremaine. See: *PLN v. Washington DOC*, 115 P.3d 316 (Wash. 2005).

ADX Publications Ban: In 2003, *PLN* sued the warden of the U.S. Penitentiary in Florence, Colorado after the ADX – the “super max” prison of the federal Bureau of Prisons – began censoring *PLN* under a policy that banned all publications that included discussions of prisons or prisoners. The case withstood a motion to dismiss by the defendants; however, the ADX mooted *PLN*'s claim by changing its policy, and *PLN* voluntarily withdrew the suit in 2005. *PLN* was represented by Mickey Gendler of Seattle and Bill Trine of Colorado. See: *PLN v. Hood*, U.S.D.C. (D. Col.), Case No. 1:03-cv-02516.

Florida Ad Ban and Writer Pay Suit:

The Florida DOC began to censor *PLN* in 2002, allegedly due to advertising content such as ads for discount prison phone services (later expanded to include ads for pen pal services). The DOC also prohibited prisoners from receiving payment

for writing for publications. *PLN* filed suit challenging these policies, and the court denied the defendants' motion for summary judgment. See: *PLN v. Crosby*, 2004 WL 2931387. However, the Florida DOC changed its censorship policies at the eve of trial, and the court found the policy change mooted *PLN*'s claim for injunctive relief; also, the court upheld the DOC's writer pay policy and ruled *PLN* didn't have standing to challenge that policy. *PLN* appealed, but the Eleventh Circuit affirmed the district court in an unpublished ruling in *PLN v. McDonough*, 200 Fed.Appx. 873 (11th Cir. 2006). *PLN* was represented by Mickey Gendler of Seattle and Randall Berg and Cullin O'Brien of the Florida Justice Institute.

Utah DOC Bulk Mail Suit: In 1997, the Utah DOC attempted to ban third-class mail. *PLN* sued and the ban was quickly changed. The lawsuit, which was joined with separate cases filed by state and county prisoners challenging jail and prison mail policies, was dismissed by the district court in 2004. *PLN* and the other plaintiffs appealed, and the Tenth Circuit dismissed *PLN*'s claims in *Jones v. Salt Lake County*, 503 F.3d 1147 (10th Cir. 2007), because “it was defendants' negligence, as opposed to the prison's bulk rate-mail regulations” that led prison officials to reject or censor *PLN*. *PLN* was represented by Brian Barnard.

Utah Jail Bulk Mail Ban: In 1998, the San Juan county jail in Utah refused to deliver *PLN* to a prisoner subscriber because it was sent third-class mail. *PLN* filed suit challenging the jail's policy. The suit was consolidated with other cases in the *Jones v. Salt Lake County* litigation (see above), and eventually settled for fees, damages and mail policy changes. *PLN* was represented by attorney Brian Barnard. See: *Cowles v. Christensen*, U.S.D.C. (D. Utah), Case No. 2:99-cv-00149.

Kansas DOC Gift Subscriptions Ban:

In 2002, *PLN* sued the Kansas DOC over its policy requiring that prisoners purchase all subscriptions and publications from their prison trust accounts, a policy limiting such expenses to \$40 per month, a ban on publications being sent to certain security levels of prisoners, and the fact that the DOC policy did not provide notice to the publisher when mail was censored. The district court dismissed the case after consolidating it with complaints filed by two Kansas prisoners. See: *Zimmerman v. Simons*, 260 F.Supp.2d 1077 (D. KS 2003). On appeal, the Tenth Circuit reversed and

remanded in *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004), holding that *PLN* had produced sufficient evidence to go to trial. The appellate court held *PLN* was entitled to judgment as a matter of law on its due process claims, and ordered the lower court to enter an injunction as to those claims. Following remand, the case went to trial in February 2007. The district court found the DOC policies were unconstitutional and ordered injunctive relief, including notice to publishers when mail is censored, and later awarded attorney fees. *PLN* was represented by Kansas attorneys Bruce Plenk and Max Kautsch. See: *PLN v. Werholtz*, U.S.D.C. (D. Kan.), Case No. 5:02-cv-04054-MLB; 2007 WL 2875113.

Washington Bulk Mail, Catalog and Legal Materials Suit: *PLN* filed suit against the Washington DOC in 2001, challenging the censorship of *PLN*'s book and subscription flyers, renewal notices, and mail sent via standard rate mail. Also challenged was the DOC's propensity to censor court rulings, legal pleadings, settlements and verdicts sent to Washington prisoners. The district court entered summary judgment on *PLN*'s claims, enjoined the bans on bulk mail and catalogs, and required that notice be provided when those items were censored. The court set for trial the claims relating to the censorship of legal materials. See: *PLN v. Lehman*, 272 F.Supp.2d 1151 (W.D. WA 2003). The defendants filed an interlocutory appeal,

which they lost. See: *PLN v. Lehman*, 397 F.3d 692 (9th Cir. 2005). The case settled on remand, with the DOC agreeing to pay damages and attorney fees. *PLN* was represented by Jesse Wing, Carrie Wilkinson and Tim Ford of McDonald, Hogue and Bayless in Seattle. See: *PLN v. Lehman*, U.S.D.C. (W.D. Wash.), Case No. 2:01-cv-01911-RSL.

Dallas Jail Publication Ban: *PLN* sued jail officials in Dallas, Texas in February 2007 over the jail's policy of banning all publications as being ostensible "fire hazards." The county entered into a consent decree in October 2007, agreeing to change the jail's mail policies and paying damages, attorney fees and costs. *PLN* was represented by Scott Medlock of the Texas Civil Rights Project. See: *PLN v. Lindsey*, U.S.D.C. (N.D. Tex.), Case No. 3:07-cv-00367.

CDCR Mail Policy Suit: In 2006, the California Department of Corrections and Rehabilitation (CDCR) agreed to settle *PLN*'s claims that numerous aspects of the prison system's mail procedures violated *PLN*'s federal and state rights. As part of the settlement the CDCR agreed to substantially change its mail rules and policies, and ordered five-year *PLN* subscriptions for all CDCR facilities. The district court maintained jurisdiction to enforce the agreement and awarded attorney fees to *PLN* in 2008. See: *PLN v. Schwarzenegger*, 561 F.Supp.2d 1095 (N.D. Cal. 2008). Although the case is closed, *PLN* continues to monitor

CDCR's compliance with the settlement. *PLN* was represented by the law firm of Rosen, Bien and Galvan LLP. See: *PLN v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. 4:07-cv-02058.

Massachusetts Book Censorship: In April 2008, after fruitless attempts at negotiation, *PLN* sued the Massachusetts DOC to challenge the exclusion of *PLN*'s books from the department's approved vendor list. A week after filing suit, *PLN* was added to the vendor list. The case settled in May 2009 with the DOC paying damages and attorney fees. *PLN* was represented by attorneys Howard Friedman

The American Friends Service Committee Prison Watch Project

is planning to update the Fall 2001 "Torture in US Prisons – Evidence of US Human Rights Violations." We are seeking testimonies from men, women and children relating to the use of extended isolation and devices of torture (use of force, chemical and physical restraints, living conditions, forced double celling in isolation, etc.). We will also be accepting drawings and photos. Our deadline is June 15th. We will only be able to acknowledge by form letter. Unless otherwise authorized the publication will use first name, last initial and facility only. Please send to Bonnie Kerness, AFSC, 89 Market St., 6th floor, Newark, NJ 07102. Without your input, this publication would not be possible. Our gratitude. Bonnie Kerness

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20 Years of *PLN* in Court (cont.)

and David Milton. See: *PLN v. Clarke*, U.S.D.C. (D. Mass.), Case No. 1:08-cv-10677-RGS.

Intervention in CCA FLSA Suit: In July 2009, *PLN* filed a motion to intervene in a class action Fair Labor Standards Act lawsuit in U.S. District Court in Kansas. The suit, which alleged that CCA had violated labor laws by failing to fully compensate its employees, had settled in February 2009; however, the terms were confidential. *PLN* moved to unseal the settlement. The district court granted *PLN*'s motion despite opposition from CCA, and unsealed the settlement on August 27, 2009; *PLN* then reported the amount and terms of the settlement agreement. *PLN* was represented by Stephen Bonney, Chief Counsel and Legal Director of the ACLU of Kansas and Western Missouri. The FLSA class action suit was *Barnwell v. CCA*, U.S.D.C. (D. Kan.), Case No. 2:08-cv-02151-JWL-DJW.

GEO Group Records Case: *PLN* sued the GEO Group (formerly Wackenhut Corrections) in state court in December 2005 under Florida's public records law, seeking information about payouts in lawsuits filed against the company and sanctions the company had faced for contractual violations. The court granted four motions to compel and GEO eventually produced the requested records in 2009. The case concluded in 2010, with GEO agreeing to pay *PLN*'s attorney fees. *PLN* was represented by Lake Worth attorney Frank Kreidler. See: *PLN v. The GEO Group, Inc.*, Circuit Court of the 15th Judicial Circuit of Florida, Case No. 50 2005 CA 011195 AA.

CCA Arizona Censorship: On September 2, 2009, *PLN* filed suit against CCA in federal court, claiming that the company's Saguaro Correctional Facility in Arizona had censored *PLN* books ordered by prisoners. The Saguaro facility reportedly had a policy that required prisoners to order books from Barnes & Nobles or Amazon, and prohibited book orders from third parties. *PLN* did not receive notice that its books were being censored. The case settled in March 2010, with CCA paying damages and attorney fees and agreeing to make policy changes. *PLN* was represented by Dan Pochoda, Legal Director of the ACLU of Arizona, and by the California law firm of Rosen, Bien and Galvan LLP. See: *PLN v. CCA*,

U.S.D.C. (D. Ariz.), Case No. 2:09-cv-01831-ROS.

Mississippi DOC / Global-Tel Records Case: On March 10, 2009, *PLN* filed suit against the Mississippi Dept. of Corrections and Global Tel*Link, a prison phone service company, to obtain a copy of Global Tel's contract with the Mississippi DOC. The contract had been sealed by a state court in a previous case involving Global Tel. *PLN* settled the suit in June 2009, with Global Tel agreeing to produce a copy of the contract and related documents. *PLN* was represented by Jackson, Mississippi attorneys Robert B. McDuff and Sibyl C. Byrd. See: *PLN v. Mississippi Dept. of Corrections*, Chancery Court of Hinds County (MS), Case No. G 2009 391 I.

Pending Cases

BOP FOIA Case: This case involves *PLN*'s Freedom of Information Act (FOIA) suit against the Bureau of Prisons (BOP), which was filed in 2005 after the BOP demanded that *PLN* pay a large sum before it would produce records related to settlements and payouts in litigation against the department. Summary judgment was granted in *PLN*'s favor in June 2006 in *PLN v. Lappin*, 436 F.Supp.2d 17 (D. DC 2006), and the court awarded *PLN* attorney fees. The BOP produced some records, but most were redacted or incomplete. *PLN* prevailed in another summary judgment motion in March 2009. See: *PLN v. Lappin*, 603 F.Supp.2d 124 (D. DC 2009). The BOP is still in the process of producing the requested records. *PLN* has been represented through most of this litigation by attorney Ed Elder.

Fulton County Jail Publication Ban: *PLN* sued the Fulton County jail in Atlanta, Georgia in October 2007 over the jail's policy of banning all books and non-religious publications. In February 2008 the district court issued a preliminary injunction enjoining the policy, and ordered that *PLN* subscriptions and book orders be delivered to prisoners. The suit settled in December 2009 with the county agreeing to pay monetary damages; the case remains pending on the issue of attorney fees. *PLN* is represented by Atlanta attorneys Brian Spears and Gerald Weber. See: *PLN v. Freeman*, U.S.D.C. (N.D. GA), Case No. 1:07-cv-02618-CAP.

CCA Tenn. Public Records Case: In May 2008, *PLN* associate editor Alex

Friedmann sued Corrections Corporation of America (CCA) under Tennessee's public records law, seeking disclosure of records related to CCA's operation of prisons and jails in Tennessee. The trial court issued a landmark ruling in favor of *PLN* in 2008, but denied attorney fees. CCA and *PLN* cross-appealed, and the Tennessee ACLU, Reporters Committee for Freedom of the Press, Society of Professional Journalists, American Society for Newspaper Editors, Associated Press and Association of Capitol Reporters and Editors filed an amicus brief on *PLN*'s behalf. On August 5, 2009, the Court of Appeals found that CCA was the functional equivalent of a state agency and thus subject to the state's public records law, and, in a revised ruling following a motion to rehear, held in September 2009 that the records requested from CCA were subject to disclosure for all but one facility. See: *Friedmann v. CCA*, 2009 WL 3131610. CCA appealed to the Tennessee Supreme Court and *PLN* cross-appealed on the issue of attorney fees. The Supreme Court denied the appeals in March 2010, leaving the appellate ruling intact; the case is being remanded to the trial court for further proceedings. *PLN* is represented by Memphis attorney Andy Clarke. See: *Friedmann v. CCA*, Chancery Court for Davidson County (TN), Case No. 01-1105-I.

BOP Video FOIA Case: *PLN* filed a Freedom of Information Act suit against the Executive Office of U.S. Attorneys in May 2008, seeking disclosure of a Bureau of Prisons (BOP) videotape of the murder of a prisoner in the segregation unit at the U.S. Penitentiary in Florence, Colorado. The video was shown in open court during the murder trials of the victim's assailants; however, the government refused to release it to *PLN*. The district court granted in part and denied in part cross-motions for summary judgment in Sept. 2009, and ordered the BOP to produce only part of the video. See: *PLN v. EOUSA*, 2009 WL 2982841. The case is presently on appeal to the Tenth Circuit, and Westword, 60 Minutes, the Associated Press, the American Society of News Editors and the ACLU of Colorado filed an amicus brief in support of *PLN*'s appeal. *PLN* is represented by attorney Gail Johnson. See: *PLN v. EOUSA*, U.S.D.C. (D. Col.), Case No. 1:08-cv-01055-MSK.

DC Public Records Suit: In June 2008, *PLN* filed a public records suit against the District of Columbia seeking information about jail-related litigation payouts. The

lawsuit challenged the District's refusal to provide the requested records in electronic format and its refusal to grant a fee waiver. Following several court hearings, the defendants are in the process of producing the requested records. *PLN* is represented by the Partnership for Civil Justice. See: *PLN v. District of Columbia*, Superior Court of the District of Columbia, Case No. 0004598-08.

Los Angeles Public Records Suit: On March 3, 2009, *PLN* filed a lawsuit against the County of Los Angeles, the Sheriff's Department and the Office of County Counsel, after submitting records requests for documents related to litigation involving the Los Angeles County jail. The county failed to produce the requested records and did not respond to a follow-up letter. *PLN* is represented by the law firm of Rosen, Bien and Galvan LLP, and Najeeb N. Khoury and Padraic Glaspy of Howarth & Smith. See: *PLN v. Los Angeles County*, Superior Court of Los Angeles County (CA), Case No. BS119336.

Pennsylvania DOC Records Case: In May 2009, *PLN* filed a petition in the Commonwealth Court of Pennsylvania under the state's Right-to-Know law,

after the Office of Open Records upheld the denial of a fee waiver in *PLN*'s public records request submitted to the Pennsylvania Department of Corrections. The DOC had refused to waive \$8,750 in copy fees, refused to provide the records in electronic format, and later denied *PLN*'s request with respect to certain documents. The court ruled on April 8, 2010 that the DOC had failed to substantiate the amount of copy fees and failed to justify its denial of *PLN*'s fee waiver request. The decision by the Office of Open Records was therefore vacated and remanded for further proceedings. *PLN* is represented by Mary Catherine Roper, a staff attorney with the Pennsylvania ACLU, as well as Andrew Foster, Alicia Hickok and Richard Coe. See: *PLN v. Office of Open Records*, Commonwealth Court of Pennsylvania, Case No. 969 CD 2009; 2010 WL 1379730.

San Francisco Public Records Suit: In August 2009, *PLN* sued the City and County of San Francisco after submitting records requests for documents related to litigation involving the San Francisco jail. Although a partial spreadsheet of cases was produced, the requested records were not. The suit was filed after the City At-

torney's office failed to respond to *PLN*'s follow-up letters. *PLN* is represented by the law firm of Rosen, Bien and Galvan LLP. See: *PLN v. City and County of San Francisco*, Superior Court for the County of San Francisco, Case No. CGC 09 491641.

Connecticut FOIA Appeal: When *PLN* requested documents related to a settlement involving a prisoners' death at the jail in Hartford, Connecticut, the city denied *PLN*'s request for a fee waiver. *PLN* appealed to the state's FOIA Commission, which ruled in September 2009 that *PLN* was entitled to a waiver. Two months later the city appealed the Commission's ruling to Superior Court, where it remains pending. *PLN* is represented by attorney Brett Dignam at Yale Law School and law students Megan Quattlebaum and Robyn Gallagher. See: *Hartford Corporation Counsel v. FOI Commission*, Superior Court, Judicial District of New Britain (CT), Case No. HHB CV 09 5014688.

Virginia DOC Censorship: On October 8, 2009, *PLN* filed suit in federal court against the Virginia Dept. of Corrections. The complaint alleges that Virginia prison officials censored *PLN*'s magazine and

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correspondence, failed to provide *PLN* with timely and adequate notice of such censorship, and barred prisoners from receiving gift books or subscriptions from third parties. *PLN* is represented by attorneys Jeffrey E. Fogel and Steven D. Rosenfield, and HRDC counsel Dan Manville. See: *PLN v. Johnson*, U.S.D.C. (W.D. VA), Case No. 3:09-cv-00068.

TDCJ Book Censorship: On November 4, 2009, *PLN* filed suit against the Texas Dept. of Criminal Justice (TDCJ) after the TDCJ censored two *PLN* books ordered by Texas prisoners. The TDCJ censored *Women Behind Bars* by former *PLN* board member Silja Talvi, and *Perpetual Prisoner Machine: How America Profits from Crime* by Joel Dyer. *PLN* contends that the censorship was improper and the TDCJ did not provide notice when the books were censored. On December 17, 2009, the district court denied the defendants' motion to dismiss and deferred judgment on the issue of qualified immunity in *PLN v. Livingston*, 2009 WL 5170229. *PLN* is represented by attorney Scott Medlock with the Texas Civil Rights Project and HRDC counsel Dan Manville. See: *PLN v. Livingston*, U.S.D.C. (S.D. Tex.), Case No. 2:09-cv-00296.

Louisiana Jail Censorship: On December 3, 2009, *PLN* sued the St. Bernard Parish Prison in Louisiana, which had a policy and practice of prohibiting magazines, newspapers and books from outside publishers or distributors. No notice was provided to *PLN* when its magazine and book orders were censored by the jail. *PLN* is represented by New Orleans attorneys Mary Howell and Elizabeth Cumming, and HRDC counsel Dan Manville. See: *PLN and HRDC v. Stephens*, U.S.D.C. (E.D. LA), Case No. 2:09-cv-07515-MVL-DEK.

CDCR Public Records Case: *PLN* filed suit in state court against the California Dept. of Corrections and Rehabilitation (CDCR) in December 2007, after the CDCR failed to respond to *PLN*'s public records request seeking payouts in litigation involving the California prison system. In December 2009 the court held the CDCR must produce the requested records, and they are in the process of doing so. *PLN* is represented by the law firm of Rosen, Bien and Galvan LLP. See: *PLN v. Tilton*, Superior Court for

Sacramento County, Case No. 34-2007-00883573-CU-PT-GDS.

Conclusion

In addition to the above cases, *PLN* has joined amicus briefs in several U.S. Supreme Court cases on behalf of prisoner plaintiffs, including *Goodman v. Georgia*, 546 U.S. 151 (2006), which involved the right of disabled prisoners to sue for monetary damages; *Woodford v. Ngo*, 548 U.S. 81 (2006), involving exhaustion of administrative remedies under the Prison Litigation Reform Act; and *Jones v. Bock*, 549 U.S. 199 (2007), which likewise involved exhaustion under the PLRA.

PLN also joined amicus briefs in several federal district court and appellate cases, including an unsuccessful certiorari petition in *Hammer v. Ashcroft*, 570 F.3d 798 (7th Cir. 2009), which challenged rules prohibiting in-person media interviews with federal death row prisoners, and a successful petition for *en banc* review in *Nelson v. CMS*, 583 F.3d 522 (8th Cir. 2009), which challenged the

practice of shackling pregnant prisoners in labor.

PLN has achieved impressive results over the years through our litigation, and we have extensively relied on attorneys willing to represent us on a contingency or pro bono basis. Our courtroom successes have been due to the excellent lawyers who represent *PLN* and *PLN*'s staff who are able to marshal the facts necessary for our attorneys to prove and win our claims.

The cases we file directly impact the First Amendment rights of both *PLN* and our subscribers, as well as other publishers and prisoners. In most of our censorship cases we attack broader censorship practices that have an impact beyond the immediate parties to the suit. We are committed to the principle that any prisoner in the U.S. who wants to receive *PLN* or the books we distribute should be able to do so, and *PLN* is one of the few publishers that is consistently willing to assert important free speech and public records rights through litigation. Unfortunately, we have more cases in the works. ■

From the Editor

by Paul Wright

Welcome to the 20th anniversary issue of *Prison Legal News*. It is quite the milestone in the history of any magazine or organization to reach the 20 year mark. The cover story and sidebar lay out our history and what we have accomplished in the past two decades.

Along the way, a lot of people have helped make *PLN* possible. This ranges from volunteers, donors, foundations, writers, advertisers, our board of directors and lawyers to our subscribers and other supporters. It has been very much a collective enterprise.

Our office move is largely completed as this issue goes to press. Comcast was slow to switch over our existing telephone lines to our new office so some people may have received a disconnected phone message. That has been resolved and the phones were finally ported over. Our Vermont office numbers include 802 579-1309 and 802 257-1342. We have done our best to maintain our mailing, printing and production operations as smoothly as possible during this move and have largely succeeded though our print schedule fell behind a little. We are planning to get back on our regular schedule within the next few issues.

We closed our Seattle office and consolidated our two offices in order to cut costs and reduce expenses. However, that entailed some one-time additional expenses ranging from the move across country itself to office furniture, rent, etc. Any donations you can send will greatly help. We are also looking for volunteers for our office in Brattleboro which is close to Southern New Hampshire and Western Massachusetts in Southern Vermont. We have plenty of light office work that volunteers can help with that range from a few hours a month to much more.

When you patronize *PLN* advertisers tell them you saw their ad in *PLN*. If you know of reputable businesses that market their wares to prisoners, let them know about *PLN* and send us their name and address so we can reach out to them. Increased advertising is what has made *PLN*'s size expansion possible. The more advertisers we have, the more news we can bring you.

Enjoy this issue of *PLN* and please encourage others to subscribe. If you can afford to make a donation to help us commemorate our 20th anniversary please do so. All donations are tax deductible. ■



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ROSEN, BIEN & GALVAN is proud to represent *Prison Legal News* in First Amendment and other federal and state civil rights cases in California and the Western U.S. We congratulate Paul Wright and the entire staff at PLN for their many legal victories over the past 20 years and their unswerving dedication to protecting the legal rights of prisoners in the United States.

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Virginia Jail Prisoner Awarded \$7,500 after Being Beaten By Guards

On September 3, 2009, U.S. District Judge Richard L. Williams entered judgment in favor of a Virginia prisoner who was beaten by guards. In all, the prisoner was awarded \$7,500.

On September 20, 2005, there was a disturbance at the Piedmont Regional Jail in Farmville, Virginia. Prisoners in a pod overturned a mop bucket and trash can after guards took away a microwave and television for misbehavior.

Timothy Barnard and two other prisoners were removed from the pod and taken to a sallyport that did not have surveillance cameras. While in the sallyport, Barnard and the other prisoners were questioned about the incident. Barnard denied knowing who was involved.

The guards then repeatedly hit and kicked Barnard. He was struck in the head with a metal baton, stomped on, and suffered a broken rib. Barnard asked for medical attention for his injuries the following day, but was told by guards to keep quiet or he would be beaten again.

An investigation into the incident by the Jail confirmed what happened. The shift supervisor on duty during the incident, Andrew Johnson, resigned. The remainder of the guards, James Davis, Clarence Whitehead and Michael Jackson, received a reprimand.

Barnard sued, alleging excessive force in violation of the Eighth Amendment. A default judgment was entered against one defendant, and the remaining defendants appeared before a magistrate judge for an evidentiary hearing.

After the evidentiary hearing, the magistrate judge concluded that the defendants' actions constituted excessive force. "Barnard simply denied wrongdoing as to the disturbance at the jail, and did nothing to instigate or otherwise warrant the subsequent beatings to which the defendants subjected him," the court wrote.

"Wantonness" was shown by the two rounds of beatings Barnard was subjected to, and the fact that he was struck with a metal baton, the court held. Accordingly, because the defendants' action violated "contemporary standards of decency," the magistrate judge recommended entry of judgment for Barnard against all of the defendants.

The district court accepted the magistrate judge's report and recommendation after receiving no objections by any defendant. The court awarded Barnard

\$250 in compensatory damages against each of the four defendants, \$3,000 in punitive damages against Johnson, \$1,500 in punitive damages against Jackson and \$1,000 in punitive damages against Davis and Whitehead.

Barnard was represented by John Davidson of Davidson and Kitzman, a Charlottesville, Virginia firm. See: *Barnard v. Piedmont Regional Jail Authority*, 2009 U.S. Dist. LEXIS 80383 (E.D. Va. 2009). ■

Private Manufacturers Use Cheap Arkansas Prison Labor

by Matt Clarke

Two private manufacturing companies have opened shops in Arkansas prisons. Actronix, Inc. employs 65 female prisoners at the McPherson Unit to produce wiring harnesses for medical imaging devices such as MRI machines and CT scanners, while Glove Corp. employs 55 male prisoners from the Pine Bluff Unit to make specialty gloves for firefighters and the military. The Glove Corp. program has met with such success that the company plans to move to the Grimes Unit and hire 15 additional prisoner employees. [See: *PLN*, Feb. 2009, p.20].

The increased use of prison labor occurred after Arkansas lost a large number of production jobs to overseas outsourcing. According to the Bureau of Labor Statistics, between 1999 and 2008 the number of production jobs in the state dropped from 187,000 to 127,000.

Glove Corp. general manager Tony Moore said he was on the verge of reducing production at the company's factory in Heber Springs when the Arkansas Economic Development Commission (AEDC) suggested that he consider using a Prison Industry Enhancement (PIE) program to hire cheap prisoner labor. ADEC offered an incentive package, and Glove Corp. decided to try it out.

Moore said that working for Glove Corp. was not easy. Prisoners must learn to sew within 1/16th of an inch on bulky and difficult materials such as Kevlar, and sometimes must sew blind when the material bunches up and blocks their view of the needle. The prisoners work 10-hour days Monday through Thursday and have only a 30-minute lunch break. Supervisors track production quotas that must be met.

Nonetheless, Moore counts the PIE program as an unbridled success for his company. "We have people who are going

to turn up for work every day. They're not going to take Monday off," he said.

Additionally, Moore noted that he saves on turnover expenses. In 2007, his company went through 180 employees just to have 30 available to manufacture 60,000 gloves. The turnover costs were about \$156,000. "There is an element in the American economy that really doesn't see working in a production factory as work they want to do," said Moore.

However, the turnover problems disappeared with the PIE program. Presumably this means that the most tedious and difficult jobs are given to prisoners, who are glad for the work because the wages are higher than other types of prison employment.

Moore also believes the work experience is rehabilitative. Disciplinary problems are rare, and only three prisoners have been removed from the program during its two-year run. "When they finish a 10-hour day, they are pretty tired. It is an honest tired. It changes their outlook. They have an air about them now, they have their self-esteem," Moore observed.

Mark Wood, senior vice-president of Actronix, touted the advantages to his company in stabilizing its freeworld work force through the use of a PIE program.

"We use the prison as a safety valve on our business," he said. When production slows down, prisoners are laid off instead of some of the 250 workers at the company's plant in Flippin, Arkansas.

There are downsides to using prisoner labor, though – chiefly the loss of production control. For example, the entire prison may go on lockdown, effectively ending production until the lockdown is lifted. Guards also must thoroughly search raw materials arriving at the prison and finished goods leaving the facility, which delays production and shipping.

The advantages for prisoners include the chance to learn a trade and earn higher wages. However, most PIE program jobs pay only minimum wage before deductions for housing costs, court costs, victim restitution and child support. Often the prisoner is left with few real earnings. And they learn low-end menial job skills that have long since migrated overseas or behind prison walls.

A chief criticism of PIE programs is that they unfairly compete with companies dependent solely on the non-prison labor force, which must provide fair wages, vacation time and health insurance benefits for their workers. Some companies have been put out of business by PIE programs that use cheap prison labor. [See: *PLN*, March 2010, p.1].

Further, there is considerable cost to the taxpayer. The Arkansas Department of Corrections had to provide Actronix with a 22,000-square-foot manufacturing facility for the company's PIE program. That was done at public expense, yet created only 65 jobs for prisoners. Additionally, private exploitation of prison labor is contrary to sound correctional principles. "Anything that creates a market incentive to lock people up undermines the very purpose of our criminal justice system," said Sheila Bedy, executive director of the Justice Policy Institute, a Washington, D.C.-based research foundation.

So long as private companies can profit from prison labor, there will be a market for moving factories behind prison walls. There are around 4,700 prisoners employed in over 180 PIE programs in 32 states. But for the government subsidies, there would be no private company employment of prisoners. ■

Sources: *Forbes*, *Associated Press*, www.actronix.com

Attention California Level IV Prisoners!

AT THE MARCH 3RD meeting of the California Rehabilitation Oversight Board (C-ROB), CDCR Chief Deputy Secretary for Adult Operations Terri McDonald stated that there are not enough Level IV prisoners who want to program to fill the 600 beds in the Progressive Programming Facility (PPF, formerly known as the Honor Program) at CSP-LAC.

"Level IV offenders can be problematic," she said. "There's just not a bucketload of those folks available to us right now."

Can this be true?

The Friends and Families for the Honor Program believe this is yet another excuse for the CDCR's lack of support for the PPF. Join with us to show the CDCR that Level IV prisoners want to rehabilitate themselves and live in peace in a humane and respectful environment!

DO YOU MEET THE FOLLOWING CRITERIA?

- ▶ No documented prison gang or disruptive group affiliation and/or activity in the past five years
- ▶ No "Sensitive Needs Yard" issues
- ▶ Are willing to program with prisoners of any race
- ▶ No serious 115 RVR's in the past five years and no work-related 115's in the past three years
- ▶ Must not be on C status currently or in the past three years
- ▶ Must not be on single cell status except for medical/mental health reasons
- ▶ Must agree to integrated housing and only coded Racially Eligible
- ▶ Must not have been assessed a SHU term (imposed or suspended) in the past five years
- ▶ Must be eligible for housing in a 270 design Level IV housing unit
- ▶ Must apply for the PPF

If you meet these criteria and want to transfer to the PPF at CSP-LAC and live like a human being while in prison, write a letter to CDCR Secretary Matthew Cate (1515 S Street, Sacramento, CA 95814) and tell him so.

*If you can, please send a copy of your letter to the **Friends and Families for the Honor Program**, 11870 Santa Monica Blvd. #692, Los Angeles, CA 90025*

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Sex for Contraband Racket Unravels After Kansas Prisoner Has Abortion

by David M. Reutter

Despite reports of rampant staff sexual abuse and harassment of women incarcerated at Kansas' Topeka Correctional Facility (TCF), it was not until one prisoner had an abortion after being raped by a vocational instructor that the mainstream media took notice.

Between 2005 and 2008, the U.S. Department of Justice documented 39 reports of sexual misconduct or harassment by prison employees at TCF. State officials disagreed. They found 31 of the reports unsubstantiated and three unfounded; two had been substantiated and two others were under investigation.

One of the substantiated cases involved a determination there was a 99.99 percent probability that TCF plumbing instructor Anastacio "Ted" Gallardo had impregnated prisoner Tracy Keith, who later had an abortion.

An investigation by the *Topeka Capital-Journal* revealed that Gallardo viewed the vocational students in his class as his own personal harem. "[A] candy store, so to speak," said Kenneth Maggard, a former TCF heating and air conditioning supervisor. Maggard had himself been accused of smuggling contraband into the facility; the charges were dropped but he was still fired.

Gallardo had an arrangement to provide cash for oral sex with Keith. She was already aware that Gallardo had an ongoing deal to provide tobacco and food to other prisoners in exchange for sexual favors.

Since Keith didn't smoke or want to sell tobacco on the prison's black market, her interest was in obtaining money. The day after prisoner Sandra McMillan approached Keith on Gallardo's behalf, Keith agreed to perform oral sex in exchange for Gallardo putting funds into her prison account.

"I'm broke," Keith said. "I have no family talking to me. My ex-husband won't let me talk with my son." Figuring she could supplement her \$14-a-month prison pay and get away with the sexual encounters because Gallardo had free run of the facility, it seemed like a no-lose situation. "It was going to be easy money," said Keith.

After lunch on October 2, 2007, Gal-

lardo took Keith and McMillan in a prison work vehicle to TCF's old two-story gym. The building was convenient because it was not only outside the perimeter fence, it was used as a storage facility.

As McMillan stood guard, Keith began to fulfill her part of the deal. However, Gallardo insisted on going further by having intercourse, and Keith refused. "My exact words were, 'Ted, I don't think that this is a good idea,'" she said. "That's a no."

Gallardo, who was 6'2" and 300 pounds, had other intentions. He pulled Keith upright and then pulled down her pants. It was over quickly. About two weeks later, Keith realized the sex really hadn't been a good idea. She knew she was pregnant.

Gallardo's reaction was to try to terminate the pregnancy without alerting prison officials. He smuggled in a morning-after pill, but it failed to work. He then sought out a contact in Mexico and a TCF prisoner who claimed to traffic pharmaceuticals for Bernard Megaffin, a registered sex offender who had been stripped of his medical license, to obtain the highly-regulated RU 486 abortion pill.

After attempts to obtain the drug failed, Gallardo had another prisoner stomp on Keith's stomach in an effort to induce an abortion. A week after Halloween in 2007, Gallardo stopped showing up for work at TCF.

Things began to unravel after prisoner Shari Bierman, a jilted former lover of Gallardo, sent in a "Form 9" that stated, "Give Tracy Keith a pregnancy test. It's Ted Gallardo's."

Knowing that her pregnancy would eventually be discovered, Keith cooperated with prison officials when she was confronted. She considered an open adoption, but with two years left on her sentence and little family support, the state would sever her parental rights. "I was really scared that I was going to get into trouble and do more time," she said. Keith didn't learn about a Topeka woman's inquiry about adopting the child until after prison officials took her to an abortion clinic in December 2007. A local group of women paid for the abortion.

While Keith hinted she had been told that other prisoners involved with Gallardo could avoid problems if her pregnancy disappeared, she said the "difficult and painful decision" to have an abortion fell on her alone. Still, other prisoners ostracized her. "I was called a baby killer," Keith stated. "They said I was a snitch for telling the truth. They tried to jump me. It was hell."

On June 19, 2008, Gallardo pleaded guilty to two contraband charges and one count of unlawful sexual conduct. A charge of rape had been dropped. He was sentenced to two years probation and ordered to register as a sex offender; the plea stipulated that he was immune from charges of "sexual conduct with the other inmate witnesses." Gallardo had been "sexually active" with McMillan and prisoner Veronica Spangler, and allegedly was intimate with Shari Bierman; three other prisoners were also listed as possibly being involved with Gallardo.

"I was sent to prison for what I did," said Keith. "Ted Gallardo raped me. I would expect him to serve time for that crime. He didn't." In fact, at the time, the offense of smuggling contraband into prison was more severe than if a prison staff member had sex with a prisoner.

Personal relationships between TCF prisoners and employees were not unusual. Civil Board summaries reviewed by the *Topeka Capital-Journal* revealed numerous such relationships, and the newspaper reported that up to one-third of TCF's 250 staff members may have been involved in contraband-for-sex arrangements.

In January 2009, a TCF activities specialist was fired for kissing or biting a prisoner's hand, allowing lewd behavior to occur between two prisoners, and delivering fist bumps while socializing with prisoners.

A TCF corporal was dismissed in 2006 after allowing a prisoner to call him at home 17 times for up to 30 minutes each. A sergeant was fired in 2003 for engaging in undue familiarity despite being warned three times to stay away from the prisoner he was seeing. Also in 2003, a TCF storekeeper specialist was terminated after a series of suspensions that included one for taking "inappropriate" pictures

of prisoners.

Former TCF prisoner Heather Morales said that after a guard swatted her bottom in 2004, things continued to escalate. "Future incidents were in my room," she remarked. "I would be sleeping and he, you know, would feel on me. I was shocked at first but I let him. He's a guard."

Another prisoner informed prison officials of the situation. The guard resigned and Morales was sent to segregation for 72 days. In 2005, another guard stopped in an isolated parking lot while transporting Morales to work in a state vehicle. "We had sex," she said. "I don't know what I was thinking."

Such situations seem to be the norm at TCF. "I managed to get pretty much anything into that facility that you could think of through guards or drop-offs along the fence," stated Kendra Barnes, who served nine years at TCF before being paroled in 2008. "Sex for drugs? Sure."

"No one in the Department of Corrections believes this is appropriate. We are aggressive in trying to root out this kind of behavior," stated Kansas Secretary of Corrections Roger Werholtz.

At least one prison employee disagreed. TCF officer Richard Short, a union leader at the facility, said some guards were "held hostage" by prisoners who made false claims of sexual misconduct and by resultant investigations by prison officials. Short had been suspended three times for violating policy by being "unduly familiar" with prisoners.

The U.S. Department of Justice conducted a national survey of sexual victimization in state and federal prisons

in 2007, based on self-reported data from prisoners at 146 correctional facilities nationwide. TCF was not one of the facilities surveyed.

While prison employees like Gallardo often claim the sex was consensual after being caught in an intimate relationship with a prisoner, prisoner advocates say the power differential that exists between staff and prisoners makes truly consensual sex impossible. "At Just Detention International [formerly Stop Prisoner Rape], we consider any sexual activity between staff and inmates to be sexual abuse," said Louisa Stannow, the organization's executive director. All 50 states have criminalized sex between prisoners and prison employees.

"No one in our corrections system – whether it's an employee or inmate – should ever be exploited or abused," said Kansas Governor Mark Parkinson. "We must ensure that the policies we have in place are working and that when people do not follow these policies, they are appropriately dealt with."

Kansas prison officials dutifully took action – by moving quickly to file an ethics complaint against an attorney who had helped document sexual misconduct at TCF. Department of Corrections officials argued that attorney Keen Umbehr misrepresented *Capital-Journal* reporter Tim Carpenter when they visited TCF to interview two prisoners in August 2009. Umbehr denied that he had misrepresented Carpenter's identity, and said he was targeted for retaliation because he helped "uncover a terrible human rights abuse."

The ethics complaint was filed 58 days after the prison visit but only two days after the *Capital-Journal* published an article about sexual abuse at TCF. While prison officials alleged that Umbehr had referred to Carpenter as an "attorney at law" on the visitation log, Umbehr noted the handwriting didn't match his and that his name on the log was misspelled. "I know how to spell my own name," he observed.

Apparently, the solution to preventing improper sexual relationships at TCF was to close the vocational plumbing and heating and air conditioning classes, which is just what prison officials did. Additionally, TCF warden Richard Koerner was reassigned on January 15, 2010, hours after the release of a National Institute of Corrections report that recommended policy changes at the facility to address the problem of sexual misconduct involving prison staff. Among other things, the report suggested clearer rules related to staff-prisoner relationships (presumably "don't have sex with prisoners"), and a better grievance process that prisoners feel they can use without risking retaliation.

The Kansas state legislature is also studying the issue. "Part of the important information we need to have is how extensive the problem is," said Senate Majority Leader Derek Schmidt. For Keith and other women prisoners who have been raped or sexually abused by prison staff, the problem is extensive indeed. ■■

Sources: *Topeka Capital-Journal*, *Associated Press*, www.hdnews.net, www.kake.com

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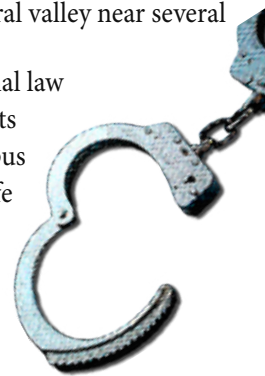
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CALIFORNIA CASES ONLY



Georgia Law Creates Homeless Sex Offender Colony

by David M. Reutter

Georgia's sex offender residency restrictions have led some offenders to live in the woods because they have no legal place to stay. Reminiscent of leper colonies, they are forced to camp out on the fringes of society.

Under Georgia law, the state's 16,000 sex offenders are prohibited from living, working or loitering within 1,000 feet of schools, churches, parks and other areas where children gather. While the law is designed to protect children, critics charge that it leaves some sex offenders homeless, unable to find employment and unsupervised due to their transient living situation.

Probation officers in Cobb County had no place for sex offenders to stay once released from prison. To solve that problem, they began sending them to a densely wooded area behind an office building in Marietta, a suburb of Atlanta.

In September 2009, nine sex offenders were living in tents around a makeshift fire pit. "I'm living like an animal. It's just bad," said Levertice Johnson, 52, who was convicted of child molestation in 2002. "You can't clean up, you can't clean yourself, you can't do nothing. I'd rather be dead. I'm serious. I'd rather be dead."

Even probation officials acknowledged the situation was not the best solution. "While having an offender located in a camp area is not ideal, the greater threat lies in homeless offenders that are not [at] a specified location and eventually absconding supervision with their whereabouts unknown," stated Ahmed Holt, manager of Georgia's sex offender administration unit.

Sarah Geraghty, an attorney with the Southern Center for Human Rights, disagreed. "Requiring people to live like animals in the woods is both inhumane and a terrible idea for public safety," she said.

State officials moved quickly to close the camp, but not because it was inhumane; rather, the colony was disbanded after it came to the attention of the mainstream media and became an embarrassment.

Sheriff's deputies told the sex offenders at the camp they had 24 hours to pack their belongings and move, and another 72 hours to report a new address to their probation officers. Most had nowhere they

could legally go.

William Hawkins, 34, fell into that category. When he was 15 years old he had sex with a 12-year-old in Florida. He received two years on house arrest and 10 years probation. Georgia officials gave him a year in jail after a series of missteps that resulted in his failure to register as a sex offender.

"I don't understand how the state gets away with it," Mindy Hawkins said about her husband, who was one of the camp residents. "This is ridiculous – especially when he has a family, a home, a support system here. It's inhumane." William can't stay with his wife, who lives in Virginia, because officials will not transfer his probation.

Sex offender colonies have formed in other states due to restrictive residency laws, most notably the infamous colony

under the Julia Tuttle Causeway in Miami. [See: *PLN*, June 2008, p.1; July 2009, p.36; Dec. 2009, p.14]. The Miami bridge colony was finally dismantled in March 2010 and its residents were relocated to apartments, motels and trailer parks following a change in the local sex offender residency statute.

"It's the end of the Julia Tuttle [colony], but it's not the end of this kind of place," said Patrick, a sex offender who lived under the bridge for three years. "There will be another Julia Tuttle, another place where people will put us so that we are out of sight and out of mind."

Unfortunately, he's most likely correct. ■

Sources: *Associated Press*, *Atlanta Journal-Constitution*, *Miami Herald*, www.findlaw.com

Housing Mentally Ill Violent Offender in Nursing Home Leads to Rape

by Matt Clarke

On January 16, 2009, a 21-year-old mentally ill man with a long history of violent crimes raped a 69-year-old woman housed in the same Illinois nursing home.

Christopher Shelton, 21, suffers from bipolar disorder that causes him to have an explosive temper, which led to multiple arrests for criminal violence. As a 6'1", 230-pound teenager, he struck teachers with a metal bar he ripped out of a classroom desk drawer. Convicted of aggravated battery, he was eventually paroled from the state prison system. However, he had a half-dozen more run-ins with the police, including a 2006 arrest for throwing a woman into a brick wall and kicking her in the head and crotch.

In 2008 he was arrested three times; one of those arrests was for punching a man in the face at the Maplewood Care nursing home in Chicago, where Shelton resided. A few weeks later he was taken into custody by police on a previous battery charge. He was released in November 2008 and asked to be readmitted to Maplewood.

Without even asking why Shelton had been arrested, the nursing home accepted

him. Maplewood tried to conduct a background check but used the wrong birth date, making the results worthless. Had they run a proper check they would have discovered, among other things, that Shelton had an outstanding felony arrest warrant.

Soon after he was readmitted to Maplewood, Shelton informed staff members that he was experiencing "increased sexual urges and thoughts." They told him he should masturbate and use videos or magazines if needed. "There was no additional monitoring as an update or action taken by staff," according to a subsequent state report.

At approximately 11:00 p.m. on January 16, 2009, a Maplewood employee noted that Shelton wasn't in his room. She marked him as unaccounted for on her rounds sheet, but did nothing further. "The facility has no process for locating or monitoring residents that are unaccounted for during rounds," the state report found.

Shelton had sneaked off the second floor, where he was housed, and raped a 69-year old woman who lived on the first floor. A little after 1:00 a.m., a nurse heard moaning from the woman's room and found her over the edge of her bed,

“crying and with a terrified look on her face.” Shelton was discovered hiding in her bathroom. He told police officers that he had “assaulted that lady” while she pleaded for him to “stop it, stop it.”

Despite this confession and the fact that the victim had a good memory, Maplewood’s investigation concluded that the sexual encounter was consensual, stating that the woman “never alleged abuse in her discussion with staff immediately or later when calling for the police.” If that were true, though, then why were the police called? Rather, Maplewood’s self-serving investigation may have been motivated by an interest in reducing the nursing home’s liability. Maplewood officials have denied that they tried to cover-up the incident.

Shelton has since claimed that the sex was consensual. Prosecutors didn’t buy that explanation, and charged him with aggravated criminal sexual assault. State and federal authorities fined Maplewood \$44,400 for violations related to the incident. The nursing home is appealing, but its proposed “plan of correction” was approved in which a special card will be placed on the room doors of vulnerable patients “so that staff may be aware of their potential for abuse.”

The rape victim’s family has filed a lawsuit against Maplewood. “The only possible reason that you would be in this situation is a profit motive,” said attorney Pete Flowers, who represents the plaintiffs. “You want more residents in your facility, but you’re unwilling to pay for the necessary elements to protect all the residents.” The suit alleges that the victim’s family was not informed that Maplewood admitted younger residents “with a history of violent and aggressive criminal behaviors.”

Illinois uses nursing homes to house many of its mentally ill patients, including former prisoners with histories of violent crime. In fact, over 3,000 Illinois nursing home residents have felony records. Sex offenders who are placed in nursing homes have been the subject of national attention and a witch-hunt-like atmosphere; however, residents like Shelton, with prior convictions for violent felonies, have been virtually ignored. Until now, that is.

As of June 2009, 15 of Maplewood’s 186 residents had prior felony convictions, 45 percent had a primary diagnosis of mental illness, and about half were younger than 65 years of age. At the Somerset Place nursing home in Chicago,

62 of the 400 residents were felons, some of whom had been arrested while living at the facility. There were 17 police calls to Somerset from April 2008 to August 2009, including 5 that involved reports of criminal sexual assault.

Shelton pleaded guilty to aggravated criminal sexual assault charges on December 18, 2009. He will serve 12 years under the plea agreement – in a state prison cell, not in a nursing home. ■

Sources: *Chicago Tribune*, www.chicago-breakingnews.com

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\$5,000 Award in New York Prisoner's Retaliation Suit

Following a bench trial, a New York federal district court awarded a prisoner \$5,000 in a lawsuit alleging that a guard retaliated against him for exercising his First Amendment rights.

The civil rights action was filed by state prisoner Karl Ahlers, who worked as a law clerk at the Arthur Kill Correctional Facility. His problems with guard Todd A. Grygo began when he assisted another prisoner in filing a lawsuit against Grygo.

In that lawsuit, which was filed on November 8, 2001, it was alleged that Grygo had assaulted and conspired to file a false disciplinary report against prisoner Daniel Smith. Both Ahlers and Smith lived in the facility's Veteran's Dorm, which was considered to be preferable to other units at the prison.

After the complaint was served on Grygo, he said to Ahlers "Payback's a bitch" and "What goes around [comes] around." In March 2002, Grygo wrote a misconduct report against Ahlers, charging him with failure to obey a direct order and harassment. The direct order charge was dismissed for lack of evidence but the harassment charge resulted in a seven-day keeplock sentence. After three days in keeplock, the warden overturned the sentence.

In addition to losing his bunk in the Veteran's Dorm, Ahlers discovered his legal papers, postage stamps and addresses had been confiscated and destroyed when he went to keeplock. He filed a retaliation suit naming Grygo, which was served on June 25, 2002. Three weeks later Grygo wrote a second misconduct report against Ahlers, claiming he had lied about another guard telling him to return to his dorm to put on his state-issued boots. That report was dismissed following a hearing.

The First Amendment protects a prisoner's speech concerning the wrongdoing of guards and prison officials, and protects those who provide legal assistance to others who report such wrongdoing. Ahlers' act of assisting Smith and other prisoners was protected activity, the district court held.

The court found that Grygo's assertions concerning the misconduct reports and his testimony at trial were not credible. Not only did the court find the reports had been fabricated, but also that Grygo knew the "sophisticated document" prepared for Smith could

only have been written by Ahlers.

As such, the district court determined that Grygo had carried through on his threats and had filed the two misconduct reports "to punish Ahlers for suing him." Additionally, "Grygo's actions in this case would certainly deter a similarly situated inmate of ordinary firmness from exercising his or her constitutional rights," which met the

requirement for a retaliation claim.

In its October 27, 2009 order, the court awarded Ahlers \$2,000 in compensatory damages and \$3,000 in punitive damages. He was represented pro bono by New York City attorney Robin Wilcox and Jennifer Diana of the Kramer, Levin, Naftalis & Frankel law firm. See: *Ahlers v. Grygo*, U.S.D.C. (E.D. New York), Case No. 1:02-cv-03256; 2009 WL 3587483. ■

Cornell Wins \$19.5 Million Alaska Contract; CCA Protest Denied

by Matt Clarke

In September 2009, Alaskan officials denied a protest filed by Corrections Corporation of America (CCA), which was the final hurdle before awarding Cornell Corrections of Alaska (a subsidiary of Cornell Corrections) a contract worth \$19,446,000 to house up to 900 Alaskan prisoners in an out-of-state private prison.

CCA had held the contract since 1994 and was paid \$20,669,000 last year to house Alaskan prisoners at its Red Rock Correctional Center in Arizona. In December 2009, the 770 prisoners at Red Rock were transported to Cornell's new 1,250-bed Hudson Correctional Facility in Colorado.

Cornell's subsidiary received special bidding preference because it was an Alaska-based company. CCA had bid \$18,724,000 per year for the three-year contract, and filed a protest against awarding the contract to Cornell Alaska because it had used its Texas-based parent company as the qualified service provider. CCA claimed that Cornell Alaska, which manages Alaskan halfway houses, would not otherwise have had the requisite experience to perform under the contract. CCA also maintained that if Cornell Alaska had to depend on its parent company, then it was no longer entitled to preference as an Alaskan company and CCA's low bid should have won. Alaska's Department of Correction (DOC) denied the protest, ruling that Cornell Alaska met the requirements for a bidder's preference and had the necessary experience.

Cornell had been trying for years to generate support for a private prison in Alaska, but became tainted by the guilty plea of its lobbyist, Bob Bobrick, for at-

tempting to bribe Alaska state Rep. Tom Anderson, who is currently serving a five-year federal prison sentence. [See: *PLN*, March 2009, p.20].

Construction of the \$240 million, 2,536-bed medium-security Goose Creek Correctional Center is scheduled to be complete in 2012. The facility, located in Port MacKenzie, Alaska, will likely put an end to the need for out-of-state prison beds. Rather than being built by the state, the prison's construction was financed through bonds issued by the Matanuska-Susitna Borough. The borough intends to pay off the bonds by leasing the prison to the DOC, then will transfer ownership of the prison to the state.

Meanwhile, some Alaskan prisoners have cited improved conditions at Cornell's Hudson Correctional Facility. "As compared to CCA, this is like a five-star restaurant. It's like a college campus," stated prisoner Danny Roach. Alaska DOC officials agreed. "Programmatically, it fits in to what we hope to have at Goose Creek, what we're planning for, and we can mirror many of the programs and the recreational opportunities that we're going to have at Goose Creek, we'll mirror them here. The transition will be a smoother one while we have our prisoners here at Hudson," said Alaska DOC official Garland Armstrong.

Others remained skeptical. "They say all this stuff all the time because they want the public to feel like their dollars are doing something," remarked Brenda Watkinson, the wife of an Alaskan prisoner who served time at CCA's Red Rock facility. "They started programs like that at Red Rock and [then] dropped them to save money."

On April 14, 2010, a disturbance involving Alaskan prisoners broke out at the Hudson facility after cell doors in a disciplinary housing unit were mistakenly or accidentally opened. About

ten prisoners broke sprinkler heads and windows; two Cornell guards fled and locked themselves in an office. Tear gas was used to regain control, the prison was placed on lockdown and the Colorado

DOC is investigating. 📰

Sources: *www.alaskadispatch.com*, *www.ktuu.com*, *Anchorage Daily News*, *Denver Post*

Early Release Scam Results in Arrests

by *Brandon Sample*

The FBI has arrested two men in an unusual and brazen plot to defraud prisoners and their families out of tens of thousands of dollars in exchange for reduced sentences.

Monterro Paul, who previously served time in federal prison for counterfeiting and drug charges, allegedly told an FBI agent that he could help prisoners get reduced sentences by setting up drug dealers to be arrested. Paul, who claimed to be with the DEA, asked for fees of up to \$200,000 for arranging the sentence reductions.

According to Paul, when the drug dealers he set up were arrested, the prisoners would get credit for providing information that resulted in the busts. The credit would be in the form of a motion under Rule 35 of the Federal Rules of Criminal Procedure, which allows the government to reduce a prisoner's sentence for snitching.

Paul was arrested at the Jackson, Mississippi airport on December 4, 2009 along with his accomplice, Mark Amos. Paul and Amos had just finished meeting with an undercover FBI agent and reportedly took \$15,000 as a down payment for the scam. Amos' role was to tell prisoners that Paul had helped him get out of prison early using the same method. Amos was only telling a half-truth, though. He had been released early for cooperating with authorities in 2005, but it was not due to

anything that Paul did. Paul and Amos met while serving time together in a federal prison in Texas.

According to FBI agent Jeremy Turner, Amos – unlike Paul – never claimed to be a DEA agent, although he too was charged with impersonating a federal officer. Paul allegedly convinced Federal Bureau of Prisons (BOP) staff at FCI Yazoo City that he was a DEA agent, and was allowed to talk with prisoners at the facility on several occasions. It is unclear

what those conversations entailed.

Oddly enough, Paul himself was once a DEA informant. Both Paul and Amos are being held without bond. A new indictment was issued against the pair in February 2010, alleging that they had scammed \$75,000 from one prisoner's family and \$15,000 from another. They apparently did not obtain any of the promised sentence reductions. 📰

Source: *Associated Press*

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\$99,999 Settlement for Michigan Prisoner Damaged by Second-Hand Smoke

A Michigan prisoner accepted \$99,999 to settle a lawsuit for damages and injuries he suffered as a result of prison officials' failure to follow medical prescriptions to house him in a non-smoking environment.

Prior to being housed at Carson City Temporary Facility (CTF), prisoner Wantwaz Davis had been in Michigan prisons since 1991 and had never been diagnosed or treated for asthma. After Davis was transferred to CTF and housed in D-unit, that changed.

Upon walking into D-unit, tobacco was the first thing Davis smelled, and it covered all other smells. The unit's fans served as a circulator of smoke. Two days after that transfer, Davis had a medical call out.

At that April 10, 2006 callout, Davis told medical staff that the tobacco smoke in the unit was causing him to experience difficulty breathing and was making him dizzy. He was issued a Special Accommodation Notice that, under policy PD-04.06.160, medical staff was required to notify security of his medical needs, which they did.

Rather than promptly move Davis, he was advised to request placement in the CTF's Tobacco-Free Housing Unit. That Unit was full, and Davis' request was responded to with a statement that he was "2nd on non-white list." The complaint charged that such racial profiling was illegal, that there was a disproportionate amount of white spaces in the Unit compared to the number of whites at the prison and that smokers were housed in the Unit.

Davis passed out due to the effects of second hand smoke (ETS) on the night of April 18, 2006. His symptoms of horrible chest pain and difficulties breathing resulted in his being rushed by ambulance to the local hospital, which diagnosed "severe asthma" from ETS.

Prison medical PA Howard Tyree explained it was medically determined that Davis had passed out due to ETS, which closed his lungs and prevented him from getting oxygen. He was given asthma inhaler medication.

Meanwhile, prison officials denied Davis' grievance on the failure to be placed in Tobacco-free housing on April 21. Four days later, Davis went to medical. He ad-

vised that he was "regularly awakened (3 times nightly) with shortness of breath [and] cough[ing]." He was issued more medication and another Special Accommodation.

Once again, prison officials refused to move Davis because he was still number 2 on the list. On May 1, he went to medical for breathing complications caused by being "around too much cigarette smoke and it makes him feel like he can't get enough air." Prison officials still resisted moving him.

Davis was again taken to a hospital on May 4 for difficulties breathing. Upon return to CTF, he was placed in tobacco-free housing. The complaint charged that Davis suffered permanent injury and will have asthma for life, requiring medications.

The lawsuit was settled on June 17, 2009. Davis was represented by attorney Daniel E. Manville. See: *Davis v. Bell*, USDC, W. D. Michigan, Case No. 1:06-cv-690. ■

CA Prisoner Erroneously Validated as Prison Gang Member; Clears His Name, Has Records Expunged, \$1.04 Million in Fees Awarded

by Michael Brodheim

On September 30, 2009, more than 16 years after being incorrectly "validated" as an associate of a violent California prison gang, and after having spent eight years in an isolation unit as a result of that false validation, former prisoner Ernesto Lira had his records cleared of any indication that he was a gang member.

Following a four-week bench trial that included over 20 witnesses and around 300 exhibits, U.S. District Court Judge Susan Illston found that Lira's gang validation was not supported by accurate or reliable evidence. Further, Lira's procedural due process rights had been violated because he was never given notice of the initial gang validation investigation, afforded an opportunity to be heard prior to being validated and placed in administration segregation, or subsequently afforded a meaningful opportunity to challenge his validation and continued segregation.

The court found that as a result of the confinement, isolation and deprivation he experienced, Lira had developed clinical depression and PTSD, and that he continued to suffer from those conditions despite having been paroled. The district court entered an order directing defendant Matthew Cate, as Secretary of the California Department of Corrections and Rehabilitation (CDCR), to expunge Lira's gang validation from CDCR records, to report the expungement to all gang-related law enforcement databases to which the validation had been previously reported,

and to remove all documents related to the validation from Lira's prison file.

California began building Security Housing Units (SHUs) in the 1980s as a means to reduce the influence of violent prison gangs operating criminal enterprises both behind bars and on the streets, according to the CDCR.

"We're taking a proactive approach to identifying gang members," said Special Agent Mike Ruff, a CDCR gang expert. "So a particular gang member may not be able to order an attack on a specific staff member or maybe even someone in the community."

However, this "proactive approach" cast such a wide net that it resulted in prisoners being validated based on flimsy, indirect allegations. Such was the case with Lira, whose name and prison ID number first appeared, mysteriously, in a "laundry list" of names at the end of a report prepared after a validated "Northern Structure" gang member had "debriefed" in an effort to effect his release from SHU confinement. The narrative portion of the debriefing report in fact referred to a different Lira, and the court found that in all likelihood it was that other Lira whose ID number should have been included at the end of the report.

Indeed, the CDCR conceded there was never any evidence that Ernesto Lira actually did anything tangibly gang-related prior to his placement in segregation. Not easily dissuaded from the righteousness of their decision, however, prison officials

vigorously defended their gang validation system which had “kept Lira in isolation, erroneously, for eight years.” Employing a sort of insidious logic that only a corrections official would find compelling, CDCR experts pointed to Lira’s peaceful demeanor and record of good conduct as evidence of his alleged gang ties.

The defendants have since appealed the district court’s ruling and filed a motion to stay the judgment pending resolution of the appeal. Meanwhile, Lira’s attorneys filed a motion for attorneys’ fees. On February 26, 2010, the district court entered an order that included an extensive discussion of attorney fee

provisions under the PLRA. The court awarded a total of \$1,044,101.10 in fees and \$46,781.12 in costs to Lira’s attorneys. He was represented by the San Francisco law firms of Howard Rice Nemerovski Canady Falk & Rabkin, and Chapman Popik & White. See: *Lira v. Director of Corrections*, 2010 WL 727979. ■

Study Finds Pharmacological Treatment of Opiate Dependence Under-Utilized in State and Federal Prisons

by Michael Brodheim

In the first national survey of its kind, researchers have documented important attitudes and practices among state and federal correctional medical directors regarding the use of methadone and buprenorphine to treat heroin/opiate addiction in prisoners, both while incarcerated and after release. The importance of the research stems from the prevalence of heroin use among prisoners, estimated (in 2004) at 9% of the federal prison population and 13% of the state prison population. The chain of logic is straightforward: studies show that approximately 55% of those with a history of substance use relapse within one month of release from incarceration; relapse to substance use, in turn, is associated with increased criminal activity, risk of HIV and HCV infection, drug overdose, and reincarceration. Thus, to the extent that treatment during and/or following incarceration can reduce the negative consequences associated with opiate addiction, offering such treatment could potentially lead to significant social and economic benefits. And indeed, research confirms that

offering prisoners pharmacological treatment and counseling for opiate dependence prior to and particularly around the time of release does decrease the likelihood of drug relapse, overdose, recidivism, and HIV risk behaviors, and additionally increases the likelihood of remaining in long-term drug treatment after release.

While methadone maintenance therapy has been used in the United States for nearly 50 years, buprenorphine was approved for use by the FDA for the management of opiate addiction by community and correctional physicians only in 2002. Treatment with either drug is formally referred to as opiate replacement therapy (ORT).

The survey found that although methadone ORT is offered more frequently than buprenorphine ORT, only 55% of prison systems offer methadone under any circumstances. By contrast, only seven prison systems (14%) offer buprenorphine, and then only in some circumstances. Post-release, 45% of facilities provide some linkage to methadone treatment, while only 29% offer referrals to commu-

nity buprenorphine providers.

In terms of raw numbers, the researchers found that no more than 2,000 prisoners nationwide received ORT using either methadone or buprenorphine. That number, however, represents only slightly better than one percent of the estimated total number of state and federal prisoners who reported regularly using heroin (at least in 2004).

The most common reason cited for not offering ORT to prisoners was an institutional preference for drug-free detoxification.

The researchers concluded that pharmacological treatment of opiate dependence remains an important but under-utilized intervention in U.S. prison settings, with the number of opiate-dependent prisoners actually receiving ORT during incarceration quite limited. Source: Nunn, A., et al., *Methadone and buprenorphine prescribing and referral practices in U.S. prison systems: Results from a Nationwide Survey*. Drug Alcohol Depend. (2009), doi:10.1016/j.drugalcdep.2009.06.015. ■



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Ninth Circuit: Federal Receiver May be Sued for Breach of Contract

by Michael Brodheim

The Ninth Circuit held on Oct. 30, 2009 that the Receiver appointed by a federal court to oversee delivery of medical care to prisoners in the California Department of Corrections and Rehabilitation (CDCR) was not immune from an official-capacity lawsuit for damages. The lawsuit alleged that the Receiver had breached a contract with Medical Development International (MDI), a Florida-based company that provided medical services at two CDCR prisons but did not get paid for much of its work.

Responding to what it characterized as an “unconscionable degree of suffering and death,” in June 2005 the U.S. District Court for the Northern District of California established a receivership to overhaul the delivery of medical services to CDCR prisoners. [See: *PLN*, Mar. 2006, p.1]. The court subsequently entered a separate order authorizing the CDCR to contract with third-party medical service providers without competitive bidding.

In that context the CDCR entered into a relationship with MDI, and, despite the absence of a finalized negotiated contract, permitted the company to provide services at two facilities – the California State Prison in Los Angeles and the California Correctional Institution in Tehachapi.

Later, when the CDCR became concerned that MDI was not licensed to practice medicine in California, the Receiver ordered CDCR officials to stop all payments to MDI. The Receiver gave MDI tacit approval to continue operating at the two prisons, yet cautioned the company that it would be paid only if it was determined that MDI was lawfully providing services in California. Ultimately concluding that that was not the case, the Receiver terminated MDI's relationship with the CDCR in April 2007. [See: *PLN*, Sept. 2007, p.26; Nov. 2007, p.30].

MDI filed suit against the Receiver and the CDCR in Sacramento County Superior Court. At the Receiver's request, the suit was removed to the U.S. District Court for the Eastern District of California pursuant to 28 U.S.C. § 1442. Relying on *Barton v. Barbour*, 104 U.S. 126 (1881), the court dismissed the com-

plaint, reasoning that a federal Receiver could not be sued unless the lawsuit was first approved by the appointing court. However, when MDI sought leave from the Northern District to sue the Receiver, its request was denied on the ground that the Receiver was absolutely immune from suit for functions intimately connected with his receivership duties.

On appeal, the Ninth Circuit noted that the Receiver was being sued in his official – not individual – capacity, and re-

jected the argument that the receivership, as opposed to the Receiver, was immune from suit. The appellate court further held that, because MDI's lawsuit did not challenge the Receiver's appointment or his authority over the CDCR, the company's contract law claims fell within a statutory exception to *Barton*, codified at 28 U.S.C. § 959(a), for ongoing services or operations as opposed to a liquidating trustee in the bankruptcy context. See: *MDI v. CDCR*, 585 F.3d 1211 (9th Cir. 2009). ■

Washington LFOs Issued Before July 1, 2000 Expire in 10 Years

The Washington State Supreme Court has unanimously held that restitution orders issued before July 1, 2000 expire and become void after 10 years, unless extended by the trial court before expiration.

In 1992, Henry Gossage was convicted of sex offenses in Washington state, sentenced to prison and ordered to pay \$2,374.88 in restitution. He completed his prison term and was transferred to community custody in June 1995. As a community custody condition, Gossage was required to pay a minimum of \$20 per month toward his legal financial obligations (LFOs), which included restitution, court costs and fees.

Gossage finished his community custody term on November 4, 2003 but had paid only \$990.50 of his LFOs, or about half of his \$20 per month requirement. He “had also accrued \$2,541.10 in interest, bringing his LFO total to \$4,020.98.”

In December 2005, Gossage sought a certificate of discharge, which “restores an offender's civil rights. RCW 9.94A.637(4). The court will issue a certificate of discharge when an offender has completed all of his sentence requirements, including any LFOs. RCW 9.94A.637(1)(a).”

The trial court denied Gossage's petition and the Court of Appeals affirmed. See: *State v. Gossage*, 138 Wn.App.298, 156 P.3d 951 (2007). The Washington Supreme Court granted review, and reversed.

The Court noted it was undisputed that Gossage had completed all of his sentence requirements except for only par-

tially paying his restitution order. Gossage argued, however, that he no longer had an outstanding LFO because the restitution order had expired.

The Court agreed, finding that the plain language of RCW 9.94A.760(4) “dictates that LFOs from pre-July 2000 offenses expire after the 10-year limitation period. ... the LFOs may be enforced during the 10-year period. ... the superior court may extend the criminal judgment for another 10-year period if it does so before the initial 10 years elapse. These two sentences combine to mean that if the court does not extend the criminal judgment, the judgment expires and the LFOs are unenforceable.”

“Because the language of RCW 9.94A.760 is plain,” the Supreme Court held the statute must be enforced “even if it evinces policy choices that we consider to be ill-advised.” The Court explained that “The language of the statute belies” the defendants' argument that the restitution obligation is not fully extinguished by the limitation period “because it may still be enforced in a civil action.” Whether civil or criminal, enforcement of the restitution order is possible only during the initial 10-year period unless timely extended by the trial court.

The Supreme Court observed that the statute was amended in 2000 to extend the court's jurisdiction for the lifetime of the offender or until all LFOs are paid. The amendment applies only to offenses committed on or after July 1, 2000. Since Gossage committed his offenses before

July 2000 and the court did not extend the initial 10-year period, his LFOs expired and became void in 2002. Accordingly, “under the discharge statute, the superior court is required to issue a certificate of discharge” because Gossage satisfied his sentencing requirements and had no outstanding LFOs at the time he sought the certificate.

The Court declined to address Gossage’s arguments “that he is entitled to restoration of his firearm rights and a

hearing as to whether the court should relieve him of the sex offender registration requirement.” Review was barred by *Sintra, Inc. v. Seattle*, 131 Wn.2d 640, 935 P.2d 555 (Wash. 1997), because Gossage offered no argument or authority for his position.

The state’s petition for a writ of certiorari to the U.S. Supreme Court was denied on June 22, 2009. See: *State v. Gossage*, 165 Wash.2d 1, 195 P.3d 525 (Wash. 2008), cert. denied. ■

Ohio Prisoner Awarded \$40,000 for Sexual Assault

On August 19, 2009, an Ohio prisoner was awarded \$40,000 after being sexually assaulted as a result of deliberate indifference to his safety.

John Meyer, a prisoner at the Southeastern Correctional Institution (SCI), approached Sergeant Barbara McNicholas after being “roughed up” and threatened by other prisoners who wanted him to steal food for them from the kitchen. Meyer told McNicholas about the threats and identified his potential assailants.

Because SCI does not have a protective custody unit, prisoners who want to be segregated for their own safety have to refuse “to lock”; that is, refuse to live in the general prison population. Prisoners who refuse “to lock,” however, are subjected to disciplinary action for refusing to obey an order.

Meyer was given the option of refusing “to lock” but turned it down, fearing the disciplinary infraction would jeopardize his chances of getting custody of his son after release.

So to protect Meyer’s safety, McNicholas told him that she would put all of the prisoners he identified as possible assailants in the hole before he returned from work. However, this did not occur. Five prisoners approached Meyer, held him down and punched him, and a prisoner nicknamed “Doughboy” sexually assaulted him.

Meyer sued McNicholas under 42 U.S.C. § 1983, arguing that her failure to protect him from the assault constituted deliberate indifference in violation of the Eighth Amendment.

McNicholas moved for summary judgment on Meyer’s allegations, arguing, among other things, that there could be no deliberate indifference because she

offered Meyer protective custody, which he refused.

The district court disagreed. McNicholas “did not – and indeed could not – actually offer protective custody to plaintiff for the simple reason that SCI does not offer protective custody,” the court noted. Further, resorting to “a fabricated disciplinary procedure is [not] a reasonable response to a risk of serious harm to an inmate.”

Because genuine issues of material fact remained in dispute regarding McNicholas’ subjective knowledge of Meyer’s risk of harm, summary judgment was denied and the case was bound over for trial.

Following a trial in August 2009, the jury returned a verdict in favor of Meyer and awarded him \$10,000 in compensatory damages and \$30,000 in punitive damages. On February 4, 2010, upon stipulation of the parties, the court awarded Meyer \$84,284.63 in attorney fees. He was represented by attorneys Al Gerhardstein and Jennifer Branch. See: *Meyer v. McNicholas*, U.S.D.C. (S.D. Ohio), Case No. 2:07-cv-01253-NMK. ■

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California: Failure to Maintain Relevant Data Renders CDCR Unable to Effectively Monitor and Manage its Operations

by Michael Brodheim

In September 2009, the California State Auditor, responding to a request from the Joint Legislative Audit Committee, submitted a report to assess the effect of California's rapidly increasing prison population on the state budget. The report found that in the past three years, while the adult prison population had decreased by roughly 1 percent, expenditures by the California Dept. of Corrections and Rehabilitation (CDCR) had increased by almost 32 percent, and at \$10 billion now represent about 10 percent of the state's total General Fund expenditures.

Despite its huge (and ever-increasing) drain on the state's coffers, the CDCR is unable to determine, because it fails to maintain and use a variety of basic information management tools, the influence of various factors – such as overcrowding, vacant employee positions, escalating overtime costs, an aging prisoner population and lengthier prison terms due to sentencing under the state's "three strikes" law – on the costs of its operations.

Some of the audit's highlights: In fiscal year (FY) 2007-08, the average annual cost of incarceration was \$49,300 per prisoner. Over 65 percent of that total was to cover housing, security and support costs; just over 26 percent covered health care, while barely 5 percent went to cover the costs of education, vocational and other rehabilitative programs.

The total annual costs varied significantly across institutions, from over \$58,000 at high security prisons and about \$42,000 at general population facilities for Level II and III prisoners, to around \$38,000 at camp institutions. Prisons with specialized medical and mental health units, such as the California Medical Facility and California State Prison at Sacramento, were the most expensive, with average annual costs totaling \$83,300 and \$80,200 per prisoner, respectively.

Female prisoners, representing less than 10 percent of the total CDCR population, had higher health care costs but lower housing, security and support costs than their male counterparts. The average total costs were \$51,405 for female prisoners versus \$49,171 for male prisoners.

Custody staff overtime costs increased significantly over the past five years, from \$152 million in FY 2003-04 to \$431 million

in FY 2007-08, an increase of \$275 million, or 184 percent. Some of this increase (about \$88 million) was attributable to a 26 percent raise in custody staff salaries – the maximum salary for a prison guard increased from \$58,600 as of June 2004 to more than \$73,700 as of July 2007, boosting the maximum overtime rate from \$41/hour to nearly \$52/hour.

However, even after accounting for salary increases, the cost of overtime for custody staff was still more than twice as much in FY 2007-08 as it was in FY

2003-04. Some of this increase was due to higher costs of filling vacant staff positions (totaling 1,200, or about 5 percent of the total number of approximately 25,000 authorized guard positions as of June 2009). The audit determined that due to the costs of benefits and training, hiring new guards to reduce overtime would actually increase the CDCR's total costs. ■

Source: *California State Auditor Report 2009-107.1*

Missouri DOC Targeted by State Auditors

On September 28, 2009, Missouri State Auditor, Susan Montee, released the results of an audit recently conducted by her office targeting the State's DOC. The audit focused primarily on the three years ending June 30, 2008 and was intended as a tool to evaluate (1) the DOC's internal controls over significant management and financial functions, (2) DOC's compliance with certain legal provisions and (3) the economy and efficiency of management practices and operations.

The major disagreement between DOC officials and Ms. Montee's office arose in regard to the proper dispensation of monies confiscated by the DOC from prisoners or parolees who escaped or absconded from supervision. In addition to these "escapee funds," as of June 30, 2008, the DOC held almost \$20,000 in unredeemed canteen coupons either lost or abandoned by prisoners. Although DOC officials have been confiscating these monies for years, it was not until fiscal year 2007 that any of the funds were spent, which auditors believe is a violation of DOC statutory authority.

The escapee and coupon funds combined totaled approximately \$1 million as of June 30, 2008. According to state auditors, this money is supposed to be used to meet the financial obligations of the escapees, such as court fines, child support or incarceration costs. Whatever funds remain after those duties are met are to be transmitted to the State Treasurer's Office, Unclaimed Property Section. In making this assertion, auditors relied on

Chapter 447, RSMo, which provides for the disposition of abandoned property.

DOC officials, however, argue that Chapter 447, RSMo, does not apply to the DOC, and, instead, rely upon institutional policy and the legislative authority provided by section 217.197, RSMo. Furthermore, DOC supports its position with applicable case law; See: *Heron v. Whiteside*, 782 S.W. 2d 414 (Mo. App. 1989) and *Charron v. Thompson*, 939 S.W. 2d 885 (Mo. 1996).

"Significant billing errors" were also discovered in regard to the \$40 million the state pays to counties and the City of St. Louis each year for the prosecution, housing, and transportation of prisoners. Auditors found 43 instances that occurred between March 2007 and May 2008 where the DOC paid multiple billings for the same prisoners and dates totaling more than \$44,000 in overpayments.

Another area of considerable concern proved to be in regard to extradition reimbursements. Of particular interest was the apparently outdated reimbursement procedure currently utilized that charges the state transport mileage for each individual prisoner. This practice is not cost effective in that different trips to the same destination produce a range of billing costs depending on the number of prisoners being transported, and each of the bills is well in excess of the actual cost of the trip.

In an attempt to assist DOC officials in developing ways to improve their efficiency, auditors provided constructive recommendations for consideration. Many

of the suggestions put forth highlight the need for improved policies, procedures and oversight, although there were various substantive changes recommended as well. Whether DOC officials choose to incorporate Ms. Montee's recommenda-

tions into whatever plan they develop to address the deficiencies remains to be seen. The only certainty is that improvement is necessary if the DOC is to operate in a cost effective and governable manner. Copies of Ms. Montee's report regarding

the DOC audit are available on PLN's website. See: Mo. State Auditor report # 2009-103, Sept. 2009. 📄

Additional source: *St. Louis Post-Dispatch*

Illinois Jail Agrees to Pay \$290,000 & Annuity Payments to Settle Excessive Force Suit

Tazewell County, Illinois has agreed to settle an excessive force suit for \$290,000 and annual annuity payments.

Charles Chandler was taken to the Tazewell County Jail on November 6, 2006, after being arrested for aggravated battery and criminal damage to property.

After being booked, Chandler was taken to a cell by guards. The cell, which was equipped with a video camera, captured some disturbing images, according to a lawsuit Chandler filed.

Chandler alleged in the suit that Sergeant Michael Harper and guards Joel Brown, Eric Rasmussen and Schad Martin viciously beat him while he was handcuffed, lying face-down on a concrete

pad in the cell. A total of ten video frames allegedly captured the beating, along with Chandler's clothes being removed as the beating took place.

After the beating stopped, Chandler was left naked, lying on the concrete slab in the cell. According to Chandler's complaint, "blood was gushing" from his "mouth and teeth that had been extracted" during the beating.

In all, Chandler fractured two ribs, 18 teeth, both of his lower jaws and suffered lacerations, contusions and muscle spasms, the complaint states. Despite the obviousness of Chandler's injuries, jail staff allegedly refused to provide Chandler with any medical care.

Chandler was taken to an emergency room by his father 22 hours after the at-

tack upon his release from jail. "Surgical plates with locking screws" were required to correct Chandler's jaw damage.

Chandler alleged that the defendants' actions constituted excessive force and deliberate indifference to his serious medical needs, both violations of the Eighth Amendment.

Tazewell County agreed to settle the case for \$290,000 upfront, followed by monthly annuity payments of \$1,000 for 15 years beginning in 2024, and annuity payments of \$4,194.27 per month thereafter until Chandler's death.

Chandler was represented by Richard Stegall of Nicoara & Stegall, a Peoria, Illinois firm. See: *Chandler v. Tazewell County*, U.S.D.C., Case No. 07-1296 (C.D. Ill. 2009) 📄



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Iraq: Unrest at Abu Ghraib as Camp Bucca Closes

by Matt Clarke

In September 2009 the U.S. military closed Camp Bucca in Iraq, once its largest detention facility, and the prison at Abu Ghraib experienced a two-day uprising. Camp Bucca cost the U.S. \$50 million to build and once held over 22,000 prisoners in separate camps. It was permanently closed on September 16, 2009, leaving only a brick factory, ice plant and water treatment facility to turn over to local residents for civilian use.

The closing of Camp Bucca was part of the demobilization of the U.S. military in Iraq. The U.S. once held about 90,000 Iraqi prisoners; it now holds around 2,900. All U.S. military prisons except one have been closed or turned over to Iraqi authorities, including the \$107 million Camp Taji. The last facility, Camp Cropper, is scheduled to be handed over on July 15, 2010.

One of the former U.S. detention facilities already turned over to the Iraqis is the prison at Abu Ghraib near Baghdad. Renamed the Baghdad Central Prison, it is still referred to locally and internationally as “Abu Ghraib” and remains infamous for the inhumane treatment of prisoners both before and after the U.S. took control of the facility. A total of eleven U.S. soldiers were convicted of abusing Iraqi prisoners at Abu Ghraib. [See: *PLN*, Aug. 2009, p.28; May 2006, p.14].

On September 10, 2009, an uprising began at the Abu Ghraib prison when three prisoners set a fire in their cell and attempted to overpower the guards. The disturbance, which may have been motivated by an escape attempt, widened into a large-scale two-day incident in which prison officials called in Iraqi soldiers and U.S. helicopters.

A delegation that included Iraqi lawmakers negotiated with the prisoners, who demanded amnesty and the replacement of prison employees whom they claimed were abusive. The delegation agreed to form a committee to study the prisoners’ demands, and most of the prisoners returned to their cells voluntarily. A few who refused to end the uprising were forced into their cells. Apparently one prisoner wrestled a rifle from a guard. Four were injured, according to Iraqi lawmaker Zeinab al-Kinani.

As is frequently the case in Iraq, firm

facts are hard to come by. Iraqi officials said three guards and three prisoners were injured with no fatalities. Shatha al-Abousi, a member of the human rights committee of Iraq’s parliament, claimed two prisoners were killed. Iraqi Deputy Justice Minister Busho Ibrahim strongly denied there were any deaths.

The reason for the uprising is equally uncertain. Shiite lawmakers said they were told the disturbance was in response to

inhumane treatment by guards, and called for an investigation. One local news report stated the incident was a Sunni-Shiite clash, while another said it was an organized protest by prisoners seeking access to cell phones. The truth – which is all too often concealed behind prison bars – may never be known. ■

Sources: *Associated Press*, www.npr.org, www.philly.com

Ion Spectrometry Scans Resume at BOP Facilities

The Federal Bureau of Prisons (BOP) has restarted its ion spectrometry program. In April 2008, the BOP suspended the use of all its ion spectrometry machines to screen prison visitors for drugs after lawsuits and complaints cast doubt on the reliability of the devices. [See: *PLN*, Feb. 2009, p.11].

Grandmothers, children and other family members were routinely turned away from visiting their loved ones when the ion spectrometry machines were in use. False-positives for the presence of illegal drugs were common, as hand-sanitizers and prescription medication set off the devices.

On March 24, 2009, the BOP reinstated the program following testing by the BOP’s Office of Security Technology. According to a memo from Joyce Conley,

Assistant Director for the Correctional Programs Division, ion spectrometry equipment may now be used at all BOP institutions, but only for testing prisoner mail, prisoner belongings, lockers, work areas and visitation rooms.

Ion spectrometry equipment is not authorized for testing prisoners or their visitors for drug residue. Despite the memo, some institutions have reportedly started using the machines on visitors. For example, visitors at FCI Sandstone have stated guards are conducting random ion scans, and posts on www.prisontalk.com indicate the machines are also being used on visitors at FCI Beckley and FCI Florence. ■

Source: www.fedcure.org

Methadone Vending Machines Installed in British Prisons

Fifty-seven methadone vending machines have been installed in British prisons in an effort to help opiate-addicted prisoners manage their drug addictions without resorting to illegal heroin supplies available behind bars.

The machines dispense individualized doses of methadone to registered prisoners after a fingerprint or iris scan. A total of about 70 machines are expected to be installed at a cost of approximately \$6.5 million, roughly 10% of the British prison system’s drug treatment budget.

“Methadone dispensers are a safe and secure method for providing a prescribed treatment,” said a prison spokesperson.

“They can only be accessed by the person who has been clinically assessed as needing methadone and that person is recognized by a biometric marker, such as their iris.”

Dominic Grieve, a member of the British Conservative party, was critical of the decision to install the prison vending machines. “We need to get prisoners off all drug addiction – not substitute one dependency for another,” he said. Grieve also argued that the methadone dispensers were an “admission of failure” by the prison system. ■

Sources: www.alternet.org; www.telegraph.co.uk



Survivor portraits by James Stenson



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Faith-Based Substance Abuse Program Contracts May Violate Florida's Constitution

by David M. Reutter

Contracts between the Florida Department of Corrections (FDOC) and faith-based substance abuse transitional housing programs may violate the "no-aid" provision of Florida's Constitution. Because the issue required further factual development to make that determination, Florida's First District Court of Appeal reversed the trial court's final judgment on the pleadings in favor of the FDOC.

The lawsuit was filed in Leon County Circuit Court by the New York-based Council for Secular Humanism (CSH) and Richard and Elaine Hull, who are Florida residents and members of CSH. The suit alleged that FDOC's use of state funds pursuant to §§ 944.473 and 944.4731, Florida Statutes, violated the "no-aid" provision of Article I, Section 3 of Florida's Constitution.

CSH specifically targeted contracts between the FDOC and Prisoners of Christ, Inc. and Lamb of God Ministries, alleging "that payments to these organizations constituted payments to churches, sects, religious sects, religious denominations or sectarian institutions." The contracts obligate the organizations to provide "faith-based substance abuse post-release transitional housing program services" for \$20 per former prisoner per day.

The FDOC entered into the contracts pursuant to statutes that require it to "consider qualified faith-based service groups on an equal basis with other private organizations." In a previous ruling, the First District had held the "no-aid" provision of Article I, Section 3 mandated that "[n]o revenue of the state ... shall ever be taken from the public treasury directly or indirectly in aid ... of any sectarian institution."

The Court of Appeal said the trial court was "erroneously persuaded" that the previous precedent was limited to a "schools only" context. In the prior case, the court had explained in dicta that "nothing in the Florida no-aid provision would create a constitutional bar to state aid to a non-profit institution that was not in itself sectarian, even if the institution is affiliated with a religious order or religious organization."

The inquiry, therefore, must focus on whether the programs funded under the

statutes and provided by the organizations "are predominantly religious in nature and whether the programs promote the religious mission of the organizations receiving the funds," the appellate court held.

CSH argued that Prisoners of Christ and Lamb of God Ministries were sectarian, and their programs were carried out in a fundamentally sectarian manner. The Court of Appeal held it must accept those

allegations as true at this early stage of the proceedings. On remand, the trial court was instructed to offer both parties the opportunity to develop a factual record. See: *Council for Secular Humanism, Inc. v. McNeil*, ___ So.3d ___ (Fla. 1st DCA 2009); 2009 WL 4782384. The appellate court issued a revised opinion on April 27, 2010, denying en banc review and certifying a question under FRAP 9.330. See: 2010 WL 1658788. ■

Missouri Jail Prisoner Awarded \$5,000 in Failure to Protect Case

On September 3, 2009, a federal jury returned a \$5,000 verdict in favor of a prisoner who alleged that staff failed to protect him from attack.

While incarcerated at the St. Louis City Justice Center, Harold Dykes was attacked by another prisoner. Before the attack, Dykes told Joetta Mitchell, a guard at the jail, that he feared for his life because of threats by the other prisoner. Mitchell did not respond to Dykes' complaints, though. Instead, she criticized Dykes for reporting them. The other prisoner made good on his threats, striking Dykes with a sock filled with batteries.

After a trial, the jury returned a verdict in favor of Dykes and awarded \$5,000. Dykes' attorneys moved for attorney's fees and costs. Specifically, the attorneys sought \$7,500 in fees, precisely 150% of the judgment, the maximum

per the fee caps imposed by the Prison Litigation Reform Act. The district court granted the motion.

Next, the court was charged with deciding how much of Dykes' \$5,000 recovery should be applied to offset the award of attorney's fees. Weighing four different factors, the court concluded that only five percent (\$250) should be applied to the attorney's fees.

In so deciding, the court held that Mitchell's culpability was high, and the need for deterrence mitigated in favor of reducing Dykes' share of the attorney's fees to only five percent.

Accordingly, the court ordered Mitchell to pay Dykes \$5,000, and Dykes' attorneys \$7,500 in attorney's fees. Dykes was represented by T. Christopher Bailey of Greensfelder and Henker. See: *Dykes v. Mitchell*, 2009 U.S. Dist. LEXIS 92450 ■

Tennessee Jail Agrees to Pay \$5,000 for Withholding Prisoner's Leg

The Davidson County Sheriff's Department has agreed to settle a lawsuit brought by a prisoner under the Americans with Disabilities Act (ADA).

Jerry Ray Brock was extradited from Columbus, Georgia to Tennessee to begin service of a Tennessee conviction. During intake at the Davidson County Jail, jail officials took Brock's prosthetic leg from him and placed it in storage. On the day Brock was scheduled to be transferred to state prison to begin serving his sentence,

jail officials refused to let Brock take his prosthetic leg with him. Brock suffered pain and medical complications from sores and blisters from being forced to walk with crutches because he did not have his leg.

Brock sued Davidson County. After a local newspaper, the *Tennessean*, ran a story about his lawsuit, Davidson County agreed to settle the case for \$5,000. Brock's attorney, David Raybin, said Brock "promised he would use the money in an appropriate fashion to live a good life

and learn from this." Raybin represented Brock without charge. "I figured that was

the reasonable thing to do," Raybin said. See: *Brock v. Davidson County Sheriff*

Department Officer, Case No. C-2713 (Circuit Court of Davidson County). ■

State of Washington Settles Suit for \$400,000 After Released Sex Offender Goes on Crime Spree

by Michael Brodheim

In June 2008, the State of Washington entered into a stipulated judgment to settle claims for damages, filed in both state and federal courts, by Diana McKissen, who was raped, tortured, and severely beaten at gunpoint in 2004, when Community Corrections Officer Chris Leyendecker allegedly failed in his responsibilities to properly and adequately supervise Richard Wilson, a high-risk sex offender released from the Washington State Penitentiary in March 2004. In settling the lawsuits, which had been filed one year earlier, the State of Washington paid Ms. McKissen \$400,000 (including attorney's fees and costs), but did not make any admissions of liability.

By the time of his release in March 2004, Wilson had convictions for delivery of narcotics, robbery and rape to his

name, and had apparently spent much of his adult life either in prison or on supervised release. The Department of Corrections considered him to be a high risk for reoffense, designated him as Risk Management-A, and determined that he needed to be monitored through home and office visits, urinalysis tests, polygraphs and reports from his sex offender therapist.

According to the complaint filed in federal court, however, shortly after Wilson's release from prison, Officer Leyendecker abdicated his responsibilities to monitor Wilson and lost track of him. That abdication proved costly, both to Wilson and the public. Wilson absconded, first to Goldendale, Washington, where he burglarized one home twice, and then to Biggs Junction, Oregon, where he raped, tortured and

severely beat Ms. McKissen at gunpoint for several hours.

Wilson's rampage continued, unfortunately, as he fled first to Idaho, where he murdered a young woman in her home there, and then to Utah where, in separate robberies, he shot and injured two more women. In the end, after leading police on a high-speed car chase, Wilson put a gun to his head and killed himself.

Ms. McKissen was represented by attorneys Douglas C. McDermott and Eric S. Newman of the Seattle firm of McDermott Newman, PLLC.

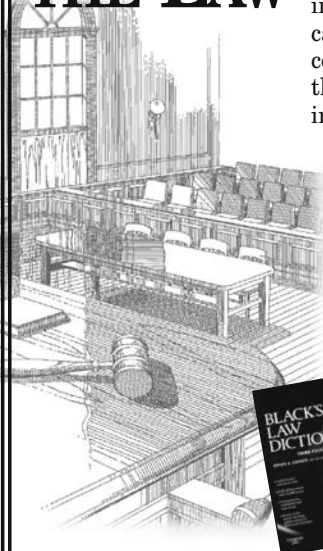
Sources: Release and Settlement Agreement in *McKissen v. Leyendecker*, CV-07-141-EFS, U.S. District Court, Eastern District of Washington, and *McKissen v. State of Washington*, No. 07-2-00912-1, Thurston County Superior Court. ■

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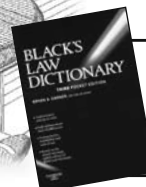
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Political Uproar Follows NC Court Ruling that Life Sentence is 80 Years

by David M. Reutter

A political brouhaha arose in October 2009 in the wake of a North Carolina appellate court decision which held that a “life sentence is as an 80-year sentence for all purposes.” While the ruling applies only to defendants convicted of crimes between 1974 and 1978, Governor Beverly Perdue assailed the decision and vowed not to release any prisoners who would benefit from the judicial opinion.

The uproar began after the North Carolina Supreme Court declined to review a ruling by the Court of Appeals in a case brought by state prisoner Bobby E. Bowden, who was convicted of two counts of first-degree murder in 1975.

Bowden’s original death sentence had been vacated and concurrent life sentences were imposed. Since becoming eligible for parole in 1987, he had received annual parole reviews. Recognizing that N.C. Gen. Stat. § 14-2 (1974) applied to him, Bowden filed a Petition for Issuance of a Writ of Habeas Corpus ad subjiciendum in December 2005.

Just six weeks after the filing, the trial court rejected Bowden’s argument that under state law a life sentence is to be considered 80 years, and that with the application of sentence reduction credits he was entitled to immediate release. He appealed.

In reversing the lower court, the Court of Appeals found the statute was not ambiguous and did not need to be read in conjunction with N.C. Gen. Stat. § 148-58 (1974), which requires all life-sentenced prisoners to be eligible for parole consideration after serving 20 years. The appellate court held the plain language of § 14-2 states “that life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State’s prison without any limitation or restriction.” See: *North Carolina v. Bowden*, 193 N.C.App. 597, 668 S.E.2d 107 (N.C. App. 2008), *review denied*.

“Bowden’s motion got people perked up,” said state appellate defender Staples Hughes, who represented him in the Court of Appeals. “It spread from there.” The North Carolina Supreme Court denied the state’s request for discretionary review on October 9, 2009, which sparked

a wildfire of political rhetoric.

“Like most of my fellow North Carolinians, I believe life should mean life, and even if a life sentence is defined as 80 years, getting out after only 35 is simply unacceptable,” said Governor Perdue, who ordered prison officials to continue to hold prisoners who became eligible for release due to the Bowden decision. Up to 60 life-sentenced prisoners were affected by the ruling, and the Department of Correction was preparing to release them as early as October 29, 2009 until the governor intervened.

Defense attorneys said Perdue was overreaching. “This is a pure and simple attack on the rule of law,” stated attorney Joseph B. Cheshire V. “We are not a society that allows our government to retroactively undo agreements it has with its citizens.” Hughes agreed, saying, “It’s simply exploiting fear, pain, tragedy that grew out of these crimes, and it’s despicable.”

When it was revising sentencing laws in 1981, the North Carolina legislature barred the most violent offenders sentenced after that year from earning sentence reduction credits. The legislature, however, gave the secretary of the Department of Correction (DOC) authority to award credits to prisoners sentenced before 1981.

A 1983 DOC policy allowed prisoners to earn one day off their sentence for each day without an incident, plus credits for participating in work release and taking classes. “The statute is very clear,” said Cheshire. “Every lawyer, defense and prosecutor, as well as judges, knew these were the rules.”

Still, Governor Perdue continued to insist that legislators did not intend to give such authority to prison officials. “I do not believe they did, and my legal counsel agrees,” she stated. “This raises the very real question that these inmates should not be eligible for early release.”

The corporate media ran with the story, calling the prisoners subject to release under the appellate ruling “the worst of the worst – convicted murderers and rapists.” It was noted that twenty of the prisoners who would be eligible for

release had amassed a collective total of 256 disciplinary infractions while incarcerated.

Meanwhile, the Bowden case was remanded for a hearing to determine what sentence reduction credits he was entitled to receive. “This entire controversy was caused by the Governor’s own department misunderstanding an appellate court decision, miscalculating sentence credits, and misinforming victims and the public. Now, she claims credit for protecting us from her own error. This is really appalling and inexplicable,” remarked Republican state Rep. Paul “Skip” Stam.

An association of trial lawyers condemned the political rhetoric over what was a clear legal decision that must be followed by state officials. “We respectfully call on our state leaders to respect the North Carolina and United States Constitution by following the jury instruction that our judges give to our jurors every day: apply the law as it is, not as you would like it to be,” stated a resolution by the Board of Governors for the North Carolina Advocates for Justice.

There may be a second round of political hand-wringing over the issue of life sentences being construed as 80-year sentences. On February 16, 2010, the North Carolina Supreme Court heard arguments in an appeal brought by life-sentenced prisoners Faye Brown and Alford Jones, whose habeas petitions were granted by the superior court in December 2009.

Both Brown and Jones had successfully argued in the lower court that because their life sentences were considered 80-year sentences, and with sentence reduction credits, they should be released from prison. Their attorney, Jane Allen, noted the law was clear. “We are a nation of laws, not arbitrariness, tyranny or whims,” she said. “No one – not the [Department of Correction], not the Attorney General – can simply choose to treat the law as if it’s nothing more than a series of items on the buffet line at the local Golden Corral [restaurant].”

The Attorney General’s office contended that the state had never intended to provide sentence reduction credits for life-sentenced prisoners. Although such

prisoners had been receiving credits, the state argued they were only for security-level and parole eligibility purposes. "It's curious that after all these years, suddenly in the wake of all the publicity about this, they decide the credit was improperly given," said state appellate defender Staples Hughes.

Meanwhile at least four lifers, including Jones, have been approved for parole – which is separate from the sentence credit and *Bowden* ruling controversy. Four other North Carolina prisoners with life sentences, including Brown, are allowed to leave the prison for employment or religious services, which belies the argument that they are the "worst of the worst" and shouldn't be released.

PLN will report the North Carolina Supreme Court's decision in the Brown and Jones cases. See: *Brown v. NC DOC*, Supreme Court of North Carolina, Case No. 517PA09 and *Jones v. Keller*, Supreme Court of North Carolina, Case No. 518PA09. ■

Additional sources: *MCT News Service*, *News Observer*, *Associated Press*, www.wral.com, www.fayobserver.com, www.wncn.com

King County, WA Pays \$125,000 for Assault on Juvenile Prisoner

Washington state's King County has paid \$125,000 to settle a claim that accused a guard of physically abusing a juvenile offender. The claim involved events that occurred on November 29, 2008 at the King County Jail.

The juvenile, Malika J. Calhoun, 15, said she was attacked in a holding cell by jail guard Paul Scheve. She sustained a bruised hip, sore neck and headaches that recur with anxiety and panic attacks.

King County elected to settle Calhoun's claim for injuries resulting from the assault on June 8, 2009. In return for settling and holding the county harmless, Calhoun received a cash settlement that will pay her dividends until 2018.

An immediate \$44,000 lump sum payment was made. For two years beginning in 2011, she will receive a \$3,500 annual payment. A payment of \$7,000 per year

follows for the next two years; additionally, there are three lump-sum payments of \$7,500 in 2011, \$10,000 in 2014 and \$69,413.31 in 2018.

Calhoun was represented by Katrina E. Frank of the MacDonald, Hoague and Bayless law firm in Seattle. See: *Calhoun v. King County*, Office of Risk Management for King County (WA), Claim No. 45270. ■

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DOJ Releases Report on Staff Sexual Abuse of Federal Prisoners

by Justin Miller

A report by the Office of the Inspector General (OIG) of the U.S. Department of Justice concerning sexual abuse of federal prisoners by prison staff found that such claims were widespread and had more than doubled during the eight-year span reviewed by the report. The OIG called the Bureau of Prison's efforts to address sexual abuse and misconduct "mixed," found the U.S. Marshals Service's prevention policies insufficient, and listed 21 recommendations to deter further abuse.

The OIG report found that sexual abuse allegations had occurred at all but one of the Bureau of Prisons' 93 facilities, including 15 of 16 occupational categories. The majority of the incidents involved criminal sexual abuse rather than administrative sexual misconduct. Further, many of the claims were also related to allegations of other serious crimes; nearly 40% of the employees who were prosecuted were convicted of additional charges, which implicated safety and security concerns at federal prisons.

A total of 1,585 allegations of staff sexual abuse and misconduct were reported during the eight-year period under review, from FY 2001 through FY 2008. The number of sexual abuse allegations rose 104 percent during that time period, from 76 in the first year to 155 in the last, while the number of sexual misconduct allegations increased by 130 percent over the same period, from 33 to 76. The rise in allegations outpaced the growth in both prison population and staff. While the Bureau of Prisons (BOP) contended that the increase was due to improved efforts to encourage reporting of sexual abuse, the OIG did not agree, finding that the increase in reported abuse and misconduct was more likely related to insufficient policies, programs, training and oversight.

The OIG noted that any sexual conduct or relationships between employees and prisoners was a crime, citing the imbalance of power that exists between the two groups. The report acknowledged that prisoners who are victimized by staff sexual abuse "may suffer physical pain, fear, humiliation, degradation, and desperation." The OIG further found that female prisoners were often at greater risk, having frequently experienced sexual abuse in their past. Among the recommendations

included in the report was a suggestion that all victims receive both medical and psychological assessments.

In addition to the impact of staff sexual abuse and misconduct on prisoners, the safety and security issues were of great concern to the OIG. The report noted that staff who engaged in sexual relations with prisoners were more likely to "neglect professional duties" and to "subvert their prison's security procedures" in the process. They were also more likely to be susceptible to prisoners' extortion demands in terms of smuggling contraband, accepting bribes, lying to investigators and committing other offenses.

Several disturbing incidents were highlighted in the report. In one, a male BOP guard agreed to pay \$5,000 to a female prisoner with whom he had been engaging in sexual acts to arrange the murder of his wife. In another incident, a Unit Manager had manipulated the BOP's database in order to remove information about a prisoner's gang affiliation and to enter a transfer request, which otherwise would not have been granted, that allowed the prisoner to move from a high-security prison to a low-security facility. Other examples included guards leaving their assigned posts in order to engage in sexual relations with prisoners.

In one particularly egregious incident, a group of guards at a BOP institution in Florida had been supplying prisoners with contraband in return for sexual favors. They were also allowing prisoners to leave their cells without authorization and providing other BOP employees with keys to staff offices where they would have sex with prisoners. Six people were indicted in 2006; however, when federal agents arrived at the facility to arrest them, one of the guards opened fire – using a firearm he had smuggled into the prison – killing OIG Special Agent William Sentner and wounding a BOP lieutenant. [See: *PLN*, Oct. 2006, p.12; Aug. 2007, p.38]. Sentner was posthumously awarded a Medal of Valor by former President Bush in October 2008.

The OIG report noted a number of differences based on the gender of staff members accused of sexual abuse. For example, male employees were much more likely than female staff members to be the subject of allegations involving

prisoners of the same gender. However, female employees were the subject of sexual misconduct allegations at a higher rate than their representation in the workforce. Further, female staff were often treated more leniently than their male counterparts.

Statistics cited by the report indicated that, while the most frequent sex abuse allegations against male staff members involved female prisoners (35%), the proportion of allegations involving prisoners of the same gender was considerably higher (32%) than it was for female staff (5%). While women accounted for only 26.5% of the BOP's total workforce, they were the subject of between 30% and 39% of the allegations reported annually, according to the report. Nearly 6% of all female employees were the subject of allegations of sexual misconduct, compared to 4% of all male staff members. Addressing the disproportionately high number of allegations involving female staff was among the recommendations made by the OIG.

However, while female employees were involved in such a high percentage of the incidents alleged during the time under review, the report also found they were less likely to be prosecuted, less likely to receive prison time (19% compared to 50% for male staff), and that when sentenced they received less time than their male counterparts (a median time of 6 months vs. 12, and a maximum sentence of 21 months vs. 120).

When questioned, Assistant U.S. Attorneys, BOP staff and OIG Special Agents stated that judges and juries often ignored the statutory provision that consent is not a defense in staff sexual misconduct cases, and that the U.S. Attorney's Office often declined to prosecute such cases out of concern they would not be able to demonstrate criminal intent. The report noted there was a "common perception" that female staff members were not capable of abusing male prisoners, and that they were manipulated into engaging in sexual misconduct.

In one case, a judge rejected a recommended sentence and sentenced a female employee to probation only, referring to her as an "incredibly vulnerable victim." However, one Assistant U.S. Attorney from the Middle District of Florida

likened staff-on-prisoner sexual abuse to statutory rape, stating, "The law has nothing to do with consent" in such cases.

The OIG was particularly critical of the U.S. Marshals Service when it came to dealing with staff sexual abuse issues. The report noted that despite a provision in the Prison Rape Elimination Act of 2003 requiring that all correctional and law enforcement authorities – including the U.S. Marshals – adopt a zero-tolerance position concerning sexual abuse, no protocols had yet been established. In its response to the report's recommendations, the Marshals contended that their current policies were sufficient. The OIG disagreed, stating that specific policies related to prevention, detection and investigation of staff sexual abuse must be implemented.

Among the other recommendations in the report was seeking alternatives to automatically segregating and transferring prisoners who were sexually victimized by staff, which the OIG believed discouraged reporting as such actions were viewed as punitive. Additional recommendations included updated staff training to reflect changes in the law and to focus on gender-specific issues, and increased oversight of prevention, detection and investigation programs and policies, plus periodic reviews. The OIG also recommended increasing the time provided for training on staff sexual abuse issues and the amount of time that Special Investigator Supervisors spend in their positions, to ensure they develop the proper amount of experience and skills to conduct investigations.

While the BOP, U.S. Marshals and

U.S. Attorneys Office agreed with nearly all of the OIG's proposed recommendations, the BOP did not agree that setting a national goal for reducing staff sexual abuse was appropriate, stating it would give the impression that a lesser number of such cases was acceptable. Or, perhaps, federal prison officials simply don't want to draw attention to the embarrassing fact that staff-on-prisoner sexual mis-

conduct not only persists but has been increasing.

PLN has extensively reported on the topic of sexual abuse by guards and other prison staff. [See, e.g., PLN, March 2010, p.22; May 2009, p.1; Aug. 2006, p.1].

Source: U.S. Department of Justice, Office of the Inspector General, Report No. I-2009-004 (Sept. 2009).

\$900,000 Settlement in Washington State Suit Over Parolee Murdering Woman

On December 10, 2008, Washington State agreed to a \$900,000 settlement in a suit alleging negligent supervision of a violent parolee who murdered a woman.

Laurence Owens, a level 3 sex offender and violent felon, was under the supervision of the Washington State Department of Corrections (DOC). Owens had a long and violent history of criminal offenses, especially violent offenses toward women. He was known to carry weapons and DOC documents stated that his "violence is ongoing and seems to be growing, it's only a period of time before he explodes." The DOC classified him at the highest risk level for commission of additional violent crimes. Nonetheless, the DOC's parole specialist never visited Owens in his domicile or asked him about women who might be at risk of future attacks.

Owens shot and killed Dori Cordova, a young mother of minor child Troy Phillips. Margaret Balderama witnessed the murder. Seattle police shot and killed Owens.

Diana Lynn is Cordova's aunt and the representative of Cordova's estate and guardian ad litem for Phillips. She and Balderama filed suit in state court against the state and the DOC alleging gross negligence in the supervision of Owens, negligence in the implementation and enforcement of Owens's parole plan and a failure to warn Cordova about Owens caused the death of Cordova and assault of Balderama, who was allegedly assaulted by the shooting.

Washington settled the claims for the estate and Phillips for \$900,000, all of which is to be paid to Phillips. The payments included a lump sum of \$374,000 and future lump sums and annual payments totaling \$900,000, the last of which is in 2024.

Apparently this does not settle Balderama's assault claim. Plaintiffs were represented by Tacoma attorney Thaddeus P. Martin. See: *Lynn v. State*, King County Superior Court, Case No. 06-2-28516-6SEA.

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Fifth Circuit Orders Discovery in Katrina Prisoner Evacuation Case

by Matt Clarke

On July 1, 2009, the Fifth Circuit Court of Appeals vacated a lower court's denial of summary judgment in a case involving the evacuation of prisoners from the Orleans Parish Prison (OPP) in New Orleans in the wake of Hurricane Katrina. The case was remanded with instructions to reconsider whether the defendant was entitled to qualified immunity after allowing limited discovery on that issue.

Ronnie L. Morgan, Jr. was a federal prisoner in protective custody (PC) at OPP when Hurricane Katrina made landfall on August 29, 2005. [See: *PLN*, April 2007, p.1]. Because OPP could no longer supply food, water, electricity, toilets or medical care, Morgan was evacuated to the Elayn Hunt Correctional Center (EHCC) and held in a large field along with thousands of other prisoners. Upon their arrival at EHCC, Morgan and other federal PC prisoners informed a guard about their PC custody status. The guard told them not to mention their status to anyone. They pointed out that their clothing was clearly marked "Federal," but were ordered onto the field anyway.

Other prisoners congregated at the gate to the field, awaiting the PC prisoners and shouting to one another about their imminent arrival. Within minutes, a PC prisoner was stabbed and beaten; when he approached the guards for help they fired on him, possibly with a bean bag gun. Other PC prisoners also were attacked. Morgan was beaten and stabbed in the head and neck about a half-hour after arriving. When he sought help from the guards, they laughed at him and forced him to spend the night walking around the yard in his blood-soaked "Federal"-marked uniform, afraid to sleep because the prisoners who attacked him were still on the field. Despite repeated requests, Morgan received no medical care or protection while at EHCC. The next day he was transferred to another facility.

Morgan filed a civil rights action in U.S. District Court pursuant to 42 U.S.C. § 1983, alleging that EHCC warden Cornel Hubert should have known about the PC prisoners yet failed to implement or follow policies to ensure their safety and failed to provide food, shelter and medical attention to prisoners in his charge. Hubert filed a motion to dismiss based

on qualified immunity, which the district court denied. He then appealed.

The Fifth Circuit held that pursuant to *Pearson v. Callahan*, 129 S.Ct. 808 (2009) [*PLN*, Sept. 2009, p.42], it could skip the issue of whether Morgan had sufficiently alleged the violation of a constitutional right and proceed with determining whether the right was clearly established. In doing so, the Court applied the heightened pleading standard of *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), requiring the pleading of the particular facts of the allegations unless they are only known to the defendants. The Fifth Circuit noted that the reasonableness of Hubert's actions would depend largely on the amount of notice he

had of the impending arrival of the OPP evacuees. "Several days of notice versus hours or even minutes of notice greatly changes the reasonableness calculus," the appellate court wrote. However, such information was not available to Morgan because discovery had not been allowed by the district court.

Since *Schultea* provides for the use of limited discovery to determine whether a government official is entitled to qualified immunity, the Fifth Circuit vacated the district court's order and remanded the case with instructions to allow discovery for the purpose of deciding whether Hubert was entitled to qualified immunity. See: *Morgan v. Hubert*, 335 Fed.Appx. 466 (5th Cir. 2009) (unpublished). ■

Colorado Guards Rarely Jailed for Sexual Abuse of Prisoners

by Matt Clarke

Although not uncommon, any kind of sexual contact between a guard and a prisoner is considered coercive sexual abuse under Colorado state law. This reflects the reality that prisoners cannot have truly consensual sex with a person who has total control and authority over them. Between 2005 and 2007, Colorado Department of Corrections (DOC) investigators confirmed there were 62 complaints of sexual misconduct involving DOC employees and private contractors. Few spent much if any time behind bars.

In June 2009, U.S. District Court Judge David Ebel criticized prosecutors for allowing former DOC Sgt. Leshawn Terrell to plead guilty to a lesser charge and receive only 60 days in jail in a case involving unlawful sexual conduct and the forcible rape of a female prisoner. The prisoner sued the DOC and Terrell, and received a \$250,000 settlement from the former and a \$1.3 million award against the latter. [See: *PLN*, Nov. 2009, p.12; May 2009, p.1].

In 2006, Rusty Rollinson, a guard at the Brush Correctional Facility, was allowed to plead guilty to felony menacing; he received a two-year probated sentence in a case that involved sexual misconduct and the forcible rape of multiple female

prisoners. The previous year, former Kit Carson Correctional Center Sgt. Teresa Carter, a Corrections Corp. of America (CCA) employee, received a two-year deferred sentence after a prisoner said he had sex with her four times – and produced nude pictures to back it up.

Why are criminal cases against prison guards not taken to trial but plea bargained for lesser charges and light sentences? A lack of credibility, prosecutors claim.

"So immediately, in front of the jury, I have a credibility problem," said Assistant District Attorney Jim Bartkus of the 13th Judicial District, who reviews sexual assault complaints forwarded by the DOC's inspector general for the three prisons in his district. "I have to calculate the impact of having a convicted felon as my primary witness. The defense is going to make sure that any given jury is going to be regaled with my star witness' criminal convictions, and it has an almost automatic impact on their credibility."

Yet prosecutors often use witnesses who have criminal records when prosecuting defendants who aren't guards, and apparently have little trouble securing convictions in such cases. Further, civil suits by sexually abused prisoners are often successful. Those cases also depend

on the jury's assessment of the prisoner's credibility. Thus, it seems more likely that prosecutors simply aren't interested in vigorously defending prisoners' right to be free from sexual assaults by prison staff.

Bartkus also claimed that loss of employment may be a sufficient deterrent for guards who are inclined to sexually abuse prisoners. "I think it probably has a more significant deterrent effect to other DOC employees because of the loss of jobs and

loss of career," he said. Yet would a prosecutor accept the same argument – loss of employment – as a sufficient deterrent for rape and sexual abuse outside of prison? If not, that creates an unjustifiable double standard.

What may be a real deterrent is civil lawsuits. DOC spokeswoman Katherine Sanguinetti said the DOC was pleased with the large amount of damages awarded by Judge Ebel. However, this leaves the

prisoner who was sexually abused as the person who is responsible for enforcement of the laws. Would anyone accept that as a just result outside of the prison context?

It appears that the real problem is the attitude, and priorities, of prison officials and prosecutors – not the credibility of prisoner witnesses who are raped or sexually abused by prison staff. ■

Source: *Denver Post*

Mississippi Earned Time Policy Violates Ex Post Facto Clause

Mississippi's Court of Appeals has remanded for an evidentiary hearing a claim that a law prohibiting prisoners who are convicted of sale or transfer of a controlled substance from eligibility for earned-time allowance is an ex post facto law as applied to the petitioner.

The petitioner, Mississippi prisoner Van Gray, pled guilty to the crime of sale and transfer of cocaine, receiving a 15-year sentence for selling less than 0.1 gram to an undercover officer on October 24, 2001.

Prior to Gray's conviction and sentence, Mississippi Code Annotated section 47-5-138.1 was amended, effective April 28, 2004, to enact the above stated prohibition. After exhausting administrative remedies, Gray filed a petition in the Circuit Court of Lamar County to clarify his sentence. He claimed the amended statute denied him the opportunity to be placed in trusty status and earn gain time.

The Circuit Court held that the authority to earn gain time is discretionary, and that the authority to grant earned gain time is not a form of sentencing or punishment, but is the legislature's method to encourage good behavior and help ease overcrowding. As Gray's sentence was within statutory

limits, the legislature's action of taking away gain time did not increase the punishment for Gray's crime.

The Court of Appeals, in its opinion, provided an exhaustive history of ex post facto law for both federal and Mississippi courts. In sum, Gray must demonstrate the application of section 47-5-138.1 to him has "retroactive application [that] will result in a longer period of incarceration than under the earlier rule" that allowed people convicted of his crime to be a trusty and earn gain time.

The Court held that determination cannot be made absent an evidentiary hearing. It recommended the circuit court appoint Gray counsel and allow discovery "as to the policies and procedures of the Department of Corrections as they pertain to the trusty program."

The specific information pertinent to Gray's claim would be: "(1) how

the trusty program works; (2) what are the requirements for obtaining trusty status; (3) how many prisoners similarly situated to Gray are granted trusty status, i.e. is it, in actual practice, automatic as Gray claims, or what factors contribute to the decision; (4) when in trusty status, what are the requirements for trusty-earned time."

Accordingly, the Circuit Court's judgment was reversed and the matter remanded for further proceedings. The defendants' petition for certiorari to the Mississippi Supreme Court was denied on July 23, 2009. See: *Gray v. Mississippi*, 13 So.3d 283 (Miss. App. 2008), *cert denied*. ■

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Are Debtors' Prisons Making a Comeback in Indiana?

by Justin Miller

Concerns are growing that small claims courts in Indiana may be taking actions that amount to the return of debtors' prisons, sparking national debate on the issue. This has occurred despite objections from the state's Court of Appeals as well as a state constitutional ban on imprisonment for debt.

Several small claims courts in the southern part of Indiana have been jail-ing, or threatening to jail, debtors who fall behind on court-ordered payments. In a recent case in Perry County, Circuit Court Judge M. Lucy Goffinet ruled in a civil case that a defendant must pay \$25 per month or he would sit "at the Sheriff's Department."

The Indiana Court of Appeals reversed, holding that the "trial court improperly threatened [the defendant] with imprisonment for his failure to propose a plan to pay the judgment." See: *Button v. James*, 909 N.E.2d 1007 (Ind. App. 2009).

In the words of Alan W. White, professor of consumer law at Valparaiso University, such actions by a small claims court are "absolutely not a routine practice anywhere else in the country." The issue gained national attention, being featured in a report on CBSMoneywatch.

Judges from Vanderburgh Superior Court, another Indiana small claims court known for ordering imprisonment, have stated they will ask the Indiana Judicial Center to examine how courts are dealing with such cases. They defend the practice, however, arguing that it is within the court's authority.

Not so, said Katherine Rybak, an attorney with Indiana Legal Services, who contends that incarcerating people for failing to pay a debt is unconstitutional. "No imprisonment for debt means no imprisonment for debt even when the debtor has the ability to pay," she observed.

The distinction, the judges argued, is that debtors are not being sentenced for failure to pay, but for failing to obey an earlier court order to pay. "It may appear to you to be a fine line, but it makes a difference," said Superior Court Magistrate Richard D'Amour. Judge Robert Tornatta, also of the Vanderburgh Superior Court, noted that in such situations, "If you listen to Ms. Rybak, there's nothing you can do. I just don't believe that."

In Indiana, many small claims cases are never heard by a judge. Instead, they are worked out as part of an oral agreement between the debtor and the creditor – or the creditor's attorney – before a court clerk, who enters the agreement as an enforceable court order. Often, agreements are made even when the debtor has no income or subsists on social security, veterans' benefits or other exempt forms of income. If the debtor fails to make a payment, the creditor can file an "infor-

mation for contempt" petition asking that the debtor be found in contempt of the court order. A subpoena is then followed by an arrest warrant for debtors who fail to appear.

PLN recently reported a similar situation in Washington state, where defendants are relegated to what amounts to debtor's prison due to non-payment of court costs. [See: *PLN*, April 2010, p.8]. ■

Source: www.courierpress.com

Closed Door Justice: Court Seeks Disbarment of Attorney in Secret

by Brandon Sample

The story of Herbert Moncier, a prominent attorney in Knoxville, Tennessee, seems foreign, as if it were from another time and place. In fact, it is almost Gestapo-like.

Moncier's problems began on November 17, 2006 during a sentencing hearing for one of his clients before U.S. District Court Judge J. Ronnie Greer. When Judge Greer attempted to question Moncier's client about a potential conflict of interest, Moncier kept interrupting. He also said the government had engaged in "scurrilous" behavior and accused Judge Greer and the magistrate of bias.

The judge told Moncier to be quiet, even threatening him with jail if he said "one more word." But Moncier persisted and Judge Greer made good on his threat, ordering that Moncier be taken into custody. Moncier spent one hour in jail and was subsequently charged with criminal contempt.

Following a trial on April 24, 2007 before Judge Greer, in which Moncier testified in his own defense, Moncier was found guilty and sentenced to one year probation and a \$5,000 fine. He appealed the conviction.

Some 14 months after the November 2006 courtroom incident, out of the blue, the Chief Judge of the Eastern District of Tennessee, Curtis L. Collier, entered a show cause order notifying Moncier that he was initiating disciplinary proceedings against him due to his conduct before Judge Greer. Moncier was directed to respond to the show cause order and to

notify other judges in his pending cases that disciplinary proceedings had been instituted against him.

All of this was normal for an attorney discipline case, with one important exception. In issuing the show cause order, Judge Collier, pursuant to Local Rules, directed that the entire disciplinary proceeding be kept secret. The show cause order and all other documents in the matter were filed under seal.

Were it not for a slip-up by the U.S. Court of Appeals for the Sixth Circuit, no one would have learned what was happening. However, when the Sixth Circuit entered a one-sentence order refusing to stay Moncier's criminal contempt conviction, a local Knoxville paper, the *News Sentinel*, took notice.

On March 6, 2008, *News Sentinel* staff contacted U.S. Magistrate Judge Susan K. Lee's chambers after seeing her name on the Sixth Circuit order. The magistrate's clerk refused to provide any substantive details about what was going on; hours later, though, Magistrate Lee unsealed all of the documents in the case. No explanation was given for the decision to unseal the records.

Randy Reagan, former president of the Tennessee Association of Criminal Defense Lawyers, called the entire effort to discipline Moncier in secret "highly unusual" and "just bizarre."

During a hearing before the magistrate, Moncier said he had never intended to be disrespectful to Judge Greer and that he was just trying to zealously represent his

client. Magistrate Lee rejected that explanation and recommended that Moncier be barred from practicing in the Eastern District of Tennessee.

Judge Collier accepted the recommendation, ordering that Moncier be suspended as a member of the bar of the Eastern District of Tennessee for a period of three to five years. The Sixth Circuit affirmed the suspension on July 8, 2009, holding that Moncier's conduct exhibited disrespect for "the civility and order in the courts." Reagan felt quite differently about the matter. "If a judge thinks I'm too zealous in my representation, he can move to bar me? That's scary, quite frankly."

Although Moncier's suspension was upheld, he did receive a modicum of relief. In a companion order entered July 8, 2009, the Sixth Circuit reversed Moncier's criminal contempt conviction before Judge Greer. The appellate court concluded that Greer had erred in presiding over the contempt proceedings since Moncier's misconduct had involved disrespect against the same judge hearing the contempt case.

Moncier's criminal contempt conviction was accordingly vacated and the case remanded for a new trial before a

different judge, scheduled for May 17, 2010. Moncier's victory will most likely be short-lived, though, as the Sixth Circuit made it clear that his conduct unquestionably constituted criminal contempt. See: *In re: Herbert S. Moncier*, U.S.D.C. (E.D. Tenn.), Case No. 1:08-mc-00009;

In re: Herbert S. Moncier, 550 F.Supp.2d 768 (E.D. Tenn. 2008); *In re: Herbert S. Moncier*, 569 F.Supp.2d 725 (E.D. Tenn. 2008); *United States v. Moncier*, 571 F.3d 593 (6th Cir. 2009), *cert. denied*. ■

Additional source: www.knoxnews.com

Washington Prisoner's Rape Claim Results in \$60,000 Settlement

The State of Washington paid \$60,000 to settle a claim that involved a prisoner at the Washington State Reformatory being "savagely sexually assaulted" by another prisoner.

In the late evening of June 9 or the early morning hours of June 10, 2005, prisoner Jason M. Grey was raped by prisoner Tremayne Francis, who prison officials were aware had previously raped another prisoner.

After promptly reporting the matter, Grey was taken to the Sexual Assault Center at the Providence Hospital. The investigation into the matter resulted in Francis being prosecuted for raping Grey.

Represented by Lynnwood attorney Stephen L. Conroy, Grey filed a tort

claim for damages against the Washington Department of Corrections. That claim asserted six separate theories to obtain damages, ranging from federal constitution violations to state law torts of negligence.

The Washington State Risk Management Division settled the matter on March 18, 2008. See claim #3106115. ■

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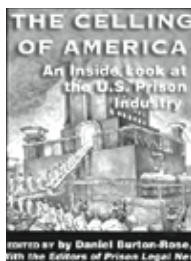
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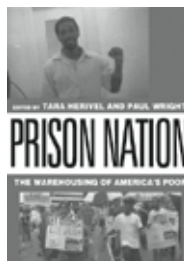
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PLRA Attorney Fee Caps Constitutional, Third Circuit Decides

The provisions of the Prison Litigation Reform Act (PLRA) that cap attorney fees do not violate equal protection, the U.S. Court of Appeals for the Third Circuit decided on May 28, 2009.

Pennsylvania prisoner Glendon Parker sued prison guard Joseph Conway for assault in violation of the Eighth Amendment. The district court appointed counsel for Parker, and following a jury trial he was awarded \$17,500 in damages. Parker's attorney then moved for \$64,089 in fees.

Recognizing that the PLRA limits attorney's fees to 150% of the total judgment and 150% of the lodestar amount (hours worked multiplied by hourly rate) for attorneys appointed under the Criminal Justice Act, Parker argued that the PLRA's fee caps were unconstitutional because they discriminated against successful prisoner litigants who filed suit while incarcerated, whereas prisoners who wait to sue until after their release are not subject to such limits.

The district court rejected Parker's constitutional argument and awarded \$26,250 in fees, an amount equal to 150% of the judgment in the case. The court later applied a separate provision of the PLRA to assess 18 percent of Parker's judgment towards the attorney fee award. Parker appealed and Conway cross-appealed.

The Third Circuit, applying a rational basis review to Parker's challenge, concluded that the fee caps were not unconstitutional. Congress had multiple "legitimate" reasons for capping attorney's fees, the appellate court wrote. For example, "Congress could have legitimately intended to reduce the variability in attorney's fee awards." Additionally, the fee caps "rationally relate to the legitimate goal of reducing ... attorney's fee awards" and deter both "frivolous lawsuits" and lawsuits "that, while not technically frivolous, generate litigation costs that exceed any potential recovery."

In upholding the fee limits, the Third Circuit joined the First, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, which have similarly concluded that the PLRA's fee caps pass constitutional muster.

Next, the Court of Appeals turned to Conway's cross-appeal. Conway argued that the district court had erred in failing to apply 25% of Parker's judgment against

the fees that were awarded. The Third Circuit disagreed.

The PLRA "does not require a district court to apply 25 percent of the judgment to satisfy an attorney's fee award," the appellate court wrote. Rather, the PLRA

only requires that the district court apply "some portion of the judgment to satisfy the attorney's fee award." The judgment of the district court was therefore affirmed. See: *Parker v. Conway*, 581 F.3d 198 (3d Cir. 2009). ■

Cost of Capital Punishment Comes Under Increased Scrutiny in a Struggling Economy

by Justin Miller

A new report released by the Death Penalty Information Center (DPIC) challenges the economic feasibility and sensibility of states maintaining the death penalty amid the nation's current economic downturn.

The report, entitled *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, "explores the prospect of saving states hundreds of millions of dollars by ending the death penalty." Additionally, the report included the results of a national poll of police chiefs, which indicated that capital punishment was "at the bottom of their priorities for achieving a safer society."

The poll, commissioned by the DPIC, surveyed 500 police chiefs selected at random from across the nation. They were asked for their opinions on a variety of issues, from the deterrence value of the death penalty and its effect on reducing violent crime to the efficiency of capital punishment when compared to alternative ways to allocate scarce budgetary resources and its preferability to sentences of life without parole.

The DPIC found that the police chiefs surveyed had a "high degree of skepticism about the death penalty, and a strong desire to spend limited funds more productively elsewhere." When asked whether or not they agreed with the statement, "The death penalty does little to prevent violent crimes because perpetrators rarely consider the consequences when engaged in violence," 57% agreed while 39% disagreed.

Further, only 37% of the poll respondents believed that capital punishment significantly reduces homicides, while a mere 24% "believe murderers think about the range of possible punishments" before committing their crimes. The DPIC report also noted that in another recent survey, 88% of the nation's top criminologists

rejected the notion that executions were a deterrent and 87% felt that abolishing capital punishment would have no significant effect on the murder rate.

Similarly, when the police chiefs were presented with a list of methods to reduce violent crime, including increasing the number of police officers, reducing drug abuse and improving the economy, only 1% of those surveyed named the death penalty as the most important. In fact, according to the poll, capital punishment was considered the "least efficient use of taxpayers' money," ranking below expanded training and neighborhood watch programs, among other options. While the police chiefs did not oppose the death penalty "in principle," less than half of those surveyed preferred it to a sentence of life without parole.

The budgetary crisis facing many state criminal justice systems also was reviewed, and the DPIC report found that significant savings could be achieved by abolishing the death penalty. It explored the true costs to states of maintaining capital punishment systems, why those costs are increasing and why they can't be effectively reduced.

Several cases were highlighted in which states with the death penalty were being forced to make significant cuts to other areas of their justice systems. A 10% reduction in pay to Atlanta police officers, a 10% cut in funding to Florida courts, and public defenders in Kentucky and Tennessee saddled with caseloads nearly three times established national standards were just a few of the examples cited.

Costs have also impacted the way some states administer their capital punishment systems. Prosecutors in Florida are reducing the number of cases in which they seek the death penalty. The head of the death penalty unit of the public defender's office in Georgia resigned,

stating that his office was unable to fairly represent defendants due to budgetary constraints. New Mexico abolished the death penalty in 2009, citing cost as a factor. [See: *PLN*, July 2009, p.28].

Indeed, the actual cost of capital punishment is difficult to ascertain. The report considered a number of different ways to calculate the expenses incurred by a state in order to maintain its death penalty system. However, the DPIC noted that under any line of reasoning, capital punishment is exceedingly more expensive than criminal justice systems where life in prison is the maximum sentence.

For example, by one method of calculation, California was found to be spending \$137 million per year on the death penalty. The same methodology estimated that only \$11.5 million would be necessary for a system in which life in prison was the maximum sentence. As California has averaged only one execution every two years since capital punishment was reinstated in 1977, the average cost per execution can be said to exceed \$250 million. The state is now also considering building a new death row facility, at a cost of about \$400 million. [See: *PLN*, Jan. 2009, p.34].

Many other costs associated with capital punishment were examined in the report. Among those were increased trial and appellate court costs; the amount of time that prosecutors, public defenders, judges and others must spend on capital punishment trials compared to other types of cases; and the additional cost of housing death-sentenced prisoners in maximum security units. As the number of both death sentences and executions

has dropped by about 60% nationwide since 2000, the cost per execution has been steadily rising.

Finally, the DPIC report concluded that such expenses cannot be responsibly reduced. For example, limiting the appellate process could lead to a greater risk of executing innocent defendants. Since 1976, 132 death row prisoners have been exonerated.

The majority of costs, however, occur

at the trial level. Such costs stem from increased attorney expenses, the bifurcated trial process, expert witnesses such as mitigation specialists and additional time spent in jury selection, among others. Similarly, shortchanging the trial process could also lead to wrongful convictions – which are yet another cost of capital punishment. ■

Source: www.deathpenaltyinfo.org

\$12,000 Award to Wheelchair-Bound NY Prisoner for Fall off Loading Ramp

A New York Court of Claims awarded a prisoner \$12,000 for injuries incurred by a fall off a curb while in a wheelchair.

Prisoner Darin Carathers became a paraplegic after sustaining a gun shot wound to the neck in 1981, leaving him wheelchair-bound. Guards from the Green Haven Correctional Facility transported him to St. Agnes Hospital on March 26, 2002, for surgery.

During the transport, Carathers was restrained with a belly chain, handcuffs and shackles on his feet. Usually, a transport for him involved gaining entry to the hospital through the emergency exit that allowed the van's ramp to be lowered for handicapped people.

On this particular visit, guards utilized the loading dock, which had a curb of "two feet maybe." Once Carathers was removed from the transport van, guards placed him on the ramp and left him to

attend to other prisoners. Because the guard failed to set the wheelchair's brake, it began to "spin around" and Carathers fell off the curb.

In an October 22, 2007 order, the Court found the state 100% liable. At a damages trial, the Court found that "Carathers suffered knee pain from the trauma of his fall, resulting in the sprain of his medial collateral ligament and lateral collateral ligaments in his left knee, some swelling in his left knee, and an elbow injury." While he suffered elbow pain for a month and knee pain for about a year, he sustained no permanent injury.

In a September 15, 2009 order, the Court awarded Carathers \$12,000 for past pain and suffering and the return of any filing fee. Carathers was represented by attorney Gary E. Divis. See: *Carathers v. The State of New York*, White Plains Court of Claims, #2009-030-025, Claim No. 109001. ■

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17,698 DNA Profiles Missing from Wisconsin Database

by Matt Clarke

In September 2009, Wisconsin officials discovered that the profiles of 17,698 convicted felons were missing from the state's DNA database.

An investigation into Milwaukee serial killer suspect Walter E. Ellis revealed that his DNA was not in Wisconsin's 128,065-profile database, though it should have been. An audit later found that about 13% of the profiles that should be in the database were missing. The omitted profiles included those of over 400 convicted sex offenders and around 10,360 felons who were no longer under correctional supervision.

Wisconsin state law requires the collection of a DNA sample from all convicted felons; the sample is used to generate a DNA profile for the state database. The 17,698 missing profiles spanned a time period from 1993 to 2009.

"Our charge is to get samples from everyone, and that's where we are," said John Dipko, a spokesman for the Wisconsin Department of Corrections (DOC). "We are also working as quickly as possible to go after and get DNA for people who are no longer under supervision."

The DOC set up a task force, consisting primarily of retired law enforcement officials, charged with collecting DNA samples from the felons whose DNA profiles were missing from the database. The state's Office of Justice Assistance's Sex Offender Apprehension and Felony Initiative was assigned to assist the task force, which includes representatives from the Badger State Sheriff's Association and the DOC.

"We have to identify and determine the existing failures in the system that caused the problems today," said Chuck Cole, a former assistant police chief who is heading the task force.

Meanwhile, a bill was introduced in the state legislature to require defendants arrested on felony charges to provide a cheek-swab DNA sample at the time they are booked. The bill (2009 Senate Bill 336) was sponsored by state Representative Ann Hraychuck and state Senator Shelia Harsdorf. Harsdorf claimed the legislation will ultimately save money by allowing suspects to be identified more quickly.

Proponents of the bill note that 21 states already have DNA-at-arrest stat-

utes. New Mexico enacted such a law in 2007; about an hour later, an arrested person's DNA was taken which matched an open murder case.

Critics contend that taking DNA samples upon arrest would mean taking DNA from people who have not yet been charged with a crime and may never be convicted. Further, obtaining so many DNA samples may cause a backlog at the state crime lab. The bill provides that people who are not criminally charged or are found not guilty have the right to request expungement of their DNA profiles from the database.

Of course, if Wisconsin is incapable of collecting the DNA profiles already

mandated by state law, one has to wonder how effective officials will be in expunging DNA samples when requested pursuant to state law. It seems unlikely that a task force would be set up to make sure such expungements are properly performed.

There has been no action taken on Senate Bill 336 by the Wisconsin legislature since December 2009. As of March 23, 2010, state officials said they had collected about 6,315 DNA samples that had been missing from the database, mostly from felons who were still in prison or on probation or parole. ■

Sources: *Milwaukee Journal-Sentinel*, www.620wtmj.com

Kentucky Supreme Court: Retroactive Application of Sex Offender Residency Restrictions Unconstitutional

On October 1, 2009, the Kentucky Supreme Court held that retroactive application of sex offender residency restrictions violated prohibitions against ex post facto laws in the U.S. and Kentucky constitutions.

In 1995, Michael Baker pleaded guilty to third-degree rape for unlawfully touching a teenage girl. He received five years probation and was required to register as a sex offender until 2010. In 2000, the Kentucky General Assembly enacted a sex offender residency restriction statute.

The current version of the law, codified at KRS 17.545, prohibits any registered sex offender from living within 1,000 feet of a school, preschool, publicly-owned playground or licensed day care facility. Failure to comply is a Class A misdemeanor for the first offense and a Class D felony for subsequent violations. A sex offender already living within 1,000 feet of a prohibited area on the amended statute's enactment date had to move within 90 days.

Baker was arrested on February 2, 2007 for violating the statute by residing within 1,000 feet of East Covered Bridge Park, which was not listed on the Division of Probation and Parole's website link provided to registered sex offenders to determine whether they are in compli-

ance with the law. Baker challenged the constitutionality of the statute in state district court, which held the law violated the ex post facto clauses of the Kentucky and U.S. constitutions as applied to him. The Kentucky Supreme Court granted the state's motion for a certification of law on the issue.

The Supreme Court conducted an ex post facto analysis pursuant to *Smith v. Doe*, 508 U.S. 84 (2003). In a 5-2 decision, the Court concluded that the General Assembly intended the statute to be civil and non-punitive. However, the residency restrictions are similar to banishment, which has been historically regarded as a form of punishment; promote the traditional aims of punishment; impose affirmative disabilities and restraints on sex offenders; do not have a rational connection to a nonpunitive purpose; and are excessive with respect to the nonpunitive purpose of public safety.

Thus, the residency restrictions are "so punitive in effect as to negate any intention to deem them civil. Therefore, the statute may not constitutionally be applied to those like [Baker] who committed crimes prior to July 12, 2006, the effective date of the statute. To do so violates the ex post facto clauses of the United States and Kentucky constitutions." The Court therefore upheld the

district court's decision.

The Kentucky Supreme Court noted that Indiana's Supreme Court had made a similar ruling in *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), and a federal district court had held that Ohio's residency restrictions violated the federal ex post facto clause in *Mikaloff v. Walsh*, Case No. 5:06-cv-

00096 (N.D. Ohio, Sept. 4, 2007); 2007 WL 2572268.

The absence of any kind of individualized assessment of risk; the fact that sex offenders were barred from sleeping near a school "when the children are not present," while not addressing their whereabouts during the school day; and the fact that the restrictions apply to sex offenders

whose crimes did not involve children also influenced the Supreme Court's decision. Baker was represented by Covington, Kentucky attorney Bradley Wayne Fox. See: *Kentucky v. Baker*, 295 S.W.3d 437 (Ky. 2009), cert. denied. ■

Additional source: www.courier-journal.com

Kern County Settles False Arrest Lawsuit for \$5.5 Million

by Michael Brodheim

In September 2009, Kern County (California) officials entered into a multimillion dollar settlement agreement with John Stoll, disposing of a federal lawsuit filed by Stoll in 2005, seeking compensation for damages allegedly sustained as a result of a violation of his civil rights, including 20 years of incarceration for crimes that likely never occurred.

Following a messy divorce, Stoll found himself accused in 1984 of being the ringleader of one of eight "child sex rings" then being investigated by the Kern County Sheriff's Office. The "ring" cases shared common themes: children testified to child-adult sex orgies where children

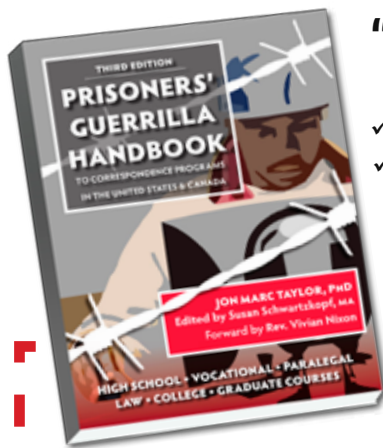
were drugged and photos of the naked participants were taken. The only evidence of any "ring" activities was the testimony of young children — most of whom, as adults, recanted.

Stoll was arrested in June 1984, prosecuted, convicted and ultimately sentenced to 40 years in prison. He was released in May 2004, one month after Kern County Superior Court Judge John Kelly granted his petition for writ of habeas corpus, finding that improper child-interview techniques created a substantial risk that Stoll had been convicted as a result of unreliable child testimony. Stoll's subsequent § 1983 lawsuit included allegations that

he had been illegally arrested and falsely imprisoned, that the evidence against him had been manufactured, and that the County had failed to disclose material exculpatory evidence.

All told, 23 people who were convicted in the Kern County "ring" cases ultimately had their child sex abuse convictions overturned. [See: *PLN*, June 2009, p. 36].

In settling the lawsuit, Kern County agreed to pay Stoll a lump sum of \$3.5 million, plus monthly payments of \$12,300 for life, guaranteed for 15 years (180 months). See: *Stoll v. County of Kern*, U.S.D.C. (E.D. CA), Case No. 1:05-cv-001059 OWW SMS. ■



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Flushing Junk Down Jail Toilets Damages Sewer System, Prompts \$2.3 Million Settlement in California Lawsuit

In October 2009, the San Mateo County Board of Supervisors tentatively agreed to pay \$2.3 million to settle a lawsuit that alleged county prisoners were damaging the adjoining sewer system by clogging it up with items not intended to be flushed down the jail's toilets. The suit was brought by the South Bayside System Authority, a public agency that provides sewer service for cities neighboring the Maguire Correctional Center in Redwood City, California.

The settlement is intended to cover the \$1.2 million in extra maintenance costs

the authority incurred in dealing with the clothing, hair brushes, food wrappers, hair gels, garbage bags and other solid matter that clogged the sewer's pumps after being flushed down the county jail's toilets. Those maintenance costs included the installation of grates at the Redwood City pump station, plus the hiring of two workers to rake the muck off the grates several times a day.

The remaining \$1.1 million from the settlement is intended to cover the future costs of handling junk being flushed out of the jail.

In addition to the monetary payout, the settlement requires the county to maintain the discharge of solid matter from the jail at its present level. Regardless of whatever steps the county may take to monitor the discharge of prohibited items, officials have acknowledged they can't always control what prisoners flush down their toilets. See: *SBSA v. County of San Mateo*, San Mateo County Superior Court, Case No. CIV-469-129. ■

Additional source: *Daily News*

CCA Agrees to Pay \$1.3 Million to Settle Sexual Harassment, Retaliation Suit

On October 1, 2009, Corrections Corporation of America (CCA) entered into a consent decree with the Equal Employment Opportunity Commission (EEOC) to settle allegations of sexual harassment and retaliation involving female employees at the company's Crowley County Correctional Facility (CCCF) in Colorado.

In September 2006, the EEOC filed a lawsuit against CCA and Dominion Correctional Services, a now-defunct corporation that once operated CCCF. According to the plaintiffs, female staff members at the facility were subjected to "unlawful sexual harassment and gender-based harassment." For example, the complaint alleged female employees were hired based on whether they might be "easy to get to bed." After the women were hired they were "routinely groped, pawed, and physically assaulted by male management and male co-workers."

When women reported this sexual harassment or when others supported them, retaliation often resulted, which "contribut[ed] to and perpetuat[ed] the hostile work environment," the complaint stated.

Retaliatory acts included increased scrutiny for employees who complained; failure to investigate claims of harassment and retaliation; making false charges in order to justify retaliatory discipline; assigning employees who complained to areas where there was an increased risk of harm; and inten-

tionally assigning female employees to work with their alleged harassers, thereby exposing them to "actual and threatened abuse."

CCA agreed to settle the case, according to court documents, "solely to avoid the cost and uncertainties of trial." The company admitted no wrongdoing.

The \$1.3 million settlement requires CCA to pay employees who were subjected to harassment or retaliation from \$7,500 to \$155,000, depending on the circumstances of each particular case. Private counsel representing some of the plaintiffs will receive \$140,000 in attorney fees out of the total settlement amount.

Aside from monetary compensa-

tion, the settlement also requires CCA to expunge disciplinary infractions from the personnel files of plaintiffs who were improperly disciplined. The settlement further requires more training for CCA employees in the areas of sexual harassment and retaliation, as well as the establishment of a clear sexual harassment and retaliation policy.

The plaintiffs who had private counsel were represented by Denver attorney Barry Roseman. See: *Equal Employment Opportunity Commission v. CCA*, U.S.D.C. (D. Col.), Case No. 1:06-cv-01956-KHV-MJW. ■

Additional source: *Pueblo Chieftain*

\$932,900 Award to Hawaii Prisoner Rendered Infertile Due to Inept Medical Care

A Hawaii state judge awarded a former prisoner \$932,900 in damages in a lawsuit alleging substandard medical care. Gregory Slingluff, 41, sued after he was rendered infertile due to poor medical treatment while incarcerated at the Halawa High Security Correctional Center in 2003-2004 for a drug offense.

Slingluff developed an infected scrotum in September 2003. Testimony at a four-day trial in September 2009 established that he was treated with the wrong and incorrect doses of antibiotics.

According to Richard Turbin, Slingluff's attorney, the infection caused

Slingluff's scrotum to swell from the size of a "grapefruit" to a "watermelon." The condition required surgical removal of his scrotum and skin graft replacement from his thigh. Slingluff faces additional reconstructive surgery.

"The state could have saved a lot of money if it had only followed its own [medical] protocols," Turbin said. The final judgment of \$932,900 plus costs was entered on November 12, 2009. See: *Slingluff v. State of Hawaii*, O'ahu First Circuit Court (Hawaii), Case No. 1CC06-1-001654. ■

Additional source: *Honolulu Advertiser*

Gloucester County, New Jersey Settles Jail Strip Search Class Action for \$4 Million

by Matt Clarke

On September 14, 2009, the parties in a class action lawsuit against Gloucester County, New Jersey over the county jail's strip search policies filed a settlement agreement in federal district court agreeing to a \$4 million settlement.

Sandra King Wilson was 51 years old when she was arrested for suspicion of shoplifting and probation violation. She was subjected to a visual body-cavity strip search at the Gloucester County Jail. Joseph DePietro, a disabled man receiving Social Security Disability benefits, was arrested for outstanding child support. He too was strip searched at the jail.

Wilson and DePietro were the named plaintiffs in a classaction federal civil rights lawsuit against the county, its sheriff and various jail officials, alleging that the jail's strip search policies and practices violated the state and federal constitutions, in that they mandated strip searches of persons arrested for misdemeanor or civil violations without particularized suspicion that the arrestees had contraband or weapons. The suit was brought pursuant to 42 U.S.C. § 1983 and N.J.S.A. 10:6-2(c), plus specified violations of the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution.

The jail changed its policies and practices on February 28, 2009. The class was defined as all persons who were strip searched at the jail between March 24, 2004 and February 28, 2009 after having been charged with non-indictable offenses (such as disorderly persons arrests, traffic violations and/or civil commitment). Arrestees who were made to take a shower or be treated with a delousing agent while completely naked and under the direct supervision of a jail employee were also considered to have been strip searched.

The defendants agreed to pay a total of \$4 million and not oppose the award of attorney fees or an incentive award of \$15,000 to the named plaintiffs, provided that all payments came out of the \$4 million settlement fund. Class members who file a claim form are entitled to a proportionate share of the amount of the settlement fund remaining after incentive awards, attorney fees and administrative

costs are paid. The defendants agreed to notify class members by sending correspondence to their last known address, via publication of a notice, using television ads, and by setting up a website. The identities of class members will be kept confidential.

Mediation was used to reach the settlement, in which the defendants did

not admit any wrongdoing. The class attorneys are Seth Lesser and Fran Rudich of New York City; Charles LaDuca and Alexandra C. Warren of Washington, D.C.; Elmer Robert Keach III of Amsterdam, New York; and William A. Riback of Haddonfield, New Jersey. See: *Wilson v. County of Gloucester*, U.S.D.C. (D. NJ), Case No. 06-cv-01368-JEI-KMW. ■

\$27,500 Settlement for Washington Prisoner's Public Records and RLUIPA Claims

The State of Washington Department of Corrections paid \$27,500 to settle two lawsuits brought by prisoner Derek E. Gronquist. The first action involved request for disclosure of public records, and the second related to violations of religious freedom.

The public records suit related to Gronquist's request to inspect records pertaining to Airway Heights Corrections Center guard Jeffrey Ward. That request broke into 12 categories various types of records that encompassed all aspects of documentation that pertains to a guard's employment. This includes lawsuits, grievances or disciplinary infractions filed by or against him. See: *Gronquist v. Department of Corrections*, Spokane County Superior Court, Case No. 07-2-00562-0.

The religious freedom claim alleged violation of the Religious Land Use and Institutionalized Persons Act. Gronquist, a Taoist, claimed prison officials substantially burdened the practice of his religion by refusing to provide him a healthy vegan diet; to purchase, possess and use property

\$22,500 to settle the public records suit. The agreement terminated a pending public records disclosure suit described in the complaint and prohibits Gronquist from making future requests for those records.

Gronquist further received \$5,000 to settle the religious freedom claim, and that monetary settlement was to be placed in his prisoner account without any deductions under statute or to pay debt to the Department of Corrections. The settlement also provided for dismissal of the two suits listed above and a pending appeal. ■

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Alternative Prisoner Phone Service Company Files Unsuccessful Suit

by David M. Reutter

A company that offers a lower-cost alternative to the monopolistic practices of the nation's largest prison and jail telephone service providers filed a federal lawsuit alleging violation of the Federal Communications Act.

The suit was filed by Millicorp, a Florida-based company that offers alternative phone services to prisoners' family members and loved ones through its subsidiary, Cons Call Home (CCH). Millicorp, a provider of interconnected voice over Internet protocol (VOIP), is registered with the Federal Communications Commission (FCC) to transmit voice communications over a broadband Internet connection rather than traditional land lines.

Millicorp sued Securus, T-Netix, Evercom and Global Tel*Link (GTL). The first three companies are under Securus' corporate umbrella, and in combination with GTL the firms control 70 to 80% of the nation's prison and jail phone services.

On average, Securus and GTL charge \$3.95 per call for local set-up and service plus an average of \$.90 per minute for long-distance calls. Through CCH, Millicorp provides a legitimate, secure and very popular technological alternative to the higher prices charged by Securus and GTL.

To offer lower-cost phone services, CCH provides its customers with a telephone number in the prison's local calling area, which prevents Securus and GTL from charging long-distance fees. Under the guise of that arrangement being a security threat because it prevents prison officials from being able to verify the customer's identity, Securus and GTL have been blocking, shutting off service or refusing to approve phone numbers issued by CCH on behalf of its customers – mainly prisoners' family members.

CCH said that being shut-out by Securus and GTL not only resulted in lost customers and revenue, but the underlying alleged security concerns have no merit, according to Millicorp's complaint.

Because CCH's customers must still set up an account with Securus and GTL to pay for phone calls to the local numbers provided by CCH, they have the customers' identification and address. Thus, while

the call is shifted from the CCH-issued local phone number, security measures to verify the customer's identity are still in place.

Moreover, prison officials have the ability to monitor all calls to CCH customers and regulate the recipients of those calls. Prison officials can also delay call approval until they verify that the number rings where the prisoner says it does. In sum, Millicorp argued that banning its lower-cost prison phone services was a pretextual excuse to justify charging exorbitant prices in a monopolistic market, which raised claims under §§ 201 and 202 of the Federal Communications Act (FCA) as well as Florida state law.

"This has everything to do with money," said Brian Prins, president of www.jailcalls.com an unrelated alterna-

tive prison phone service company. "It is simply about being a monopoly. Nor does [CCH or similar services] impinge on any legitimate security needs of corrections agencies."

Unfortunately, however, the district court granted the defendants' motion to dismiss on April 14, 2010. The court found that when Millicorp submitted a letter to the FCC complaining about the defendants' practices and requesting intervention by that agency, it had opted to pursue administrative remedies that precluded litigation under § 207 of the FCA. The court also elected not to consider the company's state law claims. See: *Millicorp v. Global Tel*Link Corporation*, U.S.D.C. (S.D. Fla.), Case No. 1:09-cv-23093-DLG. The complaint and ruling are posted on PLN's website. ■

Opening Legal Mail Outside BOP Prisoner's Presence States Constitutional Claim

The U.S. Court of Appeals for the Sixth Circuit affirmed in part and reversed in part a district court decision denying qualified immunity to several Bureau of Prisons (BOP) employees accused of opening properly marked legal mail outside a prisoner's presence.

Robert Merriweather, who was formerly incarcerated at the Federal Correctional Institution in Milan, Michigan, filed a *Bivens* action against T.A. Zamora, Brian Dutton, Scott Boudrie, Frank Finch, Steve Culver, James L. Davenport, Jr. and Don Vroman, all BOP employees, after numerous pieces of legal mail were opened outside his presence.

The magistrate judge in the case recommended that Merriweather's claims against all of the defendants be allowed to proceed. The district court adopted the magistrate's recommendation, and the BOP employees took an interlocutory appeal.

On appeal, the defendants argued that one of the envelopes marked as being from "Jerome T. Flynn, Northern District of Indiana Federal Community Defenders, Inc.," did not appropriately identify that it was from a lawyer because it did not include the word "attorney." In rejecting this argument, the Sixth Circuit noted that the relevant BOP regulation does not re-

quire that "the envelope contain the word 'attorney.'" Instead, the rule only requires "an indication that the actual sender of the envelope is an attorney."

Because the defendants had stipulated that a different envelope from the "Appellate Division Chief" of the "Federal Public Defender's Office" was appropriately marked as legal mail, the defendants could not claim that the Flynn envelope was not likewise correctly marked, the appellate court held.

Next, parroting its argument regarding the Flynn envelope, the defendants claimed that nine envelopes containing the name of the sender, the word "attorney/client" and a stamp saying "open in presence of inmate only" or "special legal mail" were not properly marked because they did not unequivocally state they were from an attorney.

Once again, the Court of Appeals emphasized that the relevant BOP regulation does not require "that the attorney designation appear at a particular place on the envelope, such as immediately after the person's name." Instead, the regulation only requires "an indication that the person is an attorney" to appear somewhere on the envelope. This, combined with the defendants' stipulation that the letter from the Appellate Division Chief was appro-

priately marked, albeit without the word "attorney" on the envelope, demonstrated that the nine envelopes in question should have been treated as legal mail.

Even if the envelopes were adequately marked, the defendants contended they were entitled to qualified immunity because the law was not clearly established that their actions were unconstitutional. The Sixth Circuit disagreed.

"Through a series of decisions, prison officials should have been aware that policies that are themselves constitutional can be unconstitutional if improperly applied," the appellate court wrote. "Prison officials would also be on notice as of 2003 that opening properly marked legal mail alone, without doing more, implicates both the First and Sixth Amendments because of the potential for a 'chilling effect.'"

However, the Court of Appeals declined to affirm the district court's denial of qualified immunity as to Boudrie, Davenport and Finch, because Merriweather had failed to allege that those defendants were personally involved in the opening of his legal mail. The judgment of the district court was accordingly affirmed in part and reversed in part. Merriweather repre-

sented himself pro se both on appeal and in the district court. See: *Merriweather*

v. Zamora, 569 F.3d 307 (6th Cir. 2009), rehearing denied. ■

***Bivens* Case by Disabled Prisoner Against Federal Prison Officials Remanded; Settles for \$15,000**

The U.S. Court of Appeals for the Fourth Circuit reversed a grant of summary judgment to federal prison officials in a *Bivens* case brought by a handicapped prisoner who was unable to take a shower or go to recreation for over two months because the defendants refused to provide him with crutches or a wheelchair.

Lloyd Eugene Brown sued John LaManna, the warden at the Federal Correctional Institution in Edgefield, South Carolina; Wayne Smith, the Camp Administrator; Brian Finnerty, a Special Housing Unit (SHU) lieutenant; and Jason Kapral, a guard in the SHU, for Eighth Amendment violations after he was denied showers and recreation for more than two months while in the SHU. Brown, who is disabled, used crutches or a wheelchair to ambulate. After entering the SHU, however, his crutches were con-

fiscated. Brown complained about being unable to stand or walk without assistance but the defendants ignored his requests.

The district court granted summary judgment to the prison officials. The Fourth Circuit reversed. "Brown presented evidence showing that he could not recreate or take a shower without assistance and that Defendants refused assistance in the face of his obvious need," the Court wrote. Additionally, Brown "raised questions about the credibility of Defendants' affidavits." Accordingly, the case was remanded for further proceedings. See: *Brown v. LaManna*, 304 Fed. Appx. 206 (4th Cir. 2008) (unpublished).

Following remand, the case settled on March 25, 2010 for \$15,000, with no admission of guilt by the defendants. Brown represented himself on appeal and in the district court. ■



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News in Brief:

California: Contra Costa County's top homicide prosecutor, Harold Jewett, was placed on administrative leave for allegedly punching his supervisor, assistant district attorney Paul Sequeira. The incident, which took place on March 8, 2010 during a staff meeting and sent Sequeira to the hospital for stitches, occurred after Sequeira confronted Jewett about a letter he sent to the local paper disparaging fund raising practices at the prosecutor's office for the upcoming election of a new district attorney.

California: State prison guard Domingo Garcia, 40, pleaded guilty on March 24, 2010 to smuggling contraband into the California State Prison-Sacramento. Garcia admitted that he took bribes to deliver phones and drugs to prisoners. He was also found with a handgun, 50 rounds of ammo and two knives in his car on prison grounds; he said they were his personal weapons and he had forgotten to remove them. His sentencing hearing is scheduled for April 26.

Florida: On March 13, 2010, Thomas Althoff, 33, was booked into the Hernando County Jail for driving on a suspended license. Jailers discovered him snorting Xanax a few hours later. He admitted to smuggling the pills into the jail by concealing them in the fat rolls of his stomach, and was charged with possession of contraband.

Florida: Sylvester Jiles, 25, was sentenced to 15 years in prison on March 23, 2010 for trying to break into the Brevard County Detention Center. That's not a typo. Jiles, who pleaded guilty in a manslaughter case and received 8 years probation last year, returned to the jail on August 31, 2009, three days after he was released, and asked to be locked up because he feared retaliation from the victim's family. When guards refused, he attempted to climb over the facility's fence and became caught in barbed wire. The incident, which involved trespassing charges, violated Jiles' probation and resulted in the 15-year sentence.

Illinois: Cook County jail guard Dwayne Jones, 25, had 10 grams of marijuana, a cell phone and charger, earphones and several DVDs, including episodes of last year's Discovery Channel series *Cook County Jail*, when authorities busted him on March 15, 2010. He was arrested, charged with two counts of possession of contraband in a penal institution and

one count of misconduct, and released on \$10,000 bail. He was also fired.

Indiana: On April 7, 2010, 24-year-old James Bohannon was sentenced to 30 years in prison following a jury trial in which he was convicted of arson. In January 2009, he started a fire in the Jennings County Jail that prompted the evacuation of about 40 prisoners due to heavy smoke. Bohannon was being held on misdemeanor charges at the time he set the fire.

Kentucky: On March 30, 2010, a jury found Bourbon County jail guard Tony Horn guilty of two misdemeanor counts of criminal attempt to tamper with physical evidence. The convictions stem from Horn ordering the destruction of e-mails concerning the death of prisoner Daniel Trimble, who committed suicide at the jail in February 2008. Horn was sentenced to 90 days in the Clark County Jail, presumably for his own safety to keep him away from prisoners he formerly guarded. He plans to run as a Republican this fall for Bourbon County judge-executive. His willingness to lie and destroy evidence makes him an excellent candidate for a political career.

Louisiana: Jelpi Picou, 49, former director of the Capital Appeals Project, pleaded guilty on February 26, 2010 to stealing more than \$200,000 in public funds used to run the non-profit legal defense firm between 2005 and 2009. He resigned from his position in November 2009 and agreed to have his law license suspended in December. Picou was released on a \$25,000 recognizance bond; his sentencing hearing is scheduled for April 30, 2010. Veteran appeals lawyer Sarah Ottinger has been named the new director of the Capital Appeals Project.

Nebraska: In March 2010, prison guards Caleb Bartels, Shawn Paulson and Derek Dickey were fired from the Nebraska state penitentiary for comments they posted on Facebook, a social networking site, concerning a prisoner assault. The comments in question were posted on Bartels' Facebook account. Paulson and Dickey then posted comments in support of his actions. "When you work in a prison a good day is getting to smash an inmate's face into the ground. ... for me today was a VERY good day," the Feb. 8, 2010 post on Bartels' Facebook page stated. Corrections officials confirmed that guards had used force against a prisoner on that

date. Bartels, Paulson and Dickey were fired because the statements were contrary to policy and could strain staff relations with prisoners.

New Jersey: Camden County assistant prosecutor Harry Collins resigned on March 26, 2010, after a co-worker discovered he had paid a witness to lie in the murder prosecution of Perman Pitman and then hid the evidence from Pitman's defense attorney. Pitman had pleaded guilty in exchange for a five-year sentence. However, he continued to file motions from prison seeking evidence he insisted would prove his innocence. One of the motions led assistant prosecutor Teresa Garvey to an old file containing a handwritten note by Collins that said a key witness had been paid to identify Pitman as the murderer. Prosecutors subsequently dismissed Pitman's conviction and he was released from prison. He has filed a civil rights action against the county.

New Jersey: On March 22, 2010, a jury acquitted Sgt. Maria Sereni, 60, a 19-year veteran at the Mercer County Jail, of crushing a co-worker's testicle during a playful pat-down search. Sereni was accused of inflicting the injury on judiciary investigator Louis Tedeschi after another co-worker introduced the two. She allegedly pulled him toward her, patted him down and grabbed his crotch. Her attorney argued that Tedeschi didn't like working in the jail and had used the incident as a way to get transferred back to court duty. Tedeschi had also filed a \$3 million suit against the jail after the incident. Sereni must appear at an administrative hearing before she can return to work.

New York: In March 2010, Jennifer Mercado was a juror at a Bronx trial involving a man accused of burglary and possessing stolen credit cards. She was accused of stealing fellow juror John Postrk's credit card and using it to make purchases during lunch breaks at stores across from the courthouse. Prosecutors and court personnel had a suspect in mind after Postrk reported the theft, because they had observed Mercado return to court with numerous shopping bags after each recess. Officials followed her to a store during the next break and caught her attempting to use Postrk's card. She was kicked off the jury and charged with various theft-related offenses.

New York: A fight involving 20 to 48

prisoners at the Rikers Island jail broke out on March 27, 2010, leaving 13 guards and 3 prisoners with injuries. The incident occurred following a cell search in a high-security unit during which guards confiscated a large amount of money from a prisoner, who then refused to lock up. One guard required 20 stitches, while some of the prisoners suffered broken hands and wrists. As usual, union officials blamed insufficient staffing at the facility.

Ohio: Former Perkins Township police chief Tim McClung pleaded guilty to theft and mail fraud in federal court on March 24, 2010 in connection with charges that he sold police department firearms and kept the proceeds. He faces a sentence of eight to 14 months in prison. McClung is also facing a theft charge in Erie County, where he is accused of stealing three weapons from the police department. He has pleaded not guilty in that case.

Ohio: On April 1, 2010, Donald D. Dudrow III, 22, was indicted on various felony and misdemeanor charges in connection with a letter he sent to his mother from the Ottawa County Detention Facility, where he was being held on probation violations. Dudrow gave his mother the name and phone number of a drug dealer plus detailed instructions – including sketches – on how to obtain Fentanyl patches, how to extract the narcotic from the patches and how to mail it to him at

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News in Brief (cont.)

the jail. Unfortunately for Dudrow he used the wrong zip code, and the letter was returned as undeliverable. Guards at the jail opened the returned letter, read its contents and turned it over to the police.

Sweden: It was reported in March 2010 that an unnamed Swedish prisoner had been warned by prison staff against using his flatulence as a form of harassment. Anders Eriksson, warden at the Kirseberg prison, called the prisoner's farts "a series of concerted attacks" against employees. The prisoner defended his actions, claiming his wind-breaking was "all noise and no fragrance."

Texas: On March 10, 2010, Frank Williams, Jr., 62, formerly a food service worker at the Reeves County Detention

Center in Pecos, pleaded guilty in federal court to accepting bribes from prisoners for smuggling cell phones into the jail. He faces up to 15 years in prison. The detention center is operated by GEO Group, a Florida-based private prison company formerly known as Wackenhut Corrections.

Washington: On March 26, 2010, Lawrence Williams, 52, a detainee at the Special Commitment Center (SCC) on McNeil Island, was convicted in federal court of conspiracy to distribute crack cocaine and witness tampering. The SCC houses sex offenders who have been civilly committed. Prosecutors alleged that Williams manipulated women, including a former SCC nurse, into acquiring the drugs for him and then paid Paepaega Matautia, Jr., 39, formerly an employee in the SCC mail room, to smuggle the

drugs into the facility. Matautia pleaded guilty to his involvement in the scheme, while the nurse was fired. Williams faces a mandatory minimum of five years and up to 40 years in prison when he is sentenced on July 12, 2010. He will be returned to the SCC after he serves his federal prison term. *PLN* previously reported this case and other unrelated incidents at the SCC. [See: *PLN*, Oct. 2009, p.18].

Washington: On March 28, 2010, the King County Jail was placed on lockdown after prisoners on the 10th floor began smashing furniture and threatening guards with homemade weapons during a security check. There were no details regarding the cause of the disturbance. Jail officials called in the Seattle Police Department's SWAT unit, and all 15 prisoners involved in the incident surrendered after about 40 minutes. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, Verso, 290 pages. \$19.00. Documented first hand reporting on law enforcement's war on the poor. Covers paramilitary policing, the INS and prisons. 1002

Prison Profiteers, edited by Paul Wright and Tara Herivel; 323 pages, \$24.95. This is the third and latest book in a series of *Prison Legal News* anthologies that examines the reality of mass imprisonment in America. [The other titles are *The Ceiling of America & Prison Nation*, see below]. *Prison Profiteers* is unique from other books because it exposes and discusses who profits and benefits from mass imprisonment, rather than who is harmed by it and how. 1063

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. Exposes the dark side of America's 'lock-em-up' political and legal climate. 1041

The Ceiling of America: An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright; Common Courage Press, 264 pages. \$22.95. *Prison Legal News* anthology that in 49 essays presents a detailed "inside" look at the workings of the American criminal justice system. 1001

The Criminal Law Handbook: Know Your Rights, Survive the System, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, & what your rights are at each stage of the process. Uses an easy to understand question & answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, Attorneys Paul Bergman & Sara J. Berman-Barrett; Nolo Press, 528 pages. \$39.99. Breaks down the trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say, in court, how to say it, where to stand, etc. (written specifically for civil cases—but it has much material applicable to criminal cases). 1037

Law Dictionary, Random House, 525 pages. \$19.95. Up-to-date law dictionary includes over 8,500 legal terms covering all types of law. Explains words with many cross-references. 1036

The Blue Book of Grammar and Punctuation, Jane Straus, 68 pages, 8-1/2 x 11. \$14.95. Self-teaching guide on all aspects of grammar and punctuation by an educator with experience teaching English skills to prisoners. Is both a reference and a workbook with exercises and answers provided. 1046

Legal Research: How to Find and Understand the Law, 12th ed., by Stephen Elias and Susan Levinkind; Nolo Press, 568 pages. \$39.99. Excellent for anyone searching for information in a real or virtual law library (including paralegals, law students, legal assistants, journalists and pro se litigants), *Legal Research* outlines a systematic method to find answers and get results. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, 2nd Rev Ed., 352 pages, \$34.99. How-to handbook for anyone who will conduct a deposition or be deposed. Valuable info, tips & instructions. 1054

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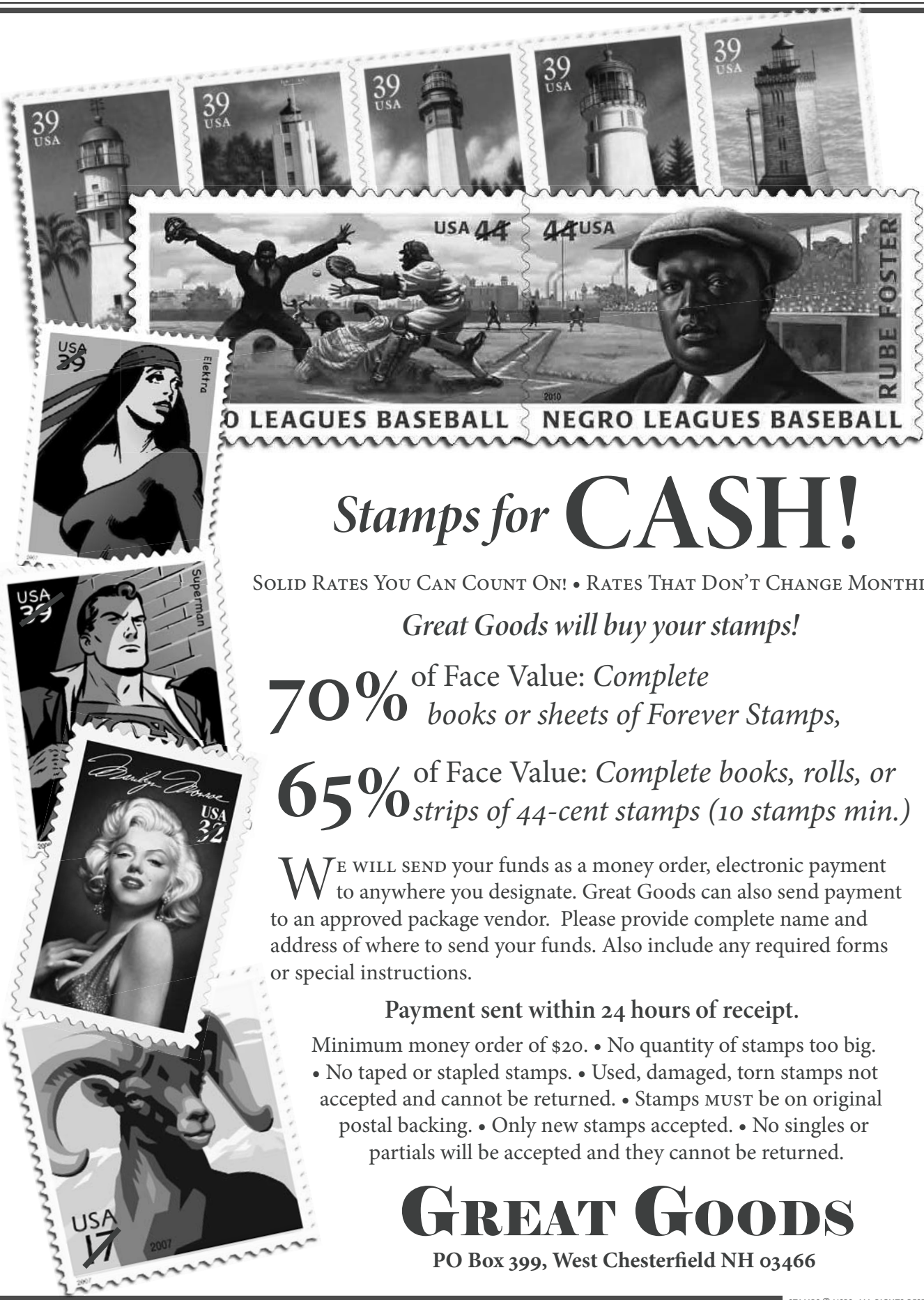
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June 2010

Secret Justice: Criminal Informants and America's Underground Legal System

by Alexandra Natapoff

I. Introduction

Although it is almost invisible to the public, the use of criminal informants is everywhere in the U.S. justice system. From street corners to jails to courthouses to prisons, every year the government negotiates thousands of deals with criminal offenders in which suspects can avoid arrest or punishment in exchange for information. These deals typically take place off-the-record, subject to few rules and little oversight. While criminal informants—sometimes referred to as “snitches”—can be important investigative tools, using them has some serious

costs: informants often continue to commit crimes, while the information they provide is infamously unreliable. Taken together, these facts make snitching an important and problematic aspect of the way America does justice.

The practice of trading information for guilt is so pervasive that it has literally become a thriving business. For example, Ann Colomb and her three sons were wrongfully convicted in 2006 of running a crack cocaine ring in Louisiana. They were convicted based on the fabricated testimony of dozens of jailhouse informants—participants in a for-profit snitch ring operating in the local federal prison. As part of that ring, prisoners were buying and selling information about pending cases to offer to prosecutors in order to reduce their own sentences.

When police rely on criminal informants, innocent people can pay a heavy price. Acting on a bad tip from a local drug dealer-turned-informant, Atlanta police sought a no-knock warrant for the home of Mrs. Kathryn Johnston. In order to get the warrant, the officers invented an imaginary snitch, telling the magistrate judge that a non-existent “reliable confidential informant” had bought crack at Mrs. Johnston’s home. While executing the warrant on November 21, 2006, police shot and killed the 92-year-old grandmother.

Criminal informants often continue to commit crimes while working for the government. To its embarrassment, the Secret Service discovered that one of their top former informants, Albert Gonzalez, was running one of the largest credit card

data theft rings in the country. Gonzalez had used his connections with the government to promote his illegal activities and also to tip off other hackers on how to avoid detection.

Sometimes informants themselves are victims. Rachel Hoffman was a Florida State college graduate with a bright future. Caught with a small amount of marijuana and some illegal pills, she agreed to work as an informant in order to avoid prison. Police sent her on a sting to buy a large amount of drugs and a gun—Rachel was killed during the sting, in May 2008.

Such stories of crime and violence illustrate the pervasive and complex role that informants play in our justice system. To be sure, informants can be a valuable investigative tool, offering the government a powerful weapon against criminal organizations and hard-to-crack cases. But the significant costs and dangers of the policy have remained almost completely overlooked. Moreover, because the deals between criminal suspects and the government tend to remain undocumented and unregulated, there is very little public data about the ways that police and prosecutors wield their immense discretion to create, forgive and deploy informants.

It is time for this state of affairs to change. The use of criminal informants is an important public policy that determines the outcome of thousands of investigations and cases every year, costing millions of dollars and touching millions of lives. It should no longer be permitted to operate off-the-record and in the shadows.

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**NOTICE OF PENDENCY OF CLASS ACTION CIVIL RIGHTS COMPLAINT
AGAINST TRANSCOR AMERICA, LLC.**

TO: ALL INMATES AND DETAINEES WHO WERE TRANSPORTED FOR MORE THAN TWENTY-FOUR (24) HOURS CONTINUOUSLY, THIS NOTICE MAY EFFECT YOUR LEGAL RIGHTS.

If you were transported by TransCor America, LLC, from a jail, prison, or state hospital in restraints, remained in the vehicle for more than 24 hours, and were deprived of overnight sleep in a bed between February 14, 2006, and the present, you are a member of this national civil rights class action now pending in federal court in San Francisco, California.

PLEASE READ THIS COURT-ORDERED CLASS-ACTION NOTICE

WHAT IS THIS CASE ABOUT? There is now pending in the District Court for the Northern District of California a class action entitled *Kevin M. Schilling, John Pinedo, William Tellez, on Behalf of Themselves and All Those Similarly Situated v. TransCor America, LLC, Sgt. John Smith, Officer Blanden, and Does 1 through 100*, Cause No. 3:08-cv-00941 SI. This Notice explains the nature of the litigation and informs you of your legal rights and obligations.

Plaintiffs are pre-trial detainees and sentenced prisoners who were transported by TransCor America, LLC, a private prisoner transport company, who remained in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class includes all pretrial detainees and prisoners who were transported by TransCor, for more than twenty-four (24) hours continuously, except pretrial detainees and prisoners who were transported on behalf of a federal agency.

Plaintiffs have sued TransCor America, LLC, for damages for cruel and unusual punishment for keeping them on the vehicles for twenty-four (24) hours or more and depriving them of overnight rest in a bed.

Plaintiffs allege that conditions on the transport vehicles violated the United States Constitution and the California State Constitution applicable to persons transported in California. Defendant denies that the conditions under which the company transported prisoners and pre-trial detainees violated their rights. The District Court Judge has issued an Order certifying this case to proceed as a national class action.

WHO IS IN THE CLASS? Plaintiffs filed this action on behalf of themselves and all other persons similarly situated. The Court has certified a class consisting of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who remained in restraints in the transport vehicle for more than twenty-four (24) hours continuously without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than twenty-four (24) hours. The class does not include pretrial detainees and prisoners who were transported by TransCor on behalf of a federal agency.

MUST I DO ANYTHING TO REMAIN IN THE CLASS? If you are a member of the class described above, you do not have to do anything to remain in the class. If you do not request exclusion from the class, you will remain a class member. If you wish to exclude yourself from the class, you must follow the procedure set forth in the following paragraph.

MAY I EXCLUDE MYSELF FROM THE CLASS? If you do not wish to be considered a member of this class, or do not wish to be represented by the plaintiffs in this action, you may be excluded from the action by mailing a letter which must be postmarked on or before August 16, 2010, requesting exclusion from the class and addressed to either:

Attorneys for Plaintiffs:

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Andrew C. Schwartz, Esq.
2121 N. California Blvd., Suite 1020
Walnut Creek, CA 94596
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Mark E. Merin
2001 P Street, Suite 100
Sacramento, CA 95811
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Karen L. Snell
Attorney at Law
c/o Andrew C. Schwartz, Esq.
2121 N. California Blvd.
Suite 1020
Walnut Creek, CA 94596

The letter should include the name and number of the case, *Schilling et al. v. TransCor America, LLC, et al.*, Case No. C 08-941 SI, your name and address, and a clear statement that you do not wish to be considered a member of the class and do not wish to be bound by the judgment in the action.

WHAT IS THE LEGAL EFFECT OF A DECISION TO REMAIN A CLASS MEMBER? This lawsuit will eventually conclude with a judgment in favor of or against all the members of the class. That judgment, whether favorable or not to class members, will bind the members of the class. That judgment will prevent any class member who does not request exclusion by a letter as described above, postmarked on or before August 16, 2010, from filing his or her own lawsuit to recover damages arising from the conditions of transport which are the subject of this class action.

MAY I HIRE MY OWN SEPARATE ATTORNEY? If you do not request exclusion, this action will be maintained on your behalf by plaintiffs and their attorneys listed above.

HOW CAN I OBTAIN ADDITIONAL INFORMATION? You can obtain further information about this action by contacting the attorneys for the plaintiffs and class members in this action. Their information is provided above.

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Secret Justice (cont.)

II. The Real Deal: How Snitching Works

The heart of snitching is the deal between the government and the criminal suspect, in which the government permits the suspect to avoid potential criminal liability or punishment in exchange for information. In this sense, "snitching" refers to a relatively narrow class of people who give information to the government in exchange for impunity for their own crimes; it is not about whistleblowers, crime victims, civilian witnesses or people who call "911." Rather, criminal informant deals are special because they involve a decision by the government to forego arrest, prosecution or punishment. In other words, snitch deals are a form of plea bargain. This is one of the most important features of informant use: it is not merely an investigative tactic, but a widespread, secretive and almost completely unregulated method of resolving guilt.

There are as many kinds of snitches as there are criminal offenders. Mark Whitacre—subject of the book and movie *The Informant*—was a high-level executive at the corporate giant Archer Daniels Midland. Whitacre became an FBI informant in part to provide crucial evidence to the government about ADM's illegal price fixing activities, and in part to cover up his own multi-million-dollar embezzlement scheme. Mafia hit man Salvatore "Sammy the Bull" Gravano became one of history's best known informants by testifying against his boss John Gotti and dozens of other mafia operatives in exchange for a five-year sentence for 19 murders he committed. Once in witness protection, Gravano went on to establish a massive ecstasy distribution ring in his new home state of Arizona.

Police and prosecutors have essentially unfettered discretion to enter into informant deals. Anyone can be made into an informant, regardless of the nature of their offense, and nearly anything can be traded, including sex, the treatment of family members and money. For example, informant Amy Geffert worked off her drug charges by posing as a prostitute and having sex with another suspect. Andrew Fastow, CFO of Enron, earned leniency for his wife Lea by cooperating against Enron CEO Kenneth Lay. Informants can also earn substantial sums of money

through forfeiture laws, which authorize giving informants up to 25 percent of the value of seized assets. While it is illegal for police to reward their informants directly with drugs, police acknowledge that in practice they often indirectly supply drugs to their informants, either because informants routinely "skim" off controlled buys, or because police give informants small amounts of cash knowing that it will be used to purchase drugs.

In exchange for cooperation, informants can earn forgiveness for every kind of crime. While the most common snitch deals typically involve drug offenses, there are many other core categories of informants who earn leniency for all sorts of crimes: from jailhouse snitches to mafia informants to antitrust defendants. The U.S. Sentencing Commission reports that federal defendants in every single offense category receive sentence reductions for cooperation, from murder to child pornography. In other words, no crime is off limits.

Informant deals vary widely by context: corporate fraud snitches are treated very differently from drug informants, while terrorism informants are in a class of their own. Informants with defense counsel tend to get better, determinate, documented deals. By contrast, unrepresented informants who negotiate directly with police—typically street and drug snitches—are essentially at the government's mercy, relying on the unwritten law of the street that information and cooperation will eventually be rewarded. In other words, while the basic contours of the snitch deal remain the same, every case has its own distinctive character.

III. How Many Are There? The Scope of the Informant Phenomenon

While informants have been around since time immemorial [*ed. note: consider Judas*], the past few decades have seen an explosion in their use and numbers. This is largely due to the war on drugs, but the phenomenon has spread to every area of law enforcement.

How many criminal informants are there? The first thing to note is that the government does not nor is it obligated to keep track of the informants it creates, how many crimes they commit, or how many crimes they help solve. While the federal government has started keeping some records, most state and local governments simply have no mechanism for counting their snitches. Accordingly,

Secret Justice (cont.)

we can only estimate the actual number of informants based on other criminal justice data.

Drug enforcement is the biggest generator of informants. Police, prosecutors, defense attorneys and judges all describe drug cases as relying on or creating informants in one way or another: informants typically provide information or make controlled buys; once arrested, drug suspects routinely become informants themselves; and a drug defendant's cooperation may be the single largest factor in negotiating a plea bargain or determining a sentence. Indeed, some police assert that they could not investigate drug cases without informants. Since drug cases make up about one third of the U.S. criminal justice system—the largest single type of case—this means that a large percentage of our criminal process is heavily dependent on informant use.

The limited available data confirms this general picture. The U.S. Sentencing Commission estimates that approximately half of all federal drug defendants cooperate in some way, although not all cooperators receive sentencing credit. This number itself likely understates the scale of the phenomenon; for example, it does not include cooperating offenders who avoid arrest and prosecution in the first place, or who cooperate with agents in informal ways that do not get documented.

Nevertheless, the estimate confirms widespread cooperation in drug cases.

At the same time, federal data is of limited value in assessing the number of informants at the state and local levels. This is for two reasons: the first is that the federal system is small—just a tenth of the entire criminal justice system. The second is that federal drug laws and sentencing guidelines are expressly designed to extract cooperation from defendants; this may or may not be true for other jurisdictions. At the same time, criminological studies of street crime and local policing indicate that snitching is widespread, perhaps even more so than federal data suggest. Some sociologists conclude that most street level criminals routinely cooperate with police as a matter of daily survival. So while we do not know for certain how many informants exist in the worlds of street and drug crime, snitching is clearly a pervasive reality.

Outside the world of drug enforcement, informant use has made its way into every single category of crime. The practice is becoming increasingly prevalent in white collar and fraud investigations, while defendants earn cooperation credit in every category of federal offense. In sum, while the massive world of drug enforcement creates the most informants, every arena of law enforcement uses and contributes to the practice.

IV. The Special Problem of Poor, High-Crime Neighborhoods

"No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeding the streets with informers and offering deals to 'snitches.' . . . [R]elying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families, in the community, or on the streets—loyalties which, in past years, kept violence within bounds."

— Dr. Jerome Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (1996)

Unbeknownst to the general public, the widespread use of criminal informants inflicts special harms on poor, high-crime, minority neighborhoods. Because drug enforcement is so pervasive in these communities, informant use is likewise common. This means that all the dangers of snitching—more crime and violence, unreliability and distrust—are concentrated in these already vulnerable neighborhoods,

sometimes with devastating results.

It has become all too well recognized that the war on drugs disproportionately targets African Americans. Although blacks and whites use and sell drugs at approximately the same rates, the justice system arrests, prosecutes and punishes blacks far more often and more harshly than it does whites for the same offenses. In some states, African Americans are arrested and prosecuted for drug offenses at more than fifty times the rate of whites. The trends for Latinos are similar. The racial skew in drug enforcement largely explains why the American prison population is now overwhelmingly black and brown: 75 percent of all incarcerated drug offenders are African American or Latino.

The racial skew in drug enforcement begins in black neighborhoods. Arrest rates for African American urban residents have skyrocketed over the past two decades, in some cities by over 500%. Because police routinely pressure drug arrestees to become informants, this means that a growing proportion of the poor urban population is likely to encounter pressure to snitch at some point.

We can only extrapolate how many informants are in poor black neighborhoods. Nationally, one third of African American men between the ages of 20 and 29 are under correctional supervision: either incarcerated, on probation or on parole. But this staggering number is somewhat misleading because it is a national average. In high-income, well-educated neighborhoods, the number is much lower. Conversely, in poor neighborhoods with weak educational resources and scarce jobs, the numbers will be higher. Indeed, in cities such as Washington, D.C. and Baltimore, Maryland, as many as half of the young black men in this age bracket are under correctional supervision at any given time.

Approximately half of these supervised young men are in the justice system for a drug-related offense, either a charge of possession or distribution, or a property offense committed in order to satisfy a substance abuse problem. This group of offenders—one quarter of the young black male population—is therefore at especially high risk of becoming informants because drug offenders—with their connections to the drug economy—are so likely to be pressured to cooperate.

Of course, being pressured to snitch and actually doing so are entirely different matters, particularly in this day and

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age where becoming an informant can be extremely dangerous. [Editor's Note: Given the pervasive number of informants, the physical risks are statistically quite minimal.] At the federal level, fifty percent of drug defendants cooperate, but as explained above, this may be too high a percentage for state and local jurisdictions. At the same time, sociological research suggests that street and local criminal offenders probably cooperate informally with police at very high rates. For the sake of argument, assume that state and local drug offenders inform at half the rate of federal offenders, in other words, at a rate of 25 percent. That would mean that for the young black male population in these high-crime pockets of poverty, half of whom are under correctional supervision, half of *those* are drug-related offenders, and one quarter of *those*—one in sixteen, or about six percent of the total—may actually be cooperating with the government.

Six percent would be a lot. It would implicate every extended family, every apartment complex, every neighborhood gathering and informal social network. It would mean that most people would know someone—maybe more than one someone—actively looking for incriminating information about others and working off their own liability in the process.

If snitching is anywhere near as pervasive in poor minority neighborhoods as this analysis suggests, it should no longer be treated solely as a law enforcement tactic. Instead, using snitches on this scale is a social policy and a deeply problematic one at that: a policy that affects the way

people behave and perceive each other, the way they relate to police, and the way they understand the law.

Another consequence of this policy is that the residents of poor neighborhoods are over-exposed to the dangers of snitching. When active informants commit new crimes, those crimes are visited upon the neighborhood. When informants finger innocent people, family, friends and neighbors are at risk. In other words, the costs of the law enforcement decision to rely heavily on criminal informants are borne primarily by those who can least afford it.

V. "Stop Snitching": Community Reactions to Informant Policies

About a decade ago, I was teaching an after-school law class in a community center in inner-city Baltimore. The class was getting restless when a young boy raised his hand. He said to me:

"I got a question. Police let dealers stay on the corner 'cuz they're snitching. Is that legal? I mean, can the police do that?"

When I explained to him that police could indeed do that, that police have discretion to let offenders remain at large, the boy and his friends were disgusted. "Police aren't doing their jobs!" exclaimed one teenager. "So all you got to do is snitch and you can keep on dealing," concluded another.

These children had received a disturbing message from the criminal justice system's heavy use of informants: that crime is negotiable and that justice is for sale. This message is one of the great,

unremarked costs of snitching.

The "stop snitching" phenomenon is a product of these same neighborhoods. These days, the motto "stop snitching"—sporting on t-shirts or proclaimed on rap DVDs—means different things to different people. For some, it is a form of witness intimidation: in many cities police complain that a "stop snitching culture" is preventing witnesses from coming forward and impeding the government's ability to solve serious crimes. For others, "stop snitching" expresses distrust of the police, the same kind of distrust that has long existed between police and residents of minority communities. In this context, "stop snitching" has become a new way of

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saying that the police are not on our side. And for yet others, “stop snitching” is just a fashion statement, a graphic on a shirt or the lyric of a song.

For all the various meanings that the “stop snitching” motto has accumulated, it bears remembering that the motto got its legs in neighborhoods that have lived with the war on drugs for over twenty years. That’s two decades of young people seeing drug dealers stay on corners “‘cuz they’re snitching.” That’s two decades of watching addicted friends and family members trading information to the police in exchange for drug money and freedom, or seeing loved ones caving under the pressure of long mandatory minimum drug sentences. In all these ways, criminal informant use has become an important if nearly invisible part of the social devastation in poor, high-crime, largely minority communities. It is also influenced by seeing the most effective “stop snitching” campaign in the country in action: the “blue wall of silence” where police misconduct and abuse is protected at all levels at any cost. The interesting

juxtaposition is that while police and law enforcement use an army of informants to ferret out some criminal activity, they actively discourage informants in their own ranks.

VI. The Law

There are many legal aspects to informant use. Some have to do with police and prosecutorial power to create, reward and punish informants. Others govern the ways that the government can deploy informants to get information about other people. The U.S. Constitution contains procedural protections for defendants who are charged with crimes based on information from informants. A few rules limit the government’s informant authority. The overall picture is one of tremendous official power to create and use informants, with few restrictions or requirements.

What follows is a very general descriptive outline of the law of informant use. It is informational only and should not be construed as legal advice.

Police and Prosecutorial Discretion

The law imposes almost no restraints on police and prosecutorial authority to

create and reward informants. As long as police have probable cause to believe a suspect has committed a crime, they have complete discretion to arrest or not to arrest, and the law permits them to use that opportunity to seek information. Prosecutors likewise have nearly unreviewable discretion to make charging decisions, and can make those decisions based on a defendant’s cooperativeness or lack thereof. Police and prosecutorial discretion is the central reason why informant use remains largely unregulated and undocumented; U.S. law simply delegates decisions about who should become an informant and how they should be rewarded to individual law enforcement officials.

The law distinguishes between police and prosecutors due to their distinct legal functions. Police are essentially fact investigators and they tend to have the most direct relationship with informants, making first contact or acting as an active informant’s “handler.” Prosecutors make legal decisions about cases—such as what crimes to charge—and handle plea bargaining and sentencing negotiations. Police lack legal authority to make promises to informants about what charges will be filed—only a prosecutor can do that—although in practice, police strongly influence what crimes informants are eventually prosecuted for. Police and prosecutors may also work together designing investigations and making decisions about how to handle informants, but the law treats them differently. For example, prosecutors have absolute immunity from civil lawsuits for their decisions about how to prosecute cases (meaning that they cannot be sued at all), while police have only qualified immunity (which means they can be sued under certain circumstances). If prosecutors act like police, engaging in investigations or other non-judicial functions, they may lose their absolute immunity.

As long as the government has a legal basis for prosecution, it can wield that threat to get an informant to do almost anything. For example, in *Alexander v. DeAngelo*, 329 F.3d 912 (7th Cir. 2003), the Seventh Circuit Court of Appeals held that the government could legally pressure an informant to pose as a prostitute and to have oral sex with another suspect in exchange for dropping drug charges. As Judge Richard Posner put it:

“[C]onfidential informants often agree to engage in risky undercover work in exchange for leniency, and we cannot

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think of any reason, especially any reason rooted in constitutional text or doctrine, for creating a categorical prohibition against the informant's incurring [costs such as] the usual risk of being beaten up or for that matter bumped off by a drug dealer with whom one is negotiating a purchase or sale of drugs in the hope of obtaining lenient treatment from the government."

At the same time, the court also held that the government could not coerce the defendant into having sex through lies and misrepresentations; for example, by telling the defendant that she faced a forty-year sentence when it was really only ten years, or by pressuring her not to call a lawyer. In *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992), the court held that it was legal for the government to threaten to prosecute the defendant's seriously ill wife in order to get him to cooperate, an arrangement referred to as a "wired plea" because the treatment of one defendant is "wired" to the cooperation of another.

Authorizing Informant Crime

The government also has complete discretion to ignore crimes committed by its informants. Because police and prosecutors are never legally obligated to arrest or prosecute anyone, this translates into the ability to forgive informant crimes simply by failing to pursue them.

The government can also authorize informants to commit additional crimes as part of investigations, such as selling drugs. For example, the FBI's informant guidelines specify two tiers of illegal activity—Tier One and Tier Two—that an informant can commit when authorized by his or her handler. The guidelines also specify crimes, such as violent crimes or perjury, which handlers cannot authorize. If an informant has been authorized to

commit an offense, the government cannot later prosecute him for that crime. This is referred to as the "public authority" defense, or sometimes as "estoppel." It is such a common issue that the Federal Rules of Criminal Procedure have a special section—Rule 12.3—to govern cases where defendants assert that they committed their crimes with "public authority," meaning the government told them they could do it.

Sentencing

The main reward for being an informant is the ability to avoid criminal charges or to get a shorter sentence. The U.S. Sentencing Guidelines have a famous provision called § 5K1.1 which governs sentencing departures for cooperation, i.e., a court's decision to give a defendant a sentence that is lower than the Guidelines would otherwise require because he or she provided "substantial assistance" to the government. Separate and apart from the Guidelines, federal drug law also imposes mandatory minimum sentences which are infamously long—sometimes decades for a first offense. 18 U.S.C. § 3553(e) permits a court to sentence a defendant below these statutory mandatory minimums if the government files a motion stating that the defendant has provided "substantial assistance." Because courts lack authority to impose shorter sentences without a substantial assistance motion, cooperation has become one of the only ways that drug defendants can avoid decades or even life in prison.

Investigations

Another area of law governs how informants can be used to investigate others. The Supreme Court has given the government nearly unfettered authority to use informants in investigations by

exempting informant use from many of the constraints of the Fourth, Fifth and Sixth Amendments.

The seminal case in this area is *Hoffa v. United States*, 385 U.S. 293 (1966). In that case, the Supreme Court held that the government could use a criminal informant recruited from a Louisiana jail cell in order to get incriminating information from Teamster President Jimmy Hoffa. Because Hoffa let the informant into his hotel room and spoke freely in front of him, the Court decided that Hoffa had no reasonable expectation of privacy in that information, and therefore the government could use it without violating the Fourth Amendment's prohibition on unreasonable searches and seizures. The Supreme Court has also authorized the use of wired informants to record information electronically.

Usually, the Fourth Amendment requires the government to have probable cause and a warrant before it can enter private hotel rooms or surreptitiously tape people's statements. Before a warrant can issue, a court has to decide whether the government has enough evidence to justify the intrusion into the target's privacy. Informants are therefore an extremely powerful tool: they permit the government to seek out and even record private information without concrete evidence of wrongdoing or a warrant, and without asking a judge. Interestingly, several states, including Massachusetts and Pennsylvania, have rejected this broad grant of investigative authority and held that under their state constitutions, warrantless informant recordings in private places like the home violate the right to privacy.

The Fifth Amendment is the basis for the famous *Miranda* warnings, under which the government cannot interrogate suspects in custody without warning them

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that they have the right to remain silent and the right to counsel. The Supreme Court has held that these rules do not apply to undercover informants. For example, a jailhouse snitch working for the government can question a suspect without triggering *Miranda*, even though if police asked those questions directly the suspect would have to be *Mirandized*. This rule applies only if the suspect has not yet been charged with a crime. Once formally charged, a suspect has the right to counsel and the government cannot use an informant to deliberately elicit information from him about that crime.

These rules also have implications for the making of informants in the first place. *Miranda* warnings are required only when a suspect is in custody, so a police officer talking to a suspect on the street corner can ask questions and try to make a deal as long as the suspect is not yet arrested or otherwise prevented from leaving. In other words, the government has many opportunities to communicate with potential informants, and to use informants to get information, without constitutional restrictions.

Procedural Protections for Defendants

The last big category of informant law applies to defendants who are charged with crimes based on information from informants. Most of these rules are informational—they tell the government what information it must disclose to defendants about informants used in their cases, a disclosure process typically referred to as “discovery.” This section discusses federal constitutional law—states can and often do adopt broader disclosure requirements.

Informant disclosure rules are very protective of the government’s ability to keep its information sources secret, particularly during investigations. The closer the defendant gets to trial, however, the more the government must disclose. For example, in *McCray v. Illinois*, 386 U.S. 300 (1967), the Supreme Court held that the government need not disclose the identity of an informant who provides information leading to an arrest or warrant. By contrast, at trial, if the government wants to withhold its informant’s identity it must show that the defendant’s right to a fair trial will not be impaired.

In addition to identity, the government may also have to reveal other information about its informants. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the government must turn over to the defendant “all evidence favorable to an accused ... where the evidence is material either to guilt or to punishment.” As part of its *Brady* obligations, the government must disclose any evidence impeaching a government witness’s credibility, i.e., any evidence that suggests the witness might be lying. In *Giglio v. United States*, 405 U.S. 150 (1972), for example, the government failed to disclose that it had promised its criminal informant witness not to prosecute him in exchange for his testimony. The Court concluded that this nondisclosure violated due process because it deprived the defendant of a fair trial. Under these rules, the government must give the defense all impeachment information about its informant witnesses, such as any promised benefits, prior inconsistent statements, the informant’s prior criminal history, and any history of perjury or recantations.

These constitutional disclosure rules, however, only apply to defendants who go to trial. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court decided that defendants who plead guilty are not entitled to *Giglio* impeachment material. Because 90-95 percent of all felony cases in the U.S. are resolved by plea, the vast majority of defendants will never see impeachment information about the informants who contributed to their cases. Since cases so rarely go to trial, most informant information therefore will never be revealed, either to the defendant, the court or the public.

What the Government Can’t Do: Outrageous Government Conduct

While the government has wide discretion in this area, there are a few doctrines that tell the government what it cannot do to and with its informants. For example, the government cannot knowingly use a lying informant as a witness, or withhold potentially exculpatory material from the defense. The government also cannot engage in “outrageous governmental conduct,” for example by using an informant to set up criminal activity to ensnare a defendant who otherwise would not have committed any crime. Courts rarely consider informant use to be outrageous, but it occasionally happens.

When the government uses an informant in an illegal way, the typical

remedy is to overturn the conviction. The government is rarely held civilly liable for the harmful actions of its informants, although some courts have contemplated it. A few informants have turned around and sued the government themselves, either because the government broke its promises of compensation or because the informant was harmed in ways that the government could have prevented.

As this brief overview reveals, informant law is essentially a vast delegation of power to law enforcement: the government can create, reward and deploy informants in almost any way it wants, subject to some limited disclosure rules that kick in only when defendants choose to go to trial. It is against this framework of unregulated official authority that the challenges of informant use must be understood and addressed.

VII. Problems

The pervasive use of informants throughout the U.S. criminal justice system exacerbates four central problems: unreliability, crime, inequality and secrecy. Because informant use is so secretive, many of these problems in turn have slipped beneath the public radar.

A. Unreliability

Information obtained from informants is infamously unreliable. A 2004 study by Northwestern University Law School examined all the wrongful capital convictions discovered to date. The study concluded that over 45 percent of those innocence cases were due to the testimony of a lying informant, making “snitches the leading cause of wrongful convictions in U.S. capital cases.” Jailhouse snitches, in particular, have incriminated so many innocent people that numerous states are starting to consider restricting their use.

Drug informants are another troubling source of error. In a case that generated an ACLU lawsuit and inspired the movie *American Violet*, Derrick Megress was a drug informant in Hearne, Texas. Facing new burglary charges, the prosecutor offered to drop charges if Megress would produce twenty new arrests. Based on Megress’s fabricated evidence, a federally-funded drug task force swept through the local housing project, arresting and prosecuting dozens of innocent residents.

Of course, sometimes informants tell the truth. The problem with informants, therefore, is not merely that they lie,

but that their information is difficult to check, that police and prosecutors rely so heavily on them, and that ultimately—as numerous wrongful convictions demonstrate—juries often believe them. In other words, our system is not well-designed to differentiate good informant information from bad. Until we adopt better checking mechanisms, our justice system will continue to be plagued by the specter of the innocent convict, behind bars based on the self-serving testimony of a criminal informant.

B. Crime

Perhaps the most fundamental compromise of informant use is that it requires the government to tolerate crime, thereby jeopardizing the integrity of the entire system. By their very nature, informant deals require law enforcement to ignore the severity of crimes committed by informants—the heart of the snitching deal. Active informants typically continue to commit new crimes in order to generate information for their handlers and to remain connected to criminal networks, from drug dealing to fraud schemes to violence. And finally, law enforcement officials routinely acknowledge that infor-

ants tend to continue to offend on their own. The government may turn a blind eye to this new criminal activity, or even assist its informants in escaping punishment for these new crimes once detected.

All this informant crime—whether authorized by the government or not—has a real effect on individuals and communities. Such crimes erode the quality of life in neighborhoods and undermine businesses; they strike fear and insecurity into the hearts of family, friends and neighbors. Informant crime also sends a pernicious message to victims—that the government has decided to tolerate their suffering in exchange for the value of the informant's cooperation. When the government gets into the business of permitting and even promoting crime for investigative purposes, it flips the entire law enforcement endeavor on its head.

C. Inequality and the Vulnerable Informant

For all the harms they inflict, informants are often victims themselves. Like most of the criminal justice population, street and drug informants are likely to be vulnerable—suffering from substance abuse or mental health issues, and lack-

ing in literacy and other skills. Because the law provides informants with so little protection, they can be subject to abuse and exploitation by law enforcement as well as other offenders. As one sociologist put it, the creation of an informant “is not a paradigm of simple bargaining between equals but, rather, a complex interaction between personnel of the criminal justice system and vulnerable people.”

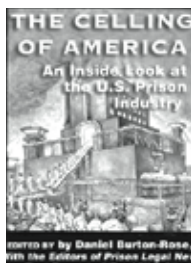
In the summer of 2009, this lesson drove the Florida legislature to pass groundbreaking legislation to better protect new informants. As described at the beginning of this article, Rachel Hoffman was a young informant who was killed when Tallahassee police sent her on a dangerous sting. After her death, her parents began a public education and lobbying campaign, and the legislature eventually passed “Rachel's Law” in her name. Rachel's Law requires Florida police to create guidelines governing the process of creating informants, and in particular to consider a suspect's youth and inexperience, as well as the level of danger he or she might face, before making an informant deal. Potential informants must be told that police cannot make promises about the disposition of

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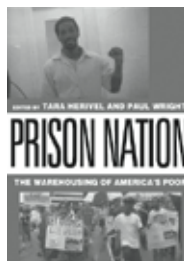
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criminal charges—only prosecutors can do that. The original draft of the legislation would also have given suspects access to legal counsel before deciding whether to become informants, but that provision was eliminated in the final version.

The lack of counsel for poor informants is particularly inequitable. Elsewhere in our justice system, it is considered fundamentally unfair to force people suspected of crimes to take on the government by themselves without a lawyer. The Sixth Amendment guarantees the right to counsel for people who plead guilty, who go to trial, and who are charged with a crime and want a lawyer during an interrogation. Informants do not yet have this right, even though the decision to snitch can be as crucial, even life-threatening, as any decision a suspect will ever make.

Of course, some informants are more vulnerable than others. While the law is the same regardless of the nature of the offense, the official culture of snitching in the white collar arena—where defendants tend to be wealthier, whiter and better educated—is very different from the world of street and drug informants. The kinds of intrusions and deals that are longstanding staples of drug enforcement—open-ended deals, lack of counsel, the toleration or even requirement of continued criminal activity—are often considered inappropriate or distasteful in the white collar arena. For example, street and drug snitches routinely make deals without counsel, under heavy personal pressure from police. But when the U.S. Department of Justice started pressuring corporate informants to relinquish their counsel and confidentiality rights, there was a national outcry and DOJ had to revise its practices. Similarly, street and drug informants are typically offenders themselves, and often receive rewards and punishment simultaneously. But when the IRS offered a multi-million dollar bounty payment to a Swiss banker who provided evidence about U.S. tax evaders, the blogosphere was awash with concern that the banker himself was a criminal, facing over three years for his part in the fraud.

Some of these disparities, of course, flow from real differences between street and corporate crime itself. Unlike a drug ring, most corporate behavior is perfectly legal and the government does not want to

harm legitimate economic activity. But the government is also much more likely to be held accountable in the white collar arena, where defendants are well-represented by counsel and often have powerful political allies. As a result, white collar snitching is far more regulated and restrained than its street-crime counterpart.

D. Secrecy

Snitching is inherently secretive. Investigations and informant identities must be kept confidential in order to be effective. But the clandestine, undocumented nature of informant use has made the entire American criminal justice system more secretive and less accountable. Informant investigations may take place without documentation or external oversight. Through informal snitch deals, the potential guilt of thousands of suspects is negotiated and resolved off-the-record. When cases do make it to court, documents are often sealed. Because the government does not have to disclose its informant deals, practices or other information, it is nearly impossible for the public to find out how the system is being run or to hold anyone accountable.

There are a myriad of ways in which the informant culture of secrecy affects the workings of the justice system. Here are just a couple of examples. In 2009, police supervisors in St. Louis became concerned about allegations that officers were using imaginary or “phantom” informants to get warrants. When supervisors asked their officers to reveal the names of their snitches, however, they refused to turn them over and the police union got a temporary restraining order against the department. The police officers argued that forcing them to reveal their informants to their own departmental supervisors would undermine their ability to use informants and jeopardize their careers. A court eventually required the police to turn over the names, but the anecdote reveals how deep-seated the culture of secrecy is, even within a single police department.

Courts also perpetuate informant secrecy, sealing cases and reducing public access to information about the criminal justice system. For example, worried about informant confidentiality and safety, several federal judicial districts eliminated public website access to criminal docket entries in 2007—not only for cases that involved informants but for all criminal cases. The year before, an *Associated Press* investigation revealed a system of “secret

dockets” in Washington, D.C., in which nearly five thousand cases remained sealed long after they were over, and in which the system falsely indicated that there was “no such case” when certain case numbers were entered into the public court docket system.

This increasing disposition towards sealing, secrecy and restricted access is in tension with the fundamental idea that the American legal system is public. The Supreme Court has long held that members of the public, including the press, have the right to gather information about the workings of government in order to keep public officials accountable. Transparency ensures that the government is actually doing what it tells its constituents. Snitching—with its secret, off-the-record deals and unregulated government authority—takes the system in precisely the opposite direction.

VIII. Reforms

This is an exciting time for informant reform. From California to New York, Texas, Florida, Illinois, Nebraska and Wisconsin, states have considered or implemented new rules for making and using informants. Congress has held several hearings and federal legislation is being proposed. Here are just a few of the proposals and reforms:

- data collection on state and local informant practices
- police and prosecutorial guidelines
- providing counsel for potential informants
- rewarding informants who testify for the defense
- corroboration requirements and reliability hearings for jailhouse informants

While many of these proposed reforms are piecemeal, they are just the beginning. Public awareness about informant use is increasing, and in ten years the law and culture of informant use is likely to look very different. Such changes could help our entire criminal justice system become more accurate, more fair, and more accountable. ■

Alexandra Natapoff is the author of the new book Snitching: Criminal Informants and the Erosion of American Justice (New York University Press), which received a 2010 Silver Gavel Award Honorable Mention from the American Bar Association. She is a Professor of Law at Loyola Law School in Los Angeles, and wrote this article exclusively for PLN.

New Details Regarding Race Riot at USP Florence

by Brandon Sample

More details have emerged about the April 2008 race riot that occurred at the United States Penitentiary (USP) in Florence, Colorado, as prisoners who participated in the violent disturbance have pleaded guilty after being criminally charged.

The riot started after members of the Aryan Brotherhood (AB) began yelling racial epithets at African American prisoners on the recreation yard on April 20, 2008. The ABs were celebrating Adolph Hitler's birthday, and some were drinking homemade alcohol. Around 200 prisoners were involved in the resulting melee. [See: *PLN*, August 2009, p.10].

It took almost 30 minutes after the brawl began for "sufficient staff" to respond, federal officials wrote in a court filing. "The staff then were able to separate the two groups [that were fighting]." In the process, two prisoners, Brian Scott Kubik and Phillip Lee Hooker, were shot to death by BOP guards.

"Staff formed a line of containment and pushed one group of inmates into the gymnasium, leaving the other group on the yard," prison officials stated. "Since the gym inmates continued to be disruptive and antagonistic toward staff, they were secured in the gym alone without correctional officers and remained there for approximately four hours."

Four white prisoners in the gym

severely beat Dirk Horne, another white prisoner, who had "refused to participate" in the riot. "The assault on Horne continued until staff arrived in sufficient numbers to order the inmates to stop and to direct Horne to walk out of the gym to a safe area where staff members were positioned," according to a plea agreement between prosecutors and Richard Frey, one of Horne's attackers. "Once out of harm's way, Horne collapsed and was taken by wheelchair to medical personnel for immediate attention."

Horne suffered a broken nose, a laceration to his left ear, fractured ribs, and bruising and swelling from the brutal attack. According to court documents, he was unrecognizable due to "the size of his swollen head that had turned purple in color." The entire incident was caught on camera.

Frey accepted a plea bargain and was sentenced in January 2010 to an additional 46 months in prison, three years supervised release and \$8,657 in restitution. Prisoners Christopher Copeland, Clifford Leonard and Jody Stamp also were indicted for their involvement in the attack. A fifth prisoner, Douglas Brannan, was charged with possessing contraband in a federal prison after he was discovered with a "shank"; he was sentenced to 12 months in prison plus three years supervised release.

Following the April 2008 riot, five prisoners were taken to a local hospital

for injuries, including gunshot wounds, and another 30 were treated at the prison's medical facility. Four staff members suffered minor injuries. Over 200 rounds of ammunition were discharged during the riot, plus tear gas, pepper balls and sting grenades.

Two prisoners have since filed suit, claiming they did not participate in the disturbance but were nonetheless shot by BOP guards. Richard Steele, who was shot in the foot, and Edward Evey, who was struck in the face by a bullet fragment, allege that prison staff were aware the riot was going to occur. They state in their complaint that they complied with instructions to lie down with their hands on their head and were about 600 feet from the fighting, but were shot anyway.

"Inmates in the yard were intoxicated from homemade alcohol and armed with prison-made weapons. Prison officials were put on notice by inmates as to the pending riot and failed to take any action whatsoever to avert the situation," said their attorney, James C. Cerney. See: *Steele v. U.S. Bureau of Prisons*, U.S.D.C. (D. Col.), Case No. 1:09-cv-01557.

The BOP's official investigative report concerning the riot at USP Florence has not been made public. ■

Sources: www.corspecops.com, *Denver Post*

ATTENTION MISSOURI INMATES WITH HEPATITIS C

The ACLU is seeking information from Missouri inmates who have been diagnosed with Hepatitis C. We want to know whether Hepatitis C positive inmates are receiving treatment for the disease and, if so, what treatment they are receiving from the Missouri Department of Corrections and its medical contractor, Correctional Medical Services.

All information received will be kept confidential. To receive a questionnaire, please write to:

Legal Director, ACLU-KSWMO
Attn: Prison Medical Project
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From the Editor

by Paul Wright

As this issue goes to press we are getting settled into our new office in Brattleboro, Vermont. We have successfully consolidated our operations into one location. We also have just hired Adam Cook as our staff attorney who will be representing *Prison Legal News* in our censorship and public records litigation and select plaintiffs in catastrophic injury cases.

Mail addressed to our Seattle address is forwarded once a week. To avoid delays please write us directly here in Vermont and update your records to show our new contact information. When writing PLN please be brief and to the point because

wading through a ten page letter to find a change of address request can sometimes result in the request not being seen by staff. We still have limited resources so please do not send us legal pleadings or voluminous documents unless we request them. If you win or settle a case, please send us that information so we can report it in *PLN*.

As the articles in this issue attest, we have had some success in various court cases recently. We would like to thank the attorneys who represented us in those cases and the readers who assisted in bringing the censorship cases. Unfortunately, despite our continued courtroom

success, we still face censorship problems around the country and have to confront the implacable efforts of government censors. If your copies of *PLN* are censored please send us the documentation indicating the censorship as all too often we are not informed of the censorship.

With our new Vermont offices we are interested in building up our base of volunteers locally. If you live nearby or know anyone who does who is interested in human rights issues and is willing to do light office work please contact us.

Please encourage others to subscribe so we can continue building our subscriber base. ■

Dozens of CIA “Ghost” Detainees Unaccounted For

by Matt Clarke

A U.S. Dept. of Justice memo, released in April 2009, indicated the CIA had 94 people in secret prisons scattered around the world as of mid-2005, and the agency had “employed enhanced techniques to varying degrees in the interrogations of 28” of those prisoners which is the government definition of torture. The information in the memo dovetails with a September 2007 statement by then-CIA director Michael V. Hayden, who said “fewer than 100 people had been detained at CIA facilities.”

In September 2006, former president George W. Bush admitted the existence of the CIA’s secret detention program. Fourteen CIA prisoners were transferred to the military prison at Guantanamo Bay in Cuba, while other detainees with “little or no additional intelligence value ... [were returned] to their home countries for prosecution or detention by their governments.”

In 2006, Bush announced that he had discontinued the secret CIA prison program and admitted the U.S. had transferred detainees to Pakistan, Egypt and Jordan, but never revealed the individual identities or fate of the 80 prisoners who were not sent to Guantanamo. Thus, the International Committee for the Red Cross was unable to locate those detainees or learn the terms under which they were handed over to foreign governments. Some CIA prisoners were returned to Libya after the U.S. re-established dip-

lomatic relations with that country in mid-2006.

“If these men are now rotting in some Egyptian dungeon, the administration can’t pretend that it’s closed the doors on the CIA program,” said Joanne Mariner, director of Human Rights Watch’s Terrorism and Counterterrorism Program.

The Red Cross has publicly named several dozen people it believes were former prisoners held at CIA facilities, whose locations and fates remain unknown. “Until the U.S. government clarifies the fate and whereabouts of these individuals, these people are still disappeared, and disappearance is one of the most grave international human rights violations,” said New York University law professor Margaret Satterthwaite.

Although the CIA’s secret prison program has supposedly been dismantled, many “ghost” prisoners still remain in U.S. custody at a facility located at Bagram Air Force Base near Kabul, Afghanistan. [See: *PLN*, Oct. 2009, p.14]. News reports indicate that over 600 detainees are being held at Bagram; they are believed to include non-Afghans captured in other countries, as well as Afghan nationals. Some Bagram prisoners have been held at the facility for six years and at least two were murdered by U.S. personnel. [See. e.g., *PLN*, March 2010, p.20].

“The U.S. government’s detention of hundreds of prisoners at Bagram has been shrouded in complete secrecy. Bagram houses far more prisoners than Guantanamo, in reportedly worse conditions and with an even less meaningful process for challenging their detention, yet very little information about the Bagram facility or the prisoners held there has been made public,” said American Civil Liberties Union (ACLU) National Security Project staff attorney Melissa Goodman. “Without transparency, we can’t be sure that we’re doing the right thing – or even holding the right people – at Bagram.”

The ACLU has filed a Freedom of Information Act request for information regarding prisoners held by U.S. military officials at the Bagram prison.

In June 2007, human rights groups released the names of three dozen people who were or are in CIA custody outside the U.S., whose fates remain unknown. “The Obama administration must change course from its ‘forward-looking’ path because it leaves too many critical questions unanswered, including those about the fate of ghost prisoners held by the United States,” stated Gitanjali Gutierrez, an attorney with the Center for Constitutional Rights.

On January 27, 2010, a joint report issued by four United Nations officials, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Working

Group on Enforced or Involuntary Disappearances, found that “secret detention in connection with counter-terrorist policies remains a serious problem,” which, “[i]f resorted to in a widespread and systematic

manner ... might reach the threshold of a crime against humanity.”

The UN report specifically mentioned the “ghost” detainees held by the CIA in undisclosed prisons, while

also citing secret detention practices in 65 other nations. ■

Sources: www.ipsnews.net, www.propublica.org, www.truthout.org

ACLU Report Applauds Michigan's Efforts to Reduce Prison Population

by David M. Reutter

A November 2009 report by Elizabeth Alexander, Director of the National Prison Project of the ACLU, explores the history and effects of over-incarceration in Michigan and how the state has managed to reduce its prison population by roughly 8% during an era of unprecedented national prison growth.

The report concludes that steps taken by Michigan officials to reverse the “tidal wave of mass incarceration” without provoking a public backlash provide “a possible model for other states seeking a smarter and more affordable criminal justice policy.”

Between 1970 and 2005, the number of people imprisoned in the United States increased 700%. Our nation “locks up almost a quarter of the prisoners in the entire world. In fact, if all of our prisoners were confined in one city, that city would be the fourth largest in the country,” according to the ACLU report.

Although incarcerating more people lowers crime rates, it is sentencing and release policies – not crime rates – that determine the prison population. While crime rates continued to fall between 1991 and 1998, the rate of incarceration continued to increase. “During that time, the states that experienced below-average increases in their rate of incarceration actually experienced

above-average decreases in crime.”

The majority of high incarceration rates in the U.S. stem from the War on Drugs, which disproportionately affects racial minorities. The consequences of “the strong tendency of states to site prisons in rural, mainly white areas, and the census policy of counting prisoners where they are imprisoned rather than in the communities where they lived, and generally will return when released from prison, shifts congressional power and federal grant money to rural areas rather than impoverished urban areas” the report states.

“Michigan has long provided a textbook example of a dysfunctional criminal justice policy,” the ACLU observes, pointing to the state’s high incarceration rate, a law (repealed in 1998) that required mandatory life sentences for possession of 650 grams of cocaine or heroin, and a 0.2% parole grant rate for eligible lifers.

Yet Michigan has implemented changes that reduced its prison population by roughly 8% between March 2007 and November 2009. It achieved this reduction by revising parole policies “based on research that has identified practices and techniques that increase the accuracy of predicting which offenders can be safely released.” Unfortunately, lifers did not benefit from this research or this policy.

The Michigan Prisoner ReEntry

Initiative (MPRI) links reentry efforts within prisons to post-release support programs in local communities. [See: *PLN*, June 2009, p.36]. About 60 days before a prisoner’s expected release date, a specific reentry plan is prepared; after release, local community services work with ex-prisoners. Graduated sanctions are imposed when a parolee violates parole rules, addressing problem behavior without assessing technical violations that result in re-incarceration.

An Executive Clemency Advisory Council was created “to identify and review potential candidates for release based on reasons such as declining health.” This program has thus far had little effect, but the governor has ordered improvements.

The changes in Michigan that resulted in a reduced prison population “are not a blueprint for states that impose fixed sentences without the possibility of parole,” but Michigan’s “experience is important because it demonstrates that common sense can in fact beat demagoguery and that smart-on-crime policies can actually triumph.” Alas, prisoners serving long sentences were the least impacted by these policy changes. ■

Source: “*Michigan Breaks the Political Logjam: A New Model for Reducing Prison Populations*,” *ACLU National Prison Project* (Nov. 2009)

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Report on Prison Privatization Plagued with Political Connections, Conflicts of Interest, Faulty Data

On May 21, 2010, the Private Corrections Institute, a non-profit citizen watchdog group that opposes prison privatization, issued a statement sharply criticizing a joint report by the Reason Foundation, a California-based libertarian think-tank that promotes the privatization of government services, and the Howard Jarvis Taxpayers Association (HJTA). The HJTA advocates for the rights of California taxpayers.

The Reason-HJTA report, which recommends that California increase the number of prisoners sent to for-profit facilities and privatize other aspects of the state's prison system, was released in April 2010 on the heels of Governor Schwarzenegger's comments in favor of private prisons in his State of the State address. California already contracts with for-profit companies to house up to 10,468 prisoners in out-of-state facilities, and is likely to increase its reliance on private prison contracts.

The Reason Foundation has long been a proponent of privatization and has received funding from private prison companies – although that apparent conflict of interest was not mentioned in the joint Reason-HJTA report. Further, the report provides political cover for gubernatorial candidate Meg Whitman, who has expressed support for prison privatization. The HJTA has endorsed Whitman and produced commercials supporting her candidacy. Corrections Corp. of America (CCA), the nation's largest private prison company, has donated \$5,000 to Whitman's campaign.

California represents an enormous market for private prison companies, which have been spending political capital for the state's business. In 2009, CCA donated \$15,000 to the California Republican Party, \$7,500 to the California Democratic Party and \$100,000 to Governor Schwarzenegger's Budget Reform Now coalition. In 2008, CCA gave \$45,000 to the state Republican Party and \$20,000 to the Democratic Party. The nation's second-largest private prison firm, GEO Group, gave \$25,000 to the California Republican Party in 2008.

The Reason-HJTA report advocates sending 25,000 California prisoners to out-of-state private prisons, claiming that would save the state up to \$1.8 billion over

a five-year period. The report purports to offer a solution to California's prison overcrowding crisis, which has led a panel of federal judges to order a major reduction in the state's prison population following almost a decade of litigation in the *Plata* case. [See, e.g., *PLN*, Sept. 2009, p.36; March 2009, p.40; Sept. 2008, p.18].

The Reason-HJTA report alleges that California spends \$162 per prisoner per diem – the highest in the nation – based on data from the American Correctional Association (ACA). The report fails to mention that the ACA – a private, self-regulated prison industry lobbying organization composed of former and current corrections officials – receives revenue from private prison companies, which also sponsor the ACA's biannual conferences.

The \$162 per diem rate cited in the report, which was obtained by simply dividing the state's total corrections budget by its prison population, grossly misrepresents the actual cost of incarceration. For example, the inflated per diem rate in the Reason-HJTA report inaccurately includes parole supervision and administrative costs, which are part of the prison system's budget, and central office administrative overhead. The report's exaggerated per diem rate also apparently includes prison design and construction expenses, which are not factored into private prison cost analyses.

The report fails to consider that privately-run prisons do not house maximum-security California prisoners, death row prisoners, female prisoners, juvenile offenders or prisoners with serious mental health or medical conditions, all of whom are more expensive to incarcerate. In the latter regard, medical costs for California prisoners held in private prisons are contractually capped at \$2,500 per prisoner; the state must pay medical expenses above that amount, plus all treatment costs for prisoners who are HIV-positive.

According to Ken Kopczynski, executive director of the Private Corrections Institute, "Contrasting the inaccurate per diem rate in the [Reason-HJTA] report with the cost of housing prisoners in out-of-state private prisons cannot even be considered an apples-to-oranges comparison. It's more like an apples-to-fish comparison."

In a 2007 letter to state Senator Gloria Romero, the non-partisan Legislative Analyst's Office (LAO) reported that "the state now budgets on average about \$56 per prisoner per day for each *additional* prison prisoner – often referred to as overcrowding costs per prisoner. By comparison, the contracted rate for ... new out of state prison beds is higher, about \$63 per prisoner per day." The LAO also noted that the per diem rate for prisoners in out-of-state private prisons did not include transportation costs, the cost of oversight by state officials, or medical expenses above the \$2,500 cap.

The Reason-HJTA report acknowledges that California's "recent contracts to house state prisoners in out-of-state [CCA] facilities spell out costs that vary from \$63-72 per bed per day" Thus it is evidently more expensive to house prisoners in private prisons, based on the LAO's average in-state per diem rate of \$56, despite the Reason-HJTA report's claims that prison privatization can result in cost savings of up to 28%.

Such alleged savings cited in the report are based in part on research by discredited former University of Florida professor Charles Thomas. Thomas operated a University project that studied the private prison industry and produced research promoting the benefits of privatization. It was subsequently discovered that Thomas owned stock in the private prison companies he was studying, sat on the board of Prison Realty Trust, a CCA spin-off, and had been paid \$3 million by Prison Realty/CCA. Thomas retired from his University position after these conflicts became known and was fined \$20,000 by the Florida Commission on Ethics. [See: *PLN*, Dec. 2004, p.19]. The Reason-HJTA report fails to mention this tainted history underlying Thomas' research.

Further, the report incestuously cites Reason's own in-house research in support of its position that private prisons are less costly than those operated by the government, and does not address other studies that have found deficiencies in prison privatization in terms of both cost savings and quality of service. The report also relies on a Vanderbilt University study funded by CCA and the Association of Private Correctional and Treatment Organizations – an industry trade group that

represents the interests of companies that profit from corrections-related services. The funding source of the Vanderbilt study was not stated in the report.

Additionally, the Reason-HJTA report cites research from Avondale Partners, an investment banking firm that issued a favorable market rating for CCA earlier this year. Notably, CCA Vice President and Treasurer Patrick Swindle formerly worked for Avondale Partners. Avondale hosted a private prison conference in New York City on May 19, 2010 that included a presentation by CCA CEO Damon Hininger; other presenters included the Reason Foundation, the CEO of the GEO Group, and California private prison lobbyist Mark Nobili. These close connections between Avondale, Reason and the private prison industry were not mentioned in the Reason-HJTA report.

"The joint Reason-HJTA report is based on sources that are so plagued with conflicts of interest that the results would be laughable if they weren't masquerading as credible research," stated Private Corrections Institute president (and *PLN* associate editor) Alex Friedmann. "This is far beyond the fox guarding the henhouse. This is the fox outsourcing

security for the hen house to a pack of wolves." Friedmann, who served time at a CCA prison in Tennessee in the 1990s, is a recognized authority on the private prison industry.

The report also fails to mention the significant problems that other states have had with prison privatization, including major riots, sex abuse scandals, escapes, improper billing by private prison companies, and employment law violations. The Reason-HJTA report glosses over other deleterious aspects of prison privatization, such as higher employee turnover rates, increased levels of prisoner-on-prisoner and prisoner-on-staff violence, lack of transparency and public accountability, and higher recidivism rates for prisoners released from privately-operated prisons.

For example, the report claims that rates of violence are lower at private prisons than at state facilities, but fails to disclose that the research underpinning that finding, from the Bureau of Justice Statistics, only applies to a narrow category of "sexual violence" – not overall institutional violence. Leonard C. Gilroy, director of government reform for the Reason Foundation and co-author of the Reason-HJTA report, acknowledged that discrepancy after being

contacted by *Prison Legal News*.

Rather than addressing the shortcomings of private prisons, the Reason Foundation and HJTA recommend that California engage in wholesale privatization – including contracting out existing state prisons built with taxpayer funds; outsourcing food services, transportation, medical and mental health care, and education and treatment programs; and privatizing probation and parole services. While this would be a windfall for private prison firms, including those that have given money to the Reason Foundation and to California lawmakers, whether it would benefit taxpayers financially or in terms of public safety is less certain.

Although the Reason-HJTA report raises serious issues, such as high recidivism rates among California prisoners and the state's prison overcrowding crisis, the Private Corrections Institute argues in its critique of the report that such issues do not justify the wholesale transfer of prisoners to for-profit prison companies, as proposed by the Reason Foundation and HJTA. ■

Sources: www.privateci.org, www.followthefox.org

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Habeas Hints: Certificate of Appealability

by Kent Russell

This column is intended to provide “habeas hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is habeas corpus practice under AEDPA, the 1996 habeas corpus law which now governs habeas corpus practice throughout the U.S.

CERTIFICATE OF APPEALABILITY: 2010

This *Habeas Hints* column revisits the Certificate of Appealability (COA) requirement in light of the 2009 amendment to Rule 11 of the Federal Habeas Corpus Rules, which now requires that, at the *same* time that a District Court Judge makes an order denying a petition for writ of habeas corpus, the judge must also make an order granting or denying a COA.

Traditional COA Requirement Under AEDPA

If a federal habeas corpus petition is dismissed at the District Court level, to pave the way for a possible appeal, the petitioner must first obtain permission to appeal (a “Certificate of Appealability,” or “COA”) from the District Court. If the District Court denies the COA application, the petitioner can then attempt to obtain one by making a timely motion for a COA in the U.S. Circuit Court of Appeals. (The deadline to apply for a COA in the Ninth Circuit is 35 days after the date of the District Court’s order denying a COA in that court). If neither court grants a COA, then the only remaining option is to try to obtain one from the U.S. Supreme Court – something that is theoretically possible, but which occurs in practice about as often as prisoners get filet mignon for dinner.

COA Application in District Court

Technically speaking, a petitioner does not actually have to make a separate application for a COA, because AEDPA provides that, if no application for a COA is filed, the Notice of Appeal will be “treated as a COA.” However, the Notice of Appeal is simply a one-sentence statement of *what* is being appealed, and says nothing about *why* an appeal should be allowed. Therefore, to have any realistic

chance at getting a COA, the petitioner will have to make a “Motion for COA” in the appropriate court.

In trying to get the District Court to grant a COA, the petitioner has to apply to the same district judge who denied the petition in the first place. Obviously, it’s no easy task to convince the judge who just denied your petition to grant you a COA, the ultimate purpose of which is to convince the Court of Appeals to reverse the judge’s ruling. Nevertheless, trying to get a COA from the District Court is not as difficult as it sounds, because under AEDPA the judge does not have to admit that s/he was “wrong” in order to issue a COA. Rather, a petitioner is entitled to a COA if he can make a “substantial showing of the denial of a constitutional right.” Appellate courts have described this burden as “relatively low,” and it can be satisfied merely by showing that reasonable judges “could disagree” with the District Court’s reasons for dismissing the case.

Applying for COA Following a Magistrate Judge’s Report and Recommendation

In most federal jurisdictions these days, habeas corpus cases are actually handled by Magistrate Judges, who don’t actually have the authority to grant or dismiss habeas corpus petitions, but who instead make “recommendations” to the District Judge. In practice, though, the District Judge almost always follows the Magistrate Judge’s recommendation in habeas corpus matters – so much so that formal approval by the District Judge is little more than a rubber stamp for whatever the Magistrate Judge recommends.

The Magistrate Judge makes recommendations on habeas corpus in the form of a “Report and Recommendation” (“R&R”). The R&R is issued after the briefing of the case is complete on both sides. However, there is no fixed time limit, and typically many months will have elapsed between the completion of the briefing in the case and the issuance of the R&R, which abruptly kicks the case back into gear. Assuming (as is unfortunately true in the vast majority of cases) that the Magistrate Judge recommends dismissal of the petition, the R&R provides the facts and law which the Magistrate Judge has used to determine that the petition has no merit.

Accompanying the R&R itself is a document entitled “Notice of Report and Recommendation” (“Notice”). The Notice warns the petitioner that, to preserve the right to object on appeal to any of the findings made in the R&R (a right which, if waived, would almost certainly make a successful appeal impossible), the petitioner must file “Objections,” supported by “Points and Authorities,” within a specified time limit. Under the 2009 amendment, the time limit is 20 days from the date of the R&R, and most Magistrate Judges will impose that deadline.

Effect of the 2009 Amendments on the Filing of Objections to the R&R

Prior to the 2009 amendment, the sole function of the Objections was to simply preserve the right to challenge the Magistrate Judge’s findings on appeal. Although that was a vitally important requirement in the appellate process, it was a relatively easy one to satisfy, because virtually any document entitled “Objections to Report and Recommendation” and filed by the clerk would be sufficient for that limited purpose. Furthermore, as for applying for a COA in the District Court, the petitioner would still have *another* chance to do so during the time that would elapse in between the date that the court overruled the objections and the deadline for filing a Notice of Appeal, which does not expire until 30 days after the date of the Judgment formally dismissing the case.

Accordingly, under the former procedure, there was no harm in hastily filing Objections within the original time frame, and then using the additional time after the Judgment was entered to work on and file a much “stronger” motion for a COA. That is no longer true, however, because the 2009 amendment to Rule 11 eliminates any second bite at the COA apple. Rather, the Objections themselves – along with whatever is filed at the *same* time as the Objections – will be all that the District Court uses to decide whether or not to issue a COA.

Habeas Hints

With the foregoing in mind, I suggest the following “Habeas Hints” as a means of dealing effectively with the 2009 amendment to Rule 11.

- Make a timely application for a

30-day extension of time to file the Objections.

Because the 2009 amendment makes it imperative to seek a COA before the Objections are ruled on, the due date for filing the Objections will dictate how much time the petitioner has to prepare a COA application – a task that is more challenging than filing the Objections themselves. Therefore, and because the 20-day statutory period provided for filing the Objections is so short, petitioners should routinely ask for an extension of 30 days within which to file the Objections. Initial applications for 30-day extensions of time are always granted, so long as the extension request is made within the initial time limit. Then, once the extension is granted, you can use that additional time not only to draft the Objections but also to prepare your motion for a COA.

- File a separate motion for a COA when you file your Objections.

As noted above, the functions served by the Objections and the COA motion are different. Hence, I recommend that *two separate* documents be filed at the same time. Below are some formatting suggestions for both documents.

- Filing the “Objections to Report and Recommendation.”

Start with an “Introduction” section in which you provide the Magistrate Judge’s name, the date of the Report and Recommendation, the original due date for the Objections, and a statement either that your Objections are being filed within that time frame or within the limit provided in response to a timely motion to extend the original deadline.

Entitle your next section, the main one, “Objections to R&R and Supporting Points and Authorities” (the latter will be woven into the former). List each objectionable factual finding in the R&R by page and line – including instances in which the Magistrate Judge purports to resolve credibility contests against you without holding an Evidentiary Hearing – and then provide your reasons for each objection. Only object to factual findings with which you actually disagree, and where you can support your position by citations to the record. As for legal argument, read all the cases cited by the Magistrate Judge and object wherever a case is disapproved, distinguishable, or does not stand for the proposition for which the Magistrate Judge cites it.

If you are seeking relief on more than one habeas claim, use separate subsections for each claim. It’s best to list at least one objection for each habeas claim on which you intend to seek relief on appeal. However, you don’t have to continue to defend each claim you made in the habeas petition, and the Objections are a good place to start to jettison weaker claims which have not panned out.

Wind up with a “Conclusion” in which you state, for example: “Based on the foregoing, the Magistrate Judge’s recommendation should be rejected, and the matter placed on the Court’s calendar for an evidentiary hearing.”

- Filing the “Motion for COA in District Court.”

I. Start with an INTRODUCTION, in which you call the court’s attention to the 2009 amendment to Rule 11, and

explain why, in light of that amendment, you are now applying for a COA in tandem with filing your Objections. Consider the following language:

“Previously in this matter, the Magistrate Judge issued a Report and Recommendation recommending the summary denial of Petitioner’s Petition for Writ of Habeas Corpus, and the dismissal of this case with prejudice. Petitioner filed timely Objections to the Report and Recommendation, which are now pending. At this juncture, the Court has not yet ruled on the Objections. However, pursuant to the 2009 amendment to Rule 11 of the Rules in Section 2254 cases, the district court must issue or deny a Certificate of Appealability when it enters an order adverse to applicant. Hence, in the event that the district court overrules the Objections, Petitioner respectfully requests the issuance of a Certificate of Appealability [hereafter “COA”].

The issues on which a COA is sought are set forth in § II, *infra*.

The legal standard applicable to granting or denying a COA is set forth in § III, *infra*.

A summary of the grounds for issuance of a COA in this matter is provided in § IV, *infra*.

This request is also based upon the files and records in this case, including but not limited to the Petition and supporting exhibits, the Traverse Brief filed heretofore, and the Objections to Report and Recommendation, which were recently filed.”

II. Section II should be: “ISSUES ON WHICH A COA IS SOUGHT.” Again, feel free to abandon weaker claims which

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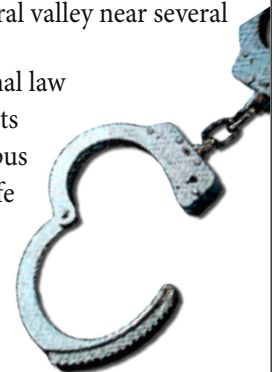
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were included in the petition but in which you have since lost confidence. As to the claims you do want to pursue, list them as questions; for example, "Whether Trial Counsel Was Ineffective."

III. Entitle this section: "LEGAL STANDARD FOR ISSUANCE OF A COA." You can use the following language:

"The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides that, in order to take an appeal from a final order denying habeas corpus, a Certificate of Appealability must be obtained from a circuit justice or from the district court judge. 28 U.S.C. § 2253, subd. (c)(1).

In order to obtain a COA, the petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). However, the petitioner need not show that he should prevail on the merits. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc) ["... [O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor"]. Rather, the petitioner is merely required to make the "modest" showing (*Lambright*, supra, at 1025) that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As explained by the Ninth Circuit in *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002), the substantial showing standard required for a COA is "relatively low." *Id.*, at 1011, citing *Slack*, supra. Hence, a COA must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; or (3) the questions raised are adequate enough to encourage the petitioner to proceed further. Finally, "The court must resolve doubts about the propriety of a COA in the petitioner's favor." *Jennings*, supra, citing *Lambright*, supra, at 1025."

IV. Section IV should be entitled: "ARGUMENTS SUPPORTING ISSUANCE OF COA."

Phrase your arguments in declarative sentences, e.g., "Reasonable Jurists Could Differ as to Whether Counsel was Ineffective." State each of your habeas claims and provide a succinct summary of the facts and law supporting each claim. Then explain how the Magistrate Judge erred in denying each claim.

Keep in mind that showing how the Magistrate Judge erred is very similar to

what you should have already done in your Objections. Hence, if you are satisfied with the Objections you have filed, you can simply ask the judge that the Objections be "incorporated by reference" in your COA motion, and/or you can attach the Objections as an exhibit to your motion.

V. CONCLUSION: Again, remind the judge how the COA motion relates to your Objections. For example:

"For the reasons stated herein, should the District Court overrule Petitioner's Objections to the Report and Recommendation and enter an order denying Petitioner's habeas corpus petition and dismissing this case with prejudice, the Court should issue a COA as to the 'Issues on Which a COA is Sought.'" ■

\$315,000 Settlement in Illegal Arizona Police Strip Search

The City of Scottsdale, Arizona paid \$315,000 to settle a lawsuit claiming that a police officer illegally strip searched a citizen after responding to a 911 call.

When Heather Tonarelli, 19, and her friend Chris Smith heard loud knocks on Tonarelli's apartment door at around 3:00 p.m. on June 15, 2008, they saw two Hispanic men they did not recognize. The men left when the door was not opened but returned about 20 minutes later. At that point, Tonarelli called 911.

Scottsdale police officers Chong Kim and Robert Inouye responded in separate squad cars. After Kim and Inouye determined that the two men were no longer in the area, they told Tonarelli and Smith to call police again if they returned.

Before Kim and Inouye arrived, Smith had called a friend, Hector Bagnod, to alert him of the situation. After the officers left, Tonarelli and Smith went outside to await Bagnod's arrival. They found Kim and Inouye giving him a ticket for speeding.

Kim instructed Tonarelli and Smith to sit on a wall a few feet from Bagnod's car. He then began interrogating Tonarelli about whether she had been using drugs or alcohol. She denied using drugs, but admitted to having a drink earlier.

Kim insisted she was using drugs and demanded that she let him search her home. If nothing was found, she would be "off the hook." Feeling threatened

Kent A. Russell specializes in habeas corpus and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AEDPA. The 5th Edition, completely revised in September 2006 and recently updated in 2010, can be purchased for \$49.99, which includes priority mail postage. Only prisoners who are paying for the book with a state-issued check or one from their prison account are eligible for the special prisoner discount price of \$39.99, which must be claimed at the time of purchase. An order form can be obtained from Kent's website (www.russellhabeas.com), or simply send a check or money order to: Kent Russell, "Cal. Habeas Handbook," 2299 Sutter Street, San Francisco, CA 94115.

and intimidated, Tonarelli complied. As Inouye continued to process Bagnod's speeding ticket, Kim and Tonarelli went to the apartment.

After conducting a search of Tonarelli's bathroom, bedroom and purse, Kim told her that she could avoid a trip to jail to be strip searched by a female officer if she would submit to a search by him. "Feeling alone, terrified, and coerced" by Kim's actions, Tonarelli "reluctantly complied."

Positioning Tonarelli so he could view anyone approaching the apartment, Kim told her to remove her clothes. "He then had her lift her dress high, above her chest, and directed her to pull down her strapless bra, expose her breasts, and to flip over the cups. He then ordered her to lower her panties to her thighs, and told her to turn around twice for him while he shined his flashlight on her body." The search lasted about 20 minutes.

Two other women had previously reported a similar incident involving Kim, but their allegation was not sustained due to lack of witnesses. Tonarelli filed suit after the illegal strip search and reached a settlement of \$315,000 on November 16, 2009. She was represented by attorneys Robert R. Rothstein and Michael C. Shiel of Santa Fe, New Mexico; Andrew C. Schwartz of Walnut Creek, California; and Karen L. Snell of San Francisco. See: *Tonarelli v. City of Scottsdale*, U.S.D.C. (D. Ariz.), Case No. 2:09-cv-00953-FJM. ■

Salt Lake County Agrees to Pay \$75,000 to Settle Jail Suicide Suit

On September 15, 2008, Salt Lake County, Utah agreed to pay \$75,000 to the family of an ex-cop who killed himself at the Salt Lake County Metro Jail.

Arthur Anderson was arrested in January 2006 after his wife accused him of ramming his pickup truck into her car and shooting her boyfriend in the leg and abdomen.

He was also charged with shooting at police, who in turn shot Henderson in the knee and foot. Previously, Henderson had been fired from the Lehi Police Department after being convicted of simple assault.

When Henderson was booked into the Salt Lake County Metro Jail, a doctor determined that he was at high risk for committing suicide. Henderson allegedly told the doctor, "There is a 60 percent chance I'll be dead in the morning."

Henderson spent his first ten days at the jail in the mental health unit, but was later moved to a maximum-security wing.

Over the next few months, Henderson's suicidal tendencies continued to

manifest. According to the lawsuit filed by his family, Henderson cut himself with a piece of his cast, banged his head against the floor and tried to choke himself with plastic bags from a sack lunch. In February 2006 he was diagnosed with having chronic suicidal ideation, but not intent to actually commit suicide.

Henderson hung himself in April 2006 with his bed sheets in his cell. Lawyers for Henderson's family alleged that "[The] jail was aware or should have been aware of the danger Mr. Henderson was to himself, and such awareness created or should have created a heightened duty of care."

The county did not admit any wrongdoing in agreeing to settle the case. Nate Bryan, a spokesman for the District Attorney's Office, said a county insurance policy covered the settlement.

Henderson's family was represented by Kevin Sutterfield of Flickinger & Sutterfield, a Provo, Utah law firm. See: *Henderson v. Salt Lake County*, U.S.D.C. (D. Utah), Case No. 2:08-cv-00272-BSJ. ■

Additional source: *Daily Herald*

50,000 Illinois Felons Released Without DNA Collection

Approximately 50,000 felons have been released from Illinois prisons and discharged from probation supervision without having their DNA collected, state officials acknowledged in September 2009.

Illinois law requires all felons sentenced on or after August 22, 2002 to provide a DNA sample. The samples are stored in CODIS, a national registry run by the federal government.

Since the Illinois law took effect, some 10,000 prisoners have been released from state prisons without providing a DNA sample, according to the Illinois Department of Corrections. Another 40,000 probationers have been released from supervision without supplying samples, the state Attorney General's office estimates.

"Serial murderers and rapists have probably remained on the loose, and families have continued to suffer," stated DuPage County State's Attorney Joseph Birkett.

"We need to find a way to get that DNA."

The failure to collect DNA from prisoners and probationers was attributed to delays in implementing the 2002 law. Such delays are nothing new; currently, there is a multi-year backlog for entering DNA samples into CODIS. Further, the State Police, which administers Illinois' DNA collection program, did not have enough DNA sample kits, and probation officials lacked sufficient medical staff to draw blood to obtain the samples until 2004, when the process was changed to only require a cheek swab.

Illinois officials are now in the process of tracking down released prisoners to obtain missing DNA samples. Last month, *PLN* reported a similar problem with DNA samples not being collected from Wisconsin prisoners. [See: *PLN*, May 2010, p.44]. ■

Sources: *Associated Press*, *Chicago Tribune*

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California Jail Detainee Attacked by Cellmate, Family Accepts \$1.85 Million

by Michael Brodheim

The family of Jimmy Haws has settled a federal lawsuit against Monterey County and county officials for \$1.85 million, two years after initiating litigation following an assault against Haws who, while a pretrial detainee at a jail in Salinas, California, was attacked by a cellmate and sustained permanent brain damage.

Haws was awaiting trial for armed robbery when he was attacked by Roger Spencer, a fellow detainee who, according to the § 1983 complaint subsequently filed by Haws' wife and guardian ad litem, was so violent and mentally unstable that the defendants knew or should have known that he was a danger to other persons in custody at the Salinas jail. Although Haws and Spencer were separated by placement in isolation, they were subsequently housed together again in the same cell. On December 7, 2006, Spencer allegedly attacked Haws again, placing him in a head lock for several minutes and rendering him unconscious. When Spencer released him, Haws fell unconscious down a flight of stairs, struck his head and sustained a closed head injury.

It took 42 minutes to summon emergency medical personnel and transport Haws less than a city block to a public hospital. By that time, he was conscious again and able to speak. A doctor ordered that Haws be given a CT scan. It took over 90 minutes to move Haws to the location in the hospital where a CT scan could be performed. During that time, his condition seriously deteriorated. The CT scan disclosed massive internal bleeding in the area of Haws' brain and an immediate need for surgical intervention. By the time the surgery was performed, however – about two hours after the CT scan – Haws had suffered irreversible brain damage.

Represented by attorneys Michael Moore of San Francisco and Ralph Boroff of Santa Cruz, Haws' wife, Carrie, brought suit against Monterey County, its Sheriff, the hospital where Haws was treated, and 300 "Doe" employees of the jail and hospital, on behalf of herself, her husband and their two minor children, alleging various state and federal causes of action.

The county decided to settle the lawsuit on the eve of trial after one of its own experts provided deposition testimony

that supported Haws' claim that the jail was overcrowded and inadequately staffed and operated.

Before fees and expenses, Jimmy Haws received \$1.5 million, while each of his children received \$50,000; the remainder of the settlement went to Carrie Haws. After

fees and expenses, Jimmy Haws received over \$800,000, to be held in trust for him for his ongoing medical needs. See: *Haws v. County of Monterey*, U.S.D.C. (N.D. Cal.), Case No. 5:07-cv-02599-JF. ■

Additional source: www.law.com

Book Review: Anne-Marie Cusac, *Cruel and Unusual: The Culture of Punishment in America*, 336 pp, Yale University Press, \$27.50

by Amy Vanderwarker

Anne-Marie Cusac is probing important questions in her book, *Cruel and Unusual: The Culture of Punishment in America*. What are the underlying social values that have allowed a prison state as vast as the U.S.'s to thrive? How is this related to the many examples of violence in popular culture? Cusac argues that the explosion in the number of prisons, the astronomical rates of incarceration, and the current harsh conditions within prisons are due in part to the resurgence of retributive, physical punishments that view prisoners as people deserving of harsh violent treatment. While I agree, I do not believe Cusac has laid out the most convincing case for why that is so.

Cusac traces cultures of punishment throughout U.S. history. She documents the use of public executions, whippings and mutilations as punishment during colonial days. She locates their roots in both traditional English law and also strict Christian beliefs about the pervasive nature of sin and the Devil. After the American Revolution, reformers pinned part of the new country's future on the ability to more humanely punish, marking a move away from the idea that all people who commit crimes are inherently evil.

While reformers advocated for punishment techniques that embodied a vision of rehabilitation, their very suggestions pioneered new forms of violence, such as frequent use of solitary confinement and creating the first large-scale prisons. By the late 1700s widespread abuse and corporal punishment had been documented inside prisons and excessive use of solitary confinement had been roundly criticized. By the 1930s,

Progressive reformers faced the rise of vicious contract prison labor practices. Violence also surfaced in various spheres of non-prison life, from the commonplace activity of whipping children in school to the brutality of lynch mobs in the Jim Crow South.

By the 1970s, cultural, economic and political shifts indicated a return of mainstream retributive punishment policies. Reactions to the social upheaval of the 1960s and economic changes that created large communities of urban unemployed, combined with white flight to suburbs, all contributed to the loss of rehabilitation ideals. "Tough on crime" politicians rode into office on waves of moral panic that identified "criminals" as people who were innately evil and deserving of harsh punishment. Public policy turned towards harsher sentencing laws and criminalization of activities such as drug use, while cutting social services.

The shift to a more violent, individualized approach to crime has been mirrored in popular culture, Cusac argues. Shows such as *Cops* and *CSI* and movies such as *The Brave One* are signs of a shift towards violent retribution in larger society, and perpetuate harsh policies towards prisoners.

Cusac uses a detailed investigation into some of the new punishment technologies in prisons and policing, specifically stun belts and restraint chairs, to highlight how violent physical punishment has come to characterize our prison and jail systems. She concludes the book by drawing parallels between contemporary patterns documented in the U.S. and the torture revealed at the military-run Abu Ghraib prison in Iraq. She notes that all the forms of violence documented had previously been seen in

prisons and jails throughout the U.S., and some of the prison and jail officials involved in those scandals were employed in various capacities in Abu Ghraib.

While making an admirable effort to uncover the long-standing roots of violent tendencies within the U.S.'s disciplinarian tactics, ultimately *Cruel and Unusual* feels like an uneven compilation of anecdotes. Some chapters contain detailed descriptions of torture that verge on voyeuristic, others contain in-depth discussions of movies such as *The Exorcist*, and there is little explanation as to the variety or the sources chosen.

I also found one of Cusac's central arguments – that many of our notions around punishment derive from orthodox Christianity – is not carried throughout the book consistently. There is huge potential in exploring the rise of the Christian Right and the explosion of the prison-state, but Cusac fails to make solid connections between the violent punishments for both children and adults advocated by fundamentalist Christians and how those ideologies spill over into other examples of violence in popular culture and criminal public policy.

Perhaps most disturbingly, overall the book fails to adequately address the hierarchical nature of punishment. Cusac's

narrative barely includes the role that one of the U.S. government's most violent state institutions, slavery, or the related extralegal state violence of lynchings, played in the development of punishment cultures. A discussion of the public executions of so-called "witches" in 17th century Massachusetts and her account of contemporary Christian fundamentalism similarly fail to consider how violent punishment is intimately linked to rigid gender roles.

While this may not be the book to examine in depth the ways that punishment is historically and contemporarily inflicted based on ideologies of race, class and gender, any discussion of how our modern-day prison system came to be without a thorough look at these disparities seems remiss.

Ignoring the larger social dynamics allows Cusac to lament the loss of the "rehabilitation" traditions from colonial reformers such as Benjamin Rush. "[T]he belief that human beings could reform underlay the philosophy of prisons and penitentiaries, dating from the revolutionary exuberance of Benjamin Rush. As American culture increasingly connected evil with individual human beings, it abandoned hope of rehabilitating them," she writes.

But Cusac is ignoring her own evidence: Benjamin Rush designed the first restraint chair used in today's prisons and jails and advocated for extensive solitary confinement. While she is critical of the harsh, individualized approach to crime that is pervasive today, the rhetoric of rehabilitation ultimately leads to the same conclusion, as she shows again and again. It is clearly important to fight the culture of violence that pervades our prisons and jails, as Cusac ultimately argues, but I would hope we can do so in a manner that leads to more substantial and lasting change. ■■



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Georgia's Privatized Probation System Traps the Poor

by David M. Reutter

As the prison industrial complex has continued to grow, critics of privatization have adamantly warned that it would lead to financial incentives for for-profit companies to keep people ensnared in the criminal justice system. The privatized probation system in Georgia is the fulfillment of that warning.

When Georgia discontinued providing probation services for State Courts in 2001, many counties hired private companies to operate such programs. Richmond County currently contracts with Sentinel Offender Services.

Sentinel earns \$35 a month in court-ordered payments for each probationer it supervises, \$30 a month for probationers who owe money and are in a court-ordered program such as anger management, and a start-up fee and additional fees of \$6 to \$12 for those on a monitoring system. The company serves over 90 courts in Georgia and supervises more than 40,000 probationers each month statewide.

According to Crystal Page, Sentinel's Augusta area manager, at any given time there are around 5,000 probationers in Richmond County. Approximately 3,000 are compliant with their payments, which would bring in more than \$1 million annually based on the minimum supervision fee.

The case of Mariette Conner demonstrates that privatized probation services can result in probationers paying more than twice the original fee when a for-profit company is involved. Conner, 63, received a traffic ticket for failing to yield to a pedestrian in a crosswalk in 2007. Because she was unable to immediately pay the \$140 fine she was placed on probation, which required her to pay a monthly fee and make payments to a victims' fund totaling \$39 a month.

Conner's sole income was Social Security, so she was only able to make small payments after riding two buses to Sentinel's office to submit her monthly report. As a result, she continued to get further behind in her payments and other bills.

Her receipt for a \$20 payment in September 2007 demonstrates the problems with the for-profit probation system. Of that payment, \$10 went to Sentinel, \$9 went to the victims' fund and \$1 went toward the fine. The Southern Center for Human Rights intervened on Conner's behalf when she was threatened with jail

time after being falsely accused of missing a monthly report.

Judge Richard Shelby terminated Conner's probation after it was shown the cost of her fine had doubled. While Conner had paid \$185.99 on the original \$140 fine, only \$56.99 had gone towards the fine. The rest went to Sentinel and the victims' fund.

The dilemma that Conner faced is the same dilemma faced by other probationers in Georgia who are unable to pay traffic fines upon their imposition. As with other misdemeanors, traffic offenses are considered crimes in Georgia, which can result in up to a year in jail and a \$1,000 fine.

"I think that the problem with outsourcing probation services is that it involves the wrong incentives. Private businesses want to make a profit, and that is the way businesses operate. Courts are supposed to dispense justice, not be looked upon as cash registers for the government," wrote attorney John "Jack" Long in an e-mail to the *Augusta Chronicle*.

In its second-quarter 2009 report to the State Court, Sentinel reported supervising probationers in a total of 25,198 cases, collecting \$552,629 for the court. While Page said the company had converted \$800,000 owed by probationers to community service work in the last two years, one unidentified former Sentinel employee accused the company of using hardball tactics to get probationers to pay.

Those who fail to make payments land in jail without bond until they pay what is owed or can assure a judge they can make future payments. Testifying in Richmond County Superior Court, the former Sentinel employee said he was fired for failing to meet the company's quota for filing a minimum number of warrants each week against probationers who missed payments.

Many probationers are mortified at the costs associated with their privatized supervision and are unable to pay. "The shock on their faces when they come in to set up [a payment plan] ... is something to see," said former Sentinel probation officer Kathleen Gibson. "Tack on the time it takes for community service, DUI school, anger management or whatever else is added to the sentence – because

they have to pay for the classes also – and the months just drag on by with the fees piling up. ... It is no wonder most of them cannot pay and end up back in jail."

The cost to taxpayers for jailing people is about \$50 per prisoner per day. Georgia has more than 10,000 outstanding warrants for probationers; many are unable to pay their monthly fees, which extends their probationary period.

"It is sort of like a revolving charge card in that there was no end to it," said former city commissioner Bobby Hankerson, adding it is like getting a \$35 late fee every month on a \$15 payment. "It never ends."

Such arrangements are, however, very profitable for for-profit companies like Sentinel, if not for the impoverished people they supervise or the taxpayers who foot the bill when probationers are jailed because they can't afford inflated supervision fees. The power of private probation companies is not absolute, though.

On April 16, 2010, the Richmond County Superior Court entered a restraining order against Sentinel, preventing the company from trying to collect fees from Hills McGee, a mentally ill veteran who lives on \$243 a month in disability payments. McGee was jailed for almost two weeks after his probation was violated for failing to pay \$186 in fees that Sentinel claimed he owed; however, the violation was later voided and his underlying convictions for obstruction of a law officer and public drunkenness were overturned. Regardless, Sentinel continued to attempt to collect the fees.

McGee's suit, which was removed to federal court, seeks class-action status and challenges the constitutionality of private probation services. On April 29, the parties agreed to a permanent injunction prohibiting Sentinel from taking any action to collect fees from McGee. See: *McGee v. Sentinel Offender Services*, U.S.D.C. (S.D. Georgia), Case No. 1:10-cv-00054-JRH-WLB.

Besides Sentinel, at least two other companies, Professional Probation Services and Southeast Corrections, provide for-profit probation supervision in Georgia. ■

Sources: *Augusta Chronicle*, *Atlanta Journal Constitution*, www.sentrak.com

Judge Finds Unconstitutional Conditions at Massachusetts Jail, 11 Years After Suit is Filed

by Brandon Sample

On September 24, 2009, Suffolk Superior Court Judge John C. Cratsley held in a class-action lawsuit that Sheriff Thomas M. Hodgson in Bristol County, Massachusetts was housing prisoners under cruel and unusual conditions.

Originally filed in 1998, the suit alleged that Hodgson was improperly triple-bunking prisoners at the Ash Street Jail, a pre-Civil War-era facility. The lawsuit also claimed that prisoners were being forced to sleep on the floor in "boats" – portable bunks – and in common areas. The lawsuit was amended in 2004 to add a claim concerning Hodgson's practice of "dry-celling" prisoners at the Dartmouth House of Correction. "Dry-celled" prisoners did not have access to a toilet.

The plaintiffs in the case had moved for summary judgment, arguing that no genuine issues of material fact were in dispute given Hodgson's admission to the practices at the jails.

Judge Cratsley, however, granted the plaintiffs' motion only in part. "[T]here

is no dispute," the court wrote, "that the defendant (1) engaged in the practice of placing pretrial detainees on the floor and in porta-bunks, and (2) permitted overcrowding, as well as double bunking at the Ash Street Jail, to exist for pretrial detainees." There was also "no dispute that these practices constituted punishment as a matter of law."

In light of these findings, Judge Cratsley held "that the defendant is liable in his official capacity for violating the plaintiffs' rights under the Due Process Clause."

The court declined to grant summary judgment on the plaintiffs' dry-celling claim, holding that the record did "not include any evidence that the defendant held pretrial detainees in dry cells." Hodgson's defense of qualified immunity was denied because the plaintiffs' claims were brought against him in his official capacity.

Hodgson said he was disappointed with the court's decision. "When I was elected I made it clear we would make the facilities the top in the nation," he stated.

"People who visit are amazed at how well the jail is run."

Greta Janusz, one of the plaintiffs' attorneys, had a different perspective. Janusz said Hodgson had "a very cavalier attitude over the 11 years of the lawsuit," and noted "he has an attitude that he's above the law."

Hodgson tried to compare the double- and triple-bunking of prisoners to double-bunking that often occurs at colleges. However, Janusz pointed out that "inmates can't just walk to the bathroom, and if they can't get a guard to unlock the door during the course of the day, then there's going to be unsanitary conditions."

The unconstitutional practices at the jail have since been remedied as a result of the class-action lawsuit. A damages determination will be made by the court at a later date. See: *Kelly v. Hodgson*, Suffolk Superior Court (MA), Case No. 1998-03083. ■

Additional source: www.heraldnews.com

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Report Details Societal Effects of High School Dropout Rates – Including Incarceration

by David M. Reutter

“Dropping out of high school [is] an apprenticeship for prison,” said Illinois State Senator Emil Jones at a 2006 Chicago conference on high school dropouts. An October 2009 report issued by Northeastern University’s Center for Labor Market Studies demonstrates the truth of that statement and the negative consequences for both dropouts and society as a whole.

The research report “was prepared to outline the employment, earnings, incarceration, teen and young adult parenting experiences and family incomes of the nation’s young adult high school dropouts and their better-educated peers in 2006 to 2008.” The report does an excellent job of fulfilling that mission, and the statistics it compiles paint a disturbing picture.

Upon dropping out of high school, the immediate consequence is a labor market problem. During 2008, 54% of the nation’s high school dropouts were unemployed. By contrast, the jobless rate for high school graduates was 32%, for those with 1-3 years of college it was 21% and for those with a bachelor’s degree or higher it was only 13%.

Race played a role in unemployment among high school dropouts, which was 69% for blacks, 57% for Asians, 54% for whites and 47% for Hispanics. The annual income of the households that dropouts came from also affected their jobless rate. Only 38% of dropouts from households making less than \$20,000 annually were employed. Those who came from homes with incomes of \$20,000 to \$100,000 had employment rates of 47% to 55%. While the year-round jobless rate for dropouts was 40%, those with a high school education were employed up to 80% of the time. The mean annual earnings for dropouts in 2007 were only \$8,358.

The status as a dropout also correlated with teen pregnancy. “Young female dropouts were six times as likely to have given birth as their peers who were college students or four year college students,” the report found.

Further, being a high school dropout substantially increased the likelihood of ending up in prison. “Nearly 1 of every 10 young male high school dropouts was institutionalized on a given day in

2006-2007 versus fewer than 1 of 33 high school graduates,” notes the report. “The incidence of institutionalization problems among young high school dropouts was more than 63 times higher than among young four-year college graduates.”

A large proportion of dropouts – nearly 37 of every 100 – live in poor or near-poor families. The impact on society is significant, as the average high school dropout will have a negative net financial contribution to society of nearly \$5,200. A high school graduate, however, will gener-

ate a net fiscal contribution to society of \$287,000 in taxes and reduced incarceration costs.

In a time when education budgets are being cut to maintain or build more prisons and jails, this report demonstrates the catastrophic consequences of such political and financial short-sightedness. It also illustrates how mass imprisonment works as a social containment policy for the poor and uneducated. The report, *The Consequences of Dropping Out of High School*, is available on *PLN*’s website. ■

Ninth Circuit: California Lifers Have No Inherent U.S. Constitutional Right to Parole

by John E. Dannenberg

In a major loss for California lifers, the Ninth Circuit U.S. Court of Appeals, in an en banc ruling, held that a second-degree murderer who had served 27 years on a 15-life sentence did not have a right to parole that devolved from either federal law or the U.S. Constitution. Affirming the U.S. District Court’s ruling, and vacating the intervening reversal of that ruling by a panel of the Ninth Circuit in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), the en banc Court of Appeals held that petitioner Ronald Hayward was at most entitled to the rights provided by state law.

The appellate court further held that federal habeas corpus challenges to the denial of parole by California lifers did not fall into the administrative exception that excused the need for a Certificate of Appealability (COA), expressly overruling *White v. Lambert*, 370 F.3d 1002 (9th Cir. 2004) [*PLN*, March 2005, p.24] and *Rosas v. Nielson*, 428 F.3d 1229 (9th Cir. 2005). A COA in such cases may now be obtained only upon an affirmative showing that reasonable minds could differ on the issues adjudicated by the district court.

Lifer parole litigation is rife in California, with over 10,000 parole-eligible prisoners looking to the courts to battle the state’s crushing, politically-orchestrated no-parole-for-lifers policy. [See, e.g., *PLN*, March 2009, p.44].

California’s Supreme Court recently

held in *In re Lawrence*, 44 Cal. 4th 1181, 190 P.3d 535 (Cal. 2008) [*PLN*, April 2009, p.30], that the controlling parole statute, California Penal Code § 3041, permits a reviewing court to uphold the denial of parole by the Board of Parole Hearings (Board), or to uphold the reversal of the Board’s grant of parole by the Governor, so long as “some evidence” supports the underlying decision. However, that evidence must demonstrate a “rational nexus” between the lifer’s *current* behavior and his behavior related to the commitment offense.

But when the state courts deny relief to an aggrieved life prisoner, the en banc Ninth Circuit has now held that California lifers may not bring a 42 U.S.C. § 2254 federal habeas corpus petition asserting either that federal law or the U.S. Constitution creates a separate, inherent right to parole. The only federal habeas relief now available for California lifers is a claim for denial of due process, predicated upon an assertion that there is *no* evidence supporting the Board’s or Governor’s decision to deny parole.

In a tersely-worded conservative opinion uncharacteristic of the Ninth Circuit, the en banc court declined to apply the U.S. Supreme Court’s “some evidence” precedent in *Superintendent v. Hill*, 472 U.S. 445 (1985), often argued as supportive of parolee due process rights, on the grounds that – upon closer analysis

– it was limited solely to consideration of prisoner good conduct credits. Whereas good conduct credits create a liberty interest (i.e., a right) because they are statutorily guaranteed, parole in California is discretionary and therefore does not enjoy the same liberty interest protection under the U.S. Constitution.

Or, as the Court of Appeals sardonically put it, “The prisoner’s interest in parole ripens into an entitlement only after the parole board has made the findings that under the statute entitle him to it, which is to say, perhaps tautologically, that a prisoner is entitled to parole only if the parole authority has made the discretionary decision that under the state standard he is entitled to parole.”

In so ruling, the en banc Ninth Circuit overruled its precedent in *Irons v. Carey*, 505 F.3d 846 (9th Cir. 2007); *Sass v. Board of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) [*PLN*, March 2007, p.23]; and *Biggs v. Terhune*, 334 F.3d 910

(9th Cir. 2003) [*PLN*, June 2004, p.32], to the extent they had inferred a U.S. Constitutionally-created liberty interest in California lifers’ parole based on a “some evidence” analysis.

The en banc court’s denial of relief under the U.S. Constitution left Hayward with only his due process claim, predicated upon the absence of any evidence to support then-Governor Gray Davis’ 2003 reversal of Hayward’s grant of parole by the Board. The Ninth Circuit reviewed the record and held there was in fact “some evidence” for the governor’s reversal. Accordingly, the district court’s decision to deny Hayward relief was affirmed.

Sadly, Hayward, who had been conditionally released pending the state’s appeal under Fed.R.App.P. 23, must return to the California prison he left two years ago to once again commence the tortuous path to obtaining parole. See: *Hayward v. Marshall*, ___ F.3d ___ (9th Cir. 2010) (en banc); 2010 WL 1664977. ■

\$1,500 Settlement for Wisconsin Prisoner’s Cold Cell Conditions Claim

The Wisconsin Department of Corrections paid \$1,500 to settle a prisoner’s lawsuit alleging violations of his Eighth Amendment rights by being subjected to cold cell temperatures.

Waupan Correctional Institution prisoner Jevon D. Jackson filed a civil rights action for being subjected to unconstitutional conditions of confinement. His ordeal began on May 18, 2007, after a psychologist ordered him placed in a strip cell for observation because she thought he was a suicide risk.

While there was no dispute that Jackson told the psychologist he had placed a plastic bag over his head, other parts of their conversation were in dispute. Nonetheless, for his own safety he was stripped naked, given a security smock to wear and a rubber mat to sleep on, and placed under observation from May 18 to May 21.

His cell had running water and Jackson “was occasionally provided with several thin squares of toilet paper, but not enough to avoid having to use his bare hand to wipe himself after having a bowel movement,” the Wisconsin federal district court noted.

Although the prison’s temperature log reflected the average temperature in Jackson’s observation cell was 73.6

degrees, he presented evidence to place that fact in dispute. He asserted the temperature probe was three feet inside the exhaust vent, which was 90% covered, and gave an inaccurate reading. Jackson said he shook uncontrollably while in the cell and the temperature felt like it was 10 degrees. Guards made no effort to act on his repeated requests for a blanket. Another prisoner in an adjacent cell, who had clothes and a blanket, submitted an affidavit supporting Jackson’s claims.

To determine whether cold cell temperatures constitute cruel and unusual punishment, courts consider “the severity of the cold; its duration; whether the prisoner has alternative means to protect himself from the cold; the adequacy of such alternatives; as well as whether he must endure other uncomfortable conditions as well as cold.” The cold temperature need not present an imminent threat to the prisoner’s health to implicate the Eighth Amendment.

The district court denied prison officials’ motion for summary judgment on September 9, 2009, and the state settled the case about a week later, on September 17. Jackson litigated the case pro se. See: *Jackson v. Thurmer*, U.S.D.C. (E.D. Wisc.), Case No. 2:07-cv-00919-JPS. ■

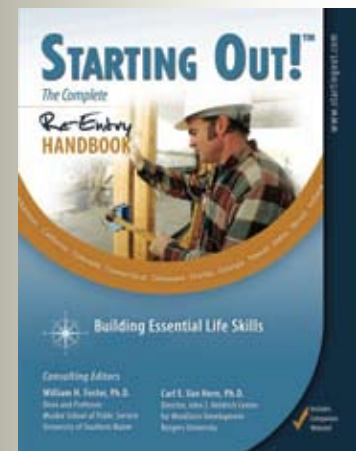
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California: Budget Cuts Target Rehabilitation Programs

by Michael Brodheim

Forced to trim its budget by \$1.2 billion, the California Department of Corrections and Rehabilitation (CDCR) is cutting back on rehabilitative programs that help reduce recidivism.

On October 14, 2009, Donovan State Prison closed its “Right Turn” substance abuse program that provided treatment for about 500 prisoners. In so doing, Donovan became the eighth California prison that does not provide any type of professional substance abuse program.

CDCR spokesperson Peggy Bengs reported that, in prisons where professional treatment services are not provided, the CDCR would rely instead on programs run by outside volunteers, such as Narcotics Anonymous. To supplement those programs the prison system will reportedly employ prisoners who have been trained as substance abuse counselors. Bengs described this as a “streamlined rehabilitation model,” which certainly sounds better than “gutting treatment services for prisoners.”

The CDCR’s budget reductions include \$250 million in cuts to rehabilitative programs, amounting to almost 45% of the prison system’s \$560 million budget for such programs. In addition to a 40% decrease in funding for substance abuse treatment, the CDCR is also slashing its budget for residential aftercare services.

In July 2009, the state was funding 8,162 post-release residential treatment beds that served an estimated 17,063 parolees annually. The budget reductions will cut those numbers in half, to 4,000 treatment beds serving an estimated 8,308 parolees.

Such cuts could prove counterproductive. According to San Diego County District Attorney spokesperson Steve Walker, “Studies show that inmates are far more likely to succeed [on parole] if they receive treatment in prison with an aftercare component in the community.” Also, as Aaron Edwards, a budget analyst for the nonpartisan Legislative Analyst’s Office, points out, “Community treatment beds are comparatively much cheaper than the \$50,000 a year cost of incarcerating parolees who are returned to prison.”

Indeed, California prisoners are reincarcerated at an astonishing rate of 60 percent. That high recidivism rate has in turn fueled a 73 percent increase in the state’s prison population over the past two

decades. As a result, spending on corrections has more than doubled since 2001.

While the CDCR’s budget cuts may be inevitable, they cannot be sustained. If anything, the availability of substance abuse treatment programs needs to be increased, not decreased. According to a 2007 report by the Little Hoover Commission, roughly two-thirds of prisoners would benefit from substance abuse treatment, yet before the recent budget cuts only about two percent of California prisoners were enrolled in such programs. Now, approximately one-half of one percent of prisoners will be able to receive substance abuse treatment. The number of substance abuse treatment positions for CDCR prisoners has dropped from 12,000 to 2,400 systemwide.

“I just hope someone up there has a

brain and can see what the impact of this will be,” stated Jean Bracy, who oversees education programs at Folsom State Prison. “You cannot take people and throw them in a cage and expect them to be OK when they get out without rehabilitation.” Systemwide, the CDCR has terminated more than half of its academic and vocational instructors.

In January 2010, CDCR officials began promoting a new program that allows prisoners to earn six weeks off their sentence each year if they complete a rehabilitation course. However, due to the state’s budget cuts, few programs remain that prisoners can participate in to earn the sentence reduction. ■

Sources: *San Diego CityBeat*, *Sacramento Bee*

Pennsylvania Judges Involved in Corruption Case Face Liability; 5,000 Convictions Thrown Out

by David M. Reutter

A Pennsylvania U.S. District Court has granted absolute judicial immunity to two former state court judges in a consolidated class-action civil rights suit. That immunity, however, only applied to judicial acts, allowing the case to proceed on the judges’ corrupt actions that were administrative in nature.

The lawsuit accuses Michael T. Conahan and Mark A. Ciavarella, Jr. of abusing their positions as judges of the Luzerne County Court of Common Pleas by accepting approximately \$2.8 million in payoffs. The conspiracy involved the judges taking bribes from the owners of the privately-operated Pennsylvania Child Care (PACC) and Western Pennsylvania Child Care (WPACC) detention facilities, and intentionally filling those facilities with juvenile offenders to generate profit.

The conspiracy also included Robert Powell, Robert Mericle, Mericle Construction, Pinacle Group of Jupiter LCC, Beverage Marketing of PA, and Vision Holdings.

Conahan used his judicial position to remove funding from the Luzerne Court detention facility, then “exerted influence to facilitate the construction, expansion

and lease of the PACC facility.” On Luzerne County’s behalf, he signed a secret “Placement Guarantee Agreement” with PACC. He also granted an injunction to prevent the results of a Pennsylvania Department of Public Welfare audit of PACC from being disclosed to the public.

In conjunction with Conahan, Ciavarella sentenced thousands of juveniles to terms of incarceration in violation of their constitutional rights – denying them counsel, the right to an impartial tribunal, and the right to free and voluntary guilty pleas. The two judges also pressured probation officers to make recommendations in favor of detention, even when they otherwise would have sought alternative sentences. [See: *PLN*, Nov. 2009, p.42; May 2009, p.20].

In one case, Ciavarella sentenced a 14-year-old girl to incarceration despite her mother’s objections that she suffered from epilepsy and was subject to seizures. Two days later the girl had a seizure; she was in juvenile court because she defaced public property with a felt-tip pen. “People in power are not always people we should trust,” the girl’s mother observed.

The consolidated class-action lawsuit

also charged Dr. Frank Vita with creating a backlog of psychological exams for offenders, as part of his contract with the two judges, to necessitate the juveniles' extended detention at PACC and WPACC.

Before the district court was the defendants' motions to dismiss. The court found that under the doctrine of absolute judicial immunity, Conahan and Ciavarella's actions in granting injunctions, adjudicating juveniles as delinquent and sentencing them to terms of incarceration were within the jurisdiction of Pennsylvania common pleas judges.

However, such immunity did not apply to the judges' administrative, non-judicial actions of signing the Placement Guarantee Agreement, influencing the Luzerne County commissioners and coercing probation officers to change their sentencing recommendations.

The district court also held that Dr. Vita was not entitled to witness/psychologist immunity for signing a contract with the judges and creating a backlog of psychological exams for offenders. The final issue in the motion to dismiss related to a juvenile's claim that "Perseus House" had forced her to take psychotropic medication, for which the court declined to extend immunity.

The district court therefore granted in part and denied in part the defendants' motions to dismiss on November 20, 2009. The class-action suit remains ongoing, with other dispositive motions pending. See: *Wallace v. Powell*, U.S.D.C. (M.D. Penn.), Case No. 3:09-cv-00286; 2009 WL 4051974.

Meanwhile, the Conahan and Ciavarella corruption scandal resulted in close scrutiny by state officials, including a special review panel formed by the Pennsylvania legislature. On May 27, 2010, the Interbranch Commission on Juvenile Jus-

tice called for increased oversight of state court judges, and made dozens of other suggestions for ensuring accountability in Pennsylvania's juvenile courts.

The Commission found that corruption in Luzerne County had been "deeply ingrained for many years," and examined why prosecutors, public defenders and probation officers had failed to stop obvious abuses committed by the corrupt judges, such as routinely hearing cases in which juveniles did not have attorneys. "We trusted the judge," said former assistant district attorney Thomas Killino. When asked whether prosecutors had wanted to know if sentences handed down by Ciavarella were unduly harsh, Killino replied, "It was not part of our purview."

Separately, in January 2010, around 5,000 juvenile convictions were thrown out from the time when Conahan and Ciavarella were taking bribes. The convictions, which spanned 2003 to 2008, previously had been vacated by the Pennsylvania Supreme Court. The district attorney's office announced the cases would not be

retried. "We are an example that shows how something should not be done. We know that here, no one is ever going to have to teach us that lesson [again]," stated District Attorney Jackie Musto Carroll.

The criminal charges against Conahan and Ciavarella remain pending after they withdrew their guilty pleas in 2009. "I'm disappointed it's taking so long," said Laurene Transue, whose daughter was sent to a boot camp by Ciavarella after mocking a school official on her MySpace page. "When are they going to stand up before a judge and be held accountable?" Conahan and Ciavarella face a 48-count indictment for racketeering, bribery, money laundering, wire and mail fraud, and tax violations. Ironically, they are benefiting from procedural safeguards in their criminal prosecution that they denied to the thousands of juveniles they sent to for-profit detention facilities. ■

Sources: *Philadelphia Inquirer*, *Billings Gazette*, *www.wnep.com*, *Washington Post*, *Times Leader*

\$2,750 Settlement in California Prisoner's Denial of Exercise Claim

The California Department of Corrections and Rehabilitation (CDCR) paid \$2,750 to settle a prisoner's Eighth Amendment claim for denial of exercise. The May 7, 2008 settlement came in a lawsuit filed by prisoner Terrell Curry.

In his third amended complaint, Curry alleged that seven guards at Salinas Valley State Prison retaliated against him, violated his First Amendment rights, were responsible for due process and equal protection violations, violated his Eighth Amendment rights by denying him exercise, and were

deliberately indifferent to his safety.

The defendants moved for summary judgment, which the U.S. District Court granted on all issues except Curry's claim for denial of exercise. Following its February 15, 2008 summary judgment order, the Court sent the case to the Pro Se Prisoner Mediation Program.

Acting pro se, Curry settled the matter for \$2,750; prison officials were allowed up to 120 days to make the payment due to California's state budget crisis. See: *Curry v. Ponder*, U.S.D.C. (N.D. Cal.), Case No. 3:06-cv-03731-MHP. ■

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Montana State and County Officials May be Liable for Injuries Caused by Private Prisoner Transport Company

The State of Montana and Montana counties may be held liable for mistreatment and injuries caused by private prisoner transportation companies, the Supreme Court of Montana held.

Jaydon Paull was arrested in 2003 by Florida officials after Montana authorities issued a warrant for his arrest due to a probation violation. American Extrajudicial Int'l (AEI), a private prisoner transport service, was hired by the Park County Sheriff's Office to return Paull to Montana.

The trip from Florida to Montana did not go well. Over the course of nine days, Paull and other prisoners were allegedly denied sufficient rest stops to use the bathroom. As a result, some prisoners defecated and urinated on themselves.

On March 3, 2003 the driver lost control of the transport vehicle; the van rolled several times, finally resting on its top. Another AEI employee was killed while Paull reportedly was injured.

The accident occurred after the AEI driver refused to give the prisoners a bathroom break. The driver, according to Paull's lawsuit, told him and the other prisoners to urinate into plastic cups or water bottles. While the prisoners were urinating, the driver started swerving the van in an apparent effort to cause the prisoners to spill urine on themselves. The driver lost control, however, resulting in the fatal accident.

AEI was not insured and went out of business, leaving potential claimants with virtually no recourse. Paull sued Park County and the State of Montana, alleging they were liable for his injuries. The county and state argued that they had no duty to Paull and were not AEI's agent when he was transported from Florida.

The Supreme Court of Montana disagreed. While "a contractor is not liable for every tort by an independent subcontractor," the Court wrote, "torts which arise from risks caused by engaging in such dangerous activity" are actionable. In this case, "the risk of driver misconduct was an inherent danger in the transportation of prisoners, which is inherently dangerous work." As such, the Supreme Court concluded that the county may be subject to "vicarious liability for the acts or omissions of its contractor, AEI."

Likewise, the Court concluded "the State had a duty to exercise ordinary care in returning Paull to Montana to answer its probation revocation proceeding." Therefore, "if the State chooses to transport prisoners by allowing other entities

to do the work, it may be held liable for the tortious acts or omissions of its agents in undertaking the transportation." See: *Paull v. Park County*, 352 Mont. 465, 218 P.3d 1198 (Mont. 2009), *rehearing denied*. ■

NACDL Releases Report on U.S. Drug and Mental Health Courts

by Matt Clarke

In September 2009, the National Association of Criminal Defense Lawyers (NACDL) released a 74-page report on the state of America's drug and mental health courts, reflecting the knowledge gleaned from over 130 expert witnesses who testified at hearings held in seven different states and questionnaires completed by 348 attorneys practicing in 40 states. The report heavily criticized drug courts in the U.S., but generally praised mental health courts.

Drug courts suffer from a lack of uniformity. The laws authorizing drug courts vary from state-to-state, county-to-county and even court-to-court within the same jurisdiction. Many drug courts reflect the personalities of the judges running them, which results in a hodgepodge of procedures being used in such programs.

Drug courts generally offer to divert from prison defendants who successfully complete court-supervised drug treatment. How this is accomplished varies greatly. In some jurisdictions, the defendant may be required to plead guilty to be admitted into a drug court and may retain a criminal record even after successfully completing treatment. Other jurisdictions permit entry into the drug court before entering a plea, with the prosecution being dropped if treatment is successful.

Drug courts may also compromise the role of the defense attorney. Most drug courts have been set up without input from defense counsel, and their procedures reflect that deficiency. A defendant may be required to forego discovery or filing any other type of pre-trial motion to qualify for the drug court program. This prevents defense counsel from ascertaining whether the state even has a triable case before the guilty plea is entered.

Further, drug courts often exclude defense counsel from staff meetings that could result in the defendant being incarcerated. Even if their presence is allowed, defense attorneys often do not show up for the frequent and time-consuming meetings. A defense attorney who is present at a meeting or hearing is expected to act as a member of the treatment team, a role which may compromise counsel's duty to advance the client's interests while preserving confidentiality.

The admission criteria for drug courts also may be biased. Many attorneys reported seeing few or no minority defendants in drug courts. Furthermore, many drug courts allow only the defendants most likely to succeed into the program. Indeed, the very existence of drug courts leads to police and prosecutors pursuing charges against defendants who otherwise might not be prosecuted due to the minor nature of their offenses. Drug courts are generally closed to repeat and serious offenders, who are most in need of the drug court's services.

In contrast to the poor grades given to drug courts, the NACDL report was quite favorable toward the more than 150 mental health courts in the U.S. Although plagued with some of the procedural and ethical problems of the drug courts, the report noted that mental health courts often diverted defendants out of the criminal justice system and helped them receive both treatment and aftercare, reducing the recidivism rate of mental health court participants.

Both drug and mental health courts deal with an intersection of criminal law and medical treatment. Perhaps the reason for the greater success of mental health courts is a greater willingness to view mental health as mainly a medical

issue while drug addiction is perceived as willful criminal behavior. If this is the case, then there is a great deal of merit in NACDL's primary recommendation

that recreational drug use be decriminalized and drug dependency be treated as a public health issue outside the criminal justice context. ■

Source: "America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform," available at www.nacdl.org/drugcourts

PLN Prevails in Public Records Suit Against GEO Group

by Alex Friedmann

In May 2010, Prison Legal News announced that it had prevailed in a public records lawsuit filed against Florida-based GEO Group (formerly Wackenhut Corrections), the nation's second-largest private prison company.

PLN filed the suit in 2005 under Florida's public records law after GEO failed to produce documents related to contractual violations and litigation against the company that resulted in settlements or verdicts. [See: *PLN*, Dec. 2005, p.25]. Under state law, F.S. 119.01(1), GEO is required to comply with public records requests.

Over the past five years of litigation the Circuit Court granted four motions to compel against GEO, ordering company officials to produce the records. GEO finally did so just before a summary judgment hearing in Palm Beach County Circuit Court, providing a spreadsheet of successful litigation against the company and agreeing to pay \$40,000 for PLN's attorney's fees. GEO also produced copies of the complaints and settlements in the ten lawsuits that had resulted in the largest monetary payouts.

"While we are pleased with the eventual outcome of this case, we are disappointed that GEO decided to drag it out over five

years, which was clearly a delaying tactic," stated PLN editor Paul Wright. "The public, which funds GEO's for-profit prison operations through taxpayer dollars, deserves better in terms of compliance with Florida's public records law."

PLN's attorney, Frank Kreidler, who specializes in public records and Sunshine Law litigation, agreed. "This was a long, tough case in which GEO failed to produce the requested records years ago, which would have made them available to the public through PLN's reporting. It is a disservice to the public when GEO fails to comply with the state's public records statute." See: *Prison Legal News v. The GEO Group, Inc.*, Fifteenth Judicial Circuit of Florida for Palm Beach County (FL), Case No. 50 2005 CA 011195 AA.

In other recent private prison-related news in Florida, a report by the Florida Center for Fiscal and Economic Policy released in April 2010 found that it was uncertain whether private prisons pro-

duce savings of at least seven percent as required by state law. The report further concluded there was insufficient data to determine the efficacy of education and rehabilitation programs provided by private prison companies.

Also, on April 13, 2010, Florida officials announced that GEO Group was losing its contracts to operate the Graceville and Moore Haven correctional facilities; those prisons will now be managed by Corrections Corporation of America. ■

Additional source: www.bizjournals.com

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Virginia Sheriff Sentenced to 19 Months on Corruption Charges

In December 2009, the former sheriff of Page County, Virginia was sentenced to 19 months in federal prison on corruption charges. The sentence was imposed following a guilty plea to an indictment that originally included 22 counts.

The story behind Daniel W. Presgraves, 47, is one of a home-grown politician whose fall from grace came on the heels of hobnobbing with many of Virginia's most prominent politicians.

When Presgraves was elected sheriff of Page County, he won over the citizenry by such moves as using prisoners to deliver Meals on Wheels. He forged relationships with former governor George Allen, former attorney general Jerry W. Kilgore and House minority whip Eric Cantor.

The pinnacle of Presgraves' rise to power came when former President George W. Bush gave a speech at Shenandoah National Park in 2007. Sheriff Presgraves was a central figure among the welcoming committee, and boasted of shaking Bush's hand.

Federal prosecutors, however, said Presgraves' "arrogance" was his downfall. "He thought he was like king of the county and he could do anything he wanted to – and for some years he did," stated Assistant U.S. Attorney Thomas J. Bondurant, Jr.

The residents of Page County considered Presgraves to be cocky. Ironically, it was cockfighting that resulted in his indictment. For many years cockfighting was legal, or at least tolerated, in many states.

A federal undercover agent posed as an out-of-state "cocker" interested in buying a cockfighting pit known as Little Boxwood. The agent arranged with Albert C. Taylor, a local cocker and GOP party official, and two other men to give Presgraves \$500 to not interfere with the sale or operation of the pit. Presgraves later deposited the money into his bank account, the indictment charged.

Witnesses at grand jury proceedings said Presgraves made lewd comments and groped a dozen female sheriff's office employees. In addition to the bribery and sexual harassment charges, he was accused of using prisoner labor to work on his and his relatives' properties. The October 2008 indictment further charged Presgraves with conspiring to deal marijuana, tipping off a local company about the federal investigation, embezzling

\$86,410 – including money from the jail's phone service provider – and attempting to launder \$200,000.

Presgraves' plea deal only required him to admit to illegally using prisoner labor and trying to persuade witnesses to lie. On December 18, 2009, he was sentenced to 19 months in prison, two

years supervised release, a \$1,000 fine and almost \$4,000 in restitution, and ordered to forfeit \$75,000. See: *United States v. Presgraves*, U.S.D.C. (W.D. Va.), Case No. 5:08-cr-00028. ■

Sources: *Washington Post*, U.S. Attorneys Office press release

Fifth Circuit: RLUIPA Does Not Create Individual Capacity Cause of Action

The Fifth Circuit Court of Appeals has held that the Religious Land Use and Institutionalized Persons Act (RLUIPA) does not create a cause of action against defendants in their individual capacities. The Court also held that the denial of Christian chapel worship may violate RLUIPA and the First Amendment.

Leroy Harvey Sossamon III, a Texas state prisoner, filed a 42 U.S.C. § 1983 civil rights action in U.S. District Court against the Texas Department of Criminal Justice (TDCJ). He alleged that the French Robertson Unit's policy of forbidding congregational worship in the chapel, and prohibiting prisoners on cell restriction from attending religious worship services, violated his rights under the First Amendment and RLUIPA. The district court granted the defendants' motion for summary judgment based on Eleventh Amendment immunity and qualified immunity barring damages, and held injunctive relief was improper under § 1983 and RLUIPA.

Sossamon appealed. The Fifth Circuit appointed counsel, then decided that his claims for injunctive relief on the cell restriction issue were moot because the TDCJ had ended its policy of prohibiting prisoners on cell restriction from attending religious services. The Court then turned to Sossamon's monetary damages claims.

The appellate court noted that RLUIPA was enacted pursuant to the spending clause. "Congressional enactments pursuant to the Spending Clause do not themselves impose direct liability on a non-party to the contract between the state and the federal government." Therefore, the Court of Appeals held that individual-capacity defendants may not be sued under RLUIPA. Thus, only injunctive and declaratory relief may be

sought under that statute.

The Fifth Circuit found there were material issues of fact regarding Sossamon's use of the chapel. He claimed that kneeling at the altar in view of the cross to pray and receive Holy Communion had a special significance and meaning for Christians. The defendants submitted a chaplain's affidavit stating that was not a core requirement of Christianity. The appellate court said the affidavit missed the point. "Prison chaplains are not the arbiters of the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion," the Court wrote.

The fact that religious services were conducted in multipurpose rooms in the individual housing buildings, or that the defendants had legitimate security concerns about the physical design of the chapel and the potential for mixing prisoners from various gangs which they kept separate in segregated housing areas, did not relieve them of their duty not to substantially burden Sossamon's religious rights.

The use of the chapel for secular purposes involving large numbers of prisoners weakened the defendants' security argument. The Court of Appeals noted that the chapel could still be used for religious congregational activity on a rotational basis between the various housing areas without creating a security concern. Further, the defendants had not even attempted to accommodate Sossamon by using a portable altar and cross. Therefore, summary judgment on this issue was inappropriate under both RLUIPA and the First Amendment. However, the defendants were entitled to qualified immunity from damages in their individual capacities for potential First Amendment violations.

The Fifth Circuit therefore reversed

the district court's judgment on the RLUIPA and First Amendment claims for injunctive and declaratory relief related to the chapel-use issue, dismissed as moot Sossamon's claims related to injunctive and declaratory relief on the cell restriction issue, and instructed the district court to vacate those portions of its ruling. The remainder of the summary judgment order was affirmed. See:

Sossamon v. Texas, 560 F.3d 316 (5th Cir. 2009).

The U.S. Supreme Court granted certiorari on May 24, 2010 on the question of "Whether an individual may sue a State or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act." See: *Sossamon v. Texas*, 2010 WL 2025142. *PLN* will report the outcome. ■

Prison Psychologist Shoots Ex-Prisoner Boyfriend, Loses Her License

The North Carolina Psychology Board has revoked the license of a prison therapist who had a sexual relationship with a former prisoner – and shot him – upon his release.

While Lamount K. Friend was at Neuse Correctional Institution, he participated in therapy sessions with prison psychologist Kristel K. Rider. A sexual relationship between the two began on the April 2009 night that Friend was released from prison. The romance did not last long, however.

Less than three weeks after his release, on April 21, Rider shot Friend in the back during an argument; the .38 bullet barely missed his heart, and he was hospitalized for three weeks. Rider claimed in a 911 call that Friend had pulled a knife on her, though he denied doing so. Rider did not have a concealed weapons permit for her handgun at the time of the shooting.

Rider was fired from her prison job following the incident for violating legal and ethics rules that prohibit psychologists from having romantic relationships with their clients. Rider's professional license was revoked on December 8, 2009; she can reapply for her license in one year.

No criminal charges were filed against Rider related to the shooting, though Friend faced two misdemeanor charges for violating a court order to stay away from Rider. Those charges were later dropped, and the couple reportedly reconciled and reunited.

Asked whether he had learned anything from his relationship with Rider, Friend said, "Don't make a woman mad, especially if she has a concealed firearm." ■

Sources: *Associated Press*, *News & Observer*

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Georgia Jail Settles PLN Censorship Suit, Pays \$149,759.21 in Damages, Attorney Fees

On April 22, 2010, Prison Legal News announced that it had settled a First Amendment censorship suit against Fulton County, Georgia and former Fulton County Sheriff Myron Freeman.

The lawsuit, filed by PLN in October 2007, claimed that prisoners at the Fulton County Jail were not allowed to receive subscriptions to PLN due to a mail policy that barred prisoners from receiving non-religious reading materials. Such materials – including books, magazines and newspapers – were returned or destroyed without notice to the sender. [See: *PLN*, Dec. 2007, p.30].

Although the same policy had been declared unconstitutional in a previous, unrelated federal lawsuit in 2002, the jail continued to use the policy to censor

subscriptions to PLN. PLN argued that the ban on non-religious reading materials was overbroad, exaggerated, arbitrary and capricious, as well as unconstitutional in violation of the First and Fourteenth Amendments. The jail changed its mail policy to let prisoners receive PLN subscriptions after PLN filed suit.

The district court granted a preliminary injunction on February 4, 2008, enjoining the Fulton County Jail from using the previous unconstitutional mail policy; however, the litigation continued for the next two years. The county eventually agreed to settle the case by paying \$30,000 to PLN as part of a consent judgment, plus attorney fees. The district court subsequently ordered Fulton County to pay PLN's attorney fees in the amount of \$115,093.20 plus

\$4,666.01 in costs.

"It took a prior finding that the old mail policy was unconstitutional, plus the suit filed by Prison Legal News and a settlement of almost \$150,000 in damages and fees before the Fulton County Jail got the message that they can't violate the First Amendment rights of publishers that want to send reading materials to prisoners," stated PLN editor Paul Wright. "The taxpayers of Fulton County are the losers in this case, unfortunately, while the First Amendment prevailed."

The settlement was reported in the *Atlanta Journal-Constitution*. PLN was ably represented by Atlanta attorneys Brian Spears and Gerald Weber. See: *Prison Legal News v. Fulton County*, U.S.D.C. (N.D. Georgia), Case No. 1:07-cv-02618-CAP. ■

Oregon Prison Officials Treat Heart Failure with Antacid, Tylenol, Heat Pack

by Mark Wilson

In May 2007, Katherine Anderson was sentenced to 26 months in prison for embezzling \$2,400 from her employer, a non-profit agency. She was sent to Oregon's Coffee Creek Correctional Facility (CCCF). The 31-year-old mother of four was released 17 months later with a replacement heart valve, a shortened life span and no chance of having more children. According to her attorney, prison medical officials had ignored symptoms of an easily treatable illness called bacterial endocarditis.

Three months into her sentence, Anderson discovered a lump in her abdomen and began suffering from nausea and diarrhea. Within weeks she was having blurred vision, dizziness, cold chills, night sweats, extreme fatigue and shortness of breath. She experienced numbness in her face and legs, and her fingertips turned purple as she suffered from textbook symptoms of endocarditis and heart failure.

One nurse said she had nothing to worry about, another told her she had the flu, and a third nurse stated she was going through menopause.

On October 27, 2007, Anderson had a fever, low blood sugar and a racing heart, according to her medical records. A nurse told her to eat something – she had an or-

ange and a peanut butter sandwich – and to take a nap.

When Anderson's symptoms persisted, she was sent to a hospital later that day. Emergency room doctors quickly diagnosed strep enterococcus – microscopic bacteria were punching holes in her aortic valve, depriving her body of oxygenated blood. Two other heart valves appeared to be damaged as well. After several blood transfusions and the first week of a six-week course of antibiotics, Anderson was returned to the prison infirmary.

Her symptoms quickly worsened and the tips of her fingers swelled – a telltale sign of chronic endocarditis. Medical staff repeatedly failed to determine that she had congestive heart failure.

Dr. Sanjiv Kaul, the head of cardiovascular medicine at Oregon Health and Science University (OHSU), was astounded that for weeks prison officials ignored clear signs that Anderson was dying of a treatable condition. "This poor woman had two valves diseased, both of them stressing her heart out, giving her heart failure," Kaul said. "Any person with decent common sense would have sent her for surgery. So I am just amazed to hear this story. I mean, this is pure ignorance."

In early December 2007, prison

medical staff finally requested a follow-up echocardiogram to see if the antibiotics were working. The Department of Corrections' notorious Therapeutic Levels of Care committee denied the request. By mid-December, Anderson complained of chest pains and her heart was racing at 120 beats per minute.

She was referred to Dr. Elizabeth Sazie, CCCF's Chief Medical Officer. Despite Anderson's prior medical history, Sazie diagnosed her with heartburn and prescribed a stomach acid reducer plus Tylenol and a heat pack for her chest. Not satisfied with this non-treatment, Anderson began seeking an attorney to help her get the medical care she needed.

When Anderson's family visited her on Christmas Day in 2007, she tried to hide the extent of her medical problems from her children. By the end of the visit, however, she cried as she hugged them, fearing she might never see them again.

That night, Anderson pleaded with a nurse to send her to a hospital. "Please. I'm dying," she recalls saying. Instead she was taken to the prison infirmary, where she convinced two other nurses to send her to the emergency room.

There, an X-ray revealed that her heart was enlarged and her lungs were

full of fluid. Anderson had been in congestive heart failure for weeks; she underwent emergency surgery four days later. Surgeons repaired her aortic valve with a Teflon replacement, put a band on her tricuspid valve, sewed up holes in her mitral valve and removed scab-like material from her damaged heart.

"When I got back to the infirmary, I found out the two nurses who sent me to the hospital were reprimanded and

the doctor who wouldn't listen to me is an employee of the month," Anderson wrote. Nurses joked that she had broken CCCF's medical budget, as the prison had spent almost \$130,000 for her emergency care. Anderson's suffering was completely unnecessary and could have been avoided with about \$100 of antibiotics had her condition been correctly identified and treated, according to Dr. Kaul.

Anderson must now take blood thin-

ners for the rest of her shortened life; as a result, she cannot have any more children. She has sued the Oregon Dept. of Corrections for deliberate indifference and medical malpractice, and is seeking \$2.5 million in damages. Anderson is represented by Portland attorney Michelle Burrows. See: *Anderson v. Sazie*, U.S.D.C. (D. Ore.), Case No. 3:09-cv-00774-ST. ■

Source: *The Oregonian*

BOP Agrees to Pay \$30,000 to Prisoner Assaulted by Guards

On July 14, 2009, the Federal Bureau of Prisons (BOP) agreed to settle a lawsuit filed by a prisoner who was beaten by guards.

On or about April 11, 2006, while being escorted to the Special Housing Unit (SHU) for allegedly assaulting a BOP employee, Kenneth Howard was tripped and thrown to the steel-plated floor of an elevator by Jamie Toro, a guard at the Metropolitan Detention Center (MDC) in Brooklyn.

While on the floor, Howard was repeatedly stomped on the back, shoulders and head by Glen Cummings, another MDC

guard. The force of Cummings' blows were so hard that a boot imprint was left in Howard's back. Toro, Elizabeth Torres and Angel Perez, two other BOP guards, watched Cummings attack Howard but did not intervene. Howard was handcuffed behind his back during the incident.

Later, Toro, Cummings, Torres and Perez tried to cover-up the incident by failing to report the assault, and by falsely claiming that Howard became combative while being escorted to the SHU. The entire incident was caught on camera.

Toro, Cummings, Torres and Perez were charged and convicted for their roles

in the incident. Toro was sentenced to 41 months; Cummings received 36 months, while Torres was given 15 months and Perez received nine months.

The BOP agreed to settle Howard's federal lawsuit a mere seven months after it was filed, for \$30,000. Howard was represented by Brett Klein of Leventhal & Klein, a Brooklyn, New York law firm. See: *Howard v. United States*, U.S.D.C. (E.D. NY), Case No. 1:09-cv-00096-JBW-RLM. ■

Additional source: *U.S. Department of Justice*



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Oregon Youth Authority Warden Gives Agency a Black Eye

A “rising star” at the Oregon Youth Authority (OYA) pleaded guilty to six criminal offenses and was sentenced to four months in jail, probation and 160 hours of community service, and ordered to pay \$11,500 in restitution. He gave OYA “a black eye that is going to be difficult to repair,” remarked Union County District Attorney Timothy Thompson.

Darrin N. Humphreys, 44, joined Oregon’s juvenile corrections system in 1987. He was later appointed Director of the RiverBend Youth Transitional Program, a 50-bed facility for offenders age 12-25 transitioning back into the community.

In 2007, Humphreys became the superintendent of the 300-bed MacLaren Youth Correctional Facility, Oregon’s largest juvenile prison. He resigned several months later, however, when the Oregon State Police began investigating claims that he stole construction materials and state property while employed at RiverBend.

Investigators found that Humphreys had claimed over \$12,000 in false mileage reimbursements, re-roofed his house with state materials, took kickbacks from a contractor, and used juvenile offenders to build kitchen cabinets. He faced 26 charges, including theft, official misconduct, tampering with public records, tampering with a witness and menacing. Humphreys’ abrupt downfall also brought down OYA Director Robert Jester and Deputy Directors Phil Lemman and Brian Florip, who resigned. [See: *PLN*, Jan. 2009, p.18]. Jester had called Humphreys “sociopathic.”

Humphreys pleaded guilty to three felony and three misdemeanor offenses. At his October 19, 2009 sentencing hearing, Humphreys’ attorney, Janie Burcart, portrayed him as the victim of an out-of-control system. She claimed he had been caught up in a management atmosphere of 80-hour work weeks, stress and corruption. “Much of the culture of the Oregon Youth Authority was massive drinking,” Burcart said. “They would drink and drink and drink. That is no way to run an agency.”

Retired RiverBend employee Kenneth Hagerman said OYA was dominated by an “old-boy network” and Humphreys had to play politics. “I would hate to see him serve as a whipping boy for the whole OYA,” agreed former MacLaren employee Elray Sampson.

Yet the assessment of Thompson, the prosecutor, seems closer to the truth: “He used Oregon Youth Authority facilities and resources as his own personal fiefdom ... for his own benefit.” Humphreys’ behavior was “the epitome of criminal thinking errors” that he was supposed to correct in juvenile offenders, Thompson added.

Circuit Court Judge Robert Morgan accused Humphreys of being “disingenuous” in claiming that he “forgot” to repay the state for roofing materials and for seeking mileage reimbursements for driving a state-owned vehicle to distant meetings. ■

Source: *The Oregonian*

New Jersey: Class-Action Status Granted in Suit Challenging Conditions of Confinement at Passaic County Jail

by Michael Brodheim

On May 28, 2009, a U.S. District Court granted class-action status to prisoners seeking declaratory and injunctive relief for unconstitutional conditions of confinement at the Passaic County Jail (PCJ) in Paterson, New Jersey. At the same time, the court denied a motion to dismiss filed by defendant George Hayman, Commissioner of the New Jersey Department of Corrections. Hayman had argued that as a matter of law, he could not be held responsible for conditions at the 50-year-old facility.

“The law is clear that the system-wide failures at Passaic County Jail warrant class-action status, and we are pleased with the court’s decision,” said Emily Goldberg, a visiting assistant clinical professor at the Center for Social Justice at Seton Hall Law School, who represents the class members along with the ACLU of New Jersey. The class consists of “all persons who are now or will become incarcerated at PCJ during the pendency of this lawsuit” – a group of plaintiffs that could number into the thousands.

The complaint, originally filed in September 2008 by eight current and former PCJ prisoners, alleges First, Eighth and Fourteenth Amendment violations, specifically that PCJ suffers from 1) overcrowding with a resulting lack of privacy, loss of sleep and threat of prisoner violence; 2) unsanitary living conditions; 3) inadequate medical care; 4) inadequate and nutritionally deficient food; 5) inadequate heating, cooling and ventilation; 6) inadequate clothing; 7) inadequate fire detection and alarm systems; 8) excessive use of force by jail staff, including the use of dogs for intimidation; 9) restrictions on

religious freedom; and 10) retaliation for filing grievances.

Although PCJ was designed to house approximately 900 prisoners, it has held as many as 2,000. There have been a number of MRSA outbreaks at the facility.

The district court had no difficulty in finding that the requirements for class certification outlined in Rule 23 of the Federal Rules of Civil Procedure were satisfied; i.e., numerosity, commonality, typicality, adequacy of representation, and that the defendants had “acted or refused to act on grounds generally applicable to the class.” The lawsuit remains pending. See: *Colon v. Passaic County*, U.S.D.C. (D. N.J.), Case No. 2:08-cv-04439-DMC-MF.

PCJ has an inglorious past. More than 30 years ago, prisoners filed suit challenging their conditions of confinement, alleging virtually the same deplorable conditions described in the current class-action complaint. See: *Valentine v. Englehardt*, U.S.D.C. (D. N.J.), Case No. 78-cv-00270. Despite a comprehensive settlement that called for vast improvements, conditions did not in fact improve. In 1982, 18 months after the settlement, former New Jersey Governor Thomas Keane toured PCJ and said the facility was “an embarrassment.”

The Department of Homeland Security’s Office of the Inspector General began an investigation into conditions at PCJ in 2005; the Passaic County Sheriff’s Office was uncooperative and ejected the federal investigators from the jail. That same year, all immigration detainees were removed from PCJ. In 2007, U.S. District Court Judge Katherine Hayden described conditions at the facility as so “shameful”

that they constituted punishment and justified a sentence reduction for a federal prisoner held at the jail. See: *United States v. Sutton*, U.S.D.C. (D. N.J.), Case No. 2:07-cr-00426-KSH; 2007 U.S. Dist. LEXIS 79518.

As a result of Judge Hayden's deci-

sion, all federal detainees were removed from PCJ in 2008. In responding to the current class-action suit, Passaic County Sheriff's Office spokesman Bill Maer said, "This lawsuit is a rehash of accusations that the department has seen before. They're generally based on the opinions of

individuals who are incarcerated, and nobody likes to be in jail." Especially when the jail has conditions of confinement as abysmal as those at PCJ, apparently. ■

Additional sources: *Associated Press*, *ACLU of New Jersey*, www.njherald.com

U.S. Attorney Nominees Involved in Hiding Court Records

by David M. Reutter

Two of the three nominees to be South Florida's next U.S. Attorney have violated a basic tenet of court administration by acting to hide court records from the public.

In 2002, U.S. Attorney nominee Daryl Trawick, a Miami-Dade Court Judge, instructed the clerk's office to alter the public docket in a criminal case against defendant Salim Batrony. A secret docket was maintained to allow Trawick to track what was actually happening in the case.

What the public saw in Batrony's case were 10 phony docket entries that made it appear the felony drug money laundering charges against him had been dropped. In actuality, Batrony had pleaded guilty to the charges and was secretly cooperating

with law enforcement authorities.

Florida's Judicial Qualifications Committee (JQC) found no evidence of wrongdoing, but by the time the JQC investigated the phony docket, the false entries had been deleted from the public record. The JQC never asked to view the fake entries on the non-public side of the electronic docket maintained by the clerk's office.

U.S. Attorney nominee David M. Buckner, a Miami lawyer, was involved in the detainment of Mohamed Kamel Bellahouel in the aftermath of the 9/11 attacks. *PLN* previously reported on this secret docket case. [See: *PLN*, Dec. 2003, p.1]. Buckner was an Assistant U.S. Attorney at the time, but the level of his involvement in the Bellahouel case is unknown as it is

still shrouded in secrecy.

In addition to Trawick and Buckner, the federal nominating commission selected Assistant Miami-Dade County Attorney Wilfredo "Willy" Ferrer as a nominee for the U.S. Attorney for South Florida. Ferrer had served as Chief of the Federal Litigation section at the Miami-Dade County Attorney's Office.

President Obama subsequently nominated Ferrer, who was confirmed by the Senate on April 22, 2010. At least the president decided to appoint someone who had not already betrayed the public's faith in an open and transparent justice system. ■

Sources: *Broward Bulldog*, www.justice.gov/lusaofls



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\$60,000 Settlement in New York Jail Captain's Assault on Prisoner

The City of New York paid \$60,000 to settle a prisoner's civil rights action. The case was succinctly defined as an incident where New York Department of Corrections (NY DOC) Captain Reginald Patterson not only "gratuitously punched an inmate, but also ... generated an elaborate ruse to cover it up."

The case revolved around a May 13, 2007 incident at the Anna M. Kross Center (AMKC) on Riker's Island. On that day, convicted prisoner David Alston, who was awaiting sentencing on a drug charge, had a visit with his wife, Shavon. Those were about the only facts not in dispute during a three-day hearing on a petition filed by NY DOC officials to terminate Patterson.

The administrative law judge considering the petition found that Patterson and AMKC guard Daniel Vallecillo were not credible witnesses. The judge held the Alstons were credible.

David Alston said that after an hour of visitation, his visit was terminated. As he was having a discussion with Vallecillo about being previously granted a time extension for the visit, Patterson walked up to Alston to ask what the "noise was."

Alston replied that he was talking to the guard. Patterson told him to get out of the line of prisoners waiting to go through the metal detector. After everyone was gone, Patterson took off his windbreaker and smirked when Alston asked for his "boots before you beat me up." Patterson then hit Alston in his right eye, and Alston was thrown in an isolation room.

When Patterson and Vallecillo returned with a baton and mace, Alston informed them that his mother-in-law was a NY DOC guard. Once Patterson verified that fact, he apologized and allowed the Alstons an additional four to five hours of visitation.

After Alston refused Patterson's offer to take him to medical and look out for him in exchange for remaining silent about the assault, Patterson and Vallecillo began to create documentation that stated Shavon had struck her husband during the visit. The judge noted that medical reports backed up Alston's version of events, as did numerous consistent interviews by NY DOC officials when Alston reported the incident.

On October 1, 2009, the administrative law judge recommended that Patterson be terminated. See: *Dep't*

of Correction v. Patterson, Index No. 2164/09. The NY DOC settled Alston's federal lawsuit several months later, on December 11, 2009. Alston was repre-

sented by Brooklyn attorney Brett H. Klein. See: *Alston v. City of New York*, U.S.D.C. (E.D. NY), Case No. 1:08-cv-03155-NGG-SMG. ■

California: Furloughing Prison Employees Costing Taxpayers More

by Michael Brodheim

Faced with an unprecedented budget deficit, California Governor Arnold Schwarzenegger ordered state workers to stay home three Fridays each month, which amounts to a 14% pay cut. Known as the "Furlough Friday" program, the cost-cutting measure, implemented in February 2009, was supposed to save the state a projected \$1.7 billion. A recent report commissioned by Senate President Pro Tem Darrel Steinberg, however, concludes that the savings will be far less than originally anticipated.

"Plain and simple," Steinberg said, not mincing his words, "It's a poorly thought-out program."

The Senate report highlights the fact that a shortage of prison staff to cover 24-hour positions has resulted in employees often having to report to work on their furlough days. Those employees are paid in IOUs that will eventually cost the state – and taxpayers – much more. Under the furlough program, furlough days are not supposed to be cashed in by workers; rather, each furlough day is to be exchanged for a day off taken no later than June 2012.

In reality, "what is happening," said Steinberg, "is the state is not reducing hours, they're deferring paychecks."

In fact, it may be worse than that. In the case of the prison health care system, for example, where a furlough savings of \$108 million was projected, rather than saving money the furloughs are actually costing the state tens of millions of dollars, according to the Senate report. That is because Clark Kelso, the federal receiver appointed to oversee the delivery of medical care to California state prisoners, has had to resort to overtime to cover what would otherwise be a personnel gap resulting from the furloughs.

"The long-term cost of this is greater than the savings," observed David Lewis, deputy director for fiscal affairs for the California Department of Corrections

and Rehabilitation (CDCR). "You sacrifice the future to deal with the current problem."

In response, Schwarzenegger spokesperson Rachel Cameron said, "The state has never had to deal with a \$60 billion deficit – over half of the general fund – in one year." The administration will review the Senate report's findings, she added.

In March 2010, the *Los Angeles Times* reported that state employees had been paid more than \$1 billion in overtime last year despite – or perhaps due to – the furloughs. Most of the overtime came from the CDCR and the Department of Mental Health. For example, prison nurse Nellie Larot lost \$10,000 in salary in 2009 due to the furloughs but made \$177,512 in overtime, which raised her total earnings to \$270,000 – more than the CDCR's director. Another prison employee, Randall Rowland, received \$133,000 in overtime pay.

The Senate report and excessive overtime paid to state employees aren't Governor Schwarzenegger's only headaches related to the furlough program. On March 19, 2010, a California Court of Appeals ordered the state to stop furloughing 500 attorneys and other staff members at the State Compensation Insurance Fund. The appellate court found the furloughs were illegal under a state law that exempted those employees from "hiring freezes and staff cutbacks otherwise required by law." The affected workers are not paid from the state's general fund, unlike most other state employees. See: *CASE v. Schwarzenegger*, 106 Cal.Rptr.3d 702 (Cal.App. 1 Dist., 2010).

Governor Schwarzenegger requested review of the ruling, and also vetoed legislation that would have exempted up to 80,000 state workers from being furloughed. The California Highway Patrol and other public safety officers are already exempt from the furlough program, but not CDCR employees.

This has led some to question whether the California Correctional Peace Officers Association (CCPOA), which represents state prison employees and has an adversarial relationship with the Schwarzenegger administration, is losing its political clout. The CCPOA had lobbied for California's harsh three-strikes law, which contributed to the state's prison overcrowding crisis; now the prison system is under court order to reduce its population by up to 40,000 prisoners and the governor is in favor of expanding the use of private prisons, which will likely cost some CDCR employees their jobs.

On May 20, 2010, the California Supreme Court agreed to review the appellate ruling in *CASE v. Schwarzenegger*. Chief Justice Ronald George met with the governor to discuss the budget for the judicial branch on May 11; Schwarzenegger restored \$100 million in funding for state courts 72 hours after the meeting, and six days later the Supreme Court agreed to review the adverse appellate ruling. The governor's office denied there was any connection between the events. ■

Sources: *www.latimes.com*, *The Economist*, *www.sfgate.com*, *www.law.com*

Sixth Circuit: Shy Bladder Suit Returned to District Court

The U.S. Court of Appeals for the Sixth Circuit affirmed in part and reversed in part the dismissal of a prisoner's lawsuit alleging violations under 42 U.S.C. § 1983 and the Americans with Disabilities Act (ADA).

Danny Ray Meeks, a Tennessee prisoner, sued the Tennessee Department of Corrections (TDOC) and seven TDOC employees after being twice disciplined for failing to give a urine sample during drug tests. Meeks claimed that he suffered from pauresis, the clinical term for "shy bladder syndrome," a medical condition that makes it difficult for some two million Americans to urinate in front of others.

In an unpublished per curiam opinion, the Court of Appeals affirmed the dismissal of Meeks' § 1983 claims because he had failed to get the two disciplinary convictions overturned. A favorable ruling on Meeks' claims, the appellate court wrote, "would imply the invalidity of his conviction or the length of his sentence," citing *Edwards v. Balisok*, 520 U.S. 641 (1997) [PLN, July 1997, p.1].

The Sixth Circuit concluded, however, that a remand was necessary to determine whether Meeks was entitled to an injunction under the ADA. The district court had held that Meeks failed to allege he was excluded from any program or benefits in violation of the ADA.

However, the Court of Appeals decided that Meeks' allegations that the TDOC discriminated against him by "denying him lower security classification, the right to work as a legal clerk, participation in the Arts & Crafts program, visitation, and the ability to purchase packages as a result of his disciplinary convictions" was sufficient to allege a claim under the ADA.

Accordingly, the case was remanded to the district court for further consideration of Meeks' ADA claim. See: *Meeks v. Tennessee Department of Corrections*, Case No. 08-05980 (6th Cir. 2009) (unpublished).

This case remains pending before the district court on cross-motions for summary judgment. See: *Meeks v. Tennessee Department of Corrections*, U.S.D.C. (M.D. Tenn.), Case No. 1:07-cv-00013. ■

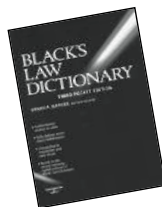
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Being in Unauthorized Jail Area Without Escape Intent Not a Crime in Indiana

The Indiana Court of Appeals held that when prisoners “have no intent or plan to flee from detention in the penal facility in which they are confined, they cannot be guilty of the crime of escape when they merely enter restricted areas of the facility without permission.”

That decision came in an appeal by the State of Indiana, challenging a trial court’s dismissal of escape charges brought against six prisoners at the Greene County Jail.

They were charged after jail officials

learned that three female prisoners had removed metal ceiling panels in their cell block and climbed through the ceiling into the men’s cell block, usually after midnight. There they would hang out, play cards and have sex with three male prisoners, who went into the female cell block at least once. This activity occurred over a dozen times from September to October 2008. [See: *PLN*, July 2009, p.50].

The appellate court said that to prove the prisoners committed the offense of

escape, the state had to establish “they intentionally fled detention in a penal facility.” The facts alleged in this case failed to show any such attempt to flee the jail. Instead, at most the facts indicated a violation of jail rules, which was not a crime.

As such, the trial court’s order of dismissal was affirmed. Court of Appeals Judge Ezra H. Friedlander entered a lengthy dissenting opinion. See: *State of Indiana v. Moore*, 914 N.E.2d 304 (Ind. App. 2009), *review denied*. ■

Florida Prisoner Exonerated by DNA After Serving 35 Years

by David M. Reutter

After 35 years of proclaiming his innocence for the kidnapping and rape of a 9-year-old boy, James Bain, 54, was finally proven innocent and released from a Florida prison on December 17, 2009.

Of the 246 prisoners nationwide exonerated by DNA evidence, Bain served the most time, according to the Innocence Project of Florida.

At the time of the 1974 crime, the victim said his attacker had bushy sideburns and a mustache. The boy’s uncle, a former assistant principal at a local high school, thought it sounded like Bain, one of his former students.

Confronted by detectives with a photo lineup, the victim identified Bain. Questions remain as to whether the detectives steered the child to make an incorrect identification. In a subsequent deposition, the victim said he was asked to “pick out Jimmie Bain” among the photos.

Evidentiary testing available at the time failed to definitively link Bain to the crime. Despite that fact the jury rejected his alibi defense, supported by his twin sister, that he was home watching TV. Following his conviction Bain was sentenced to life in prison.

After four of his pro se petitions seeking DNA testing were thrown out by state courts, the Innocence Project of Florida became involved in Bain’s case in early 2009. A private lab in Ohio proved his innocence and an expedited test by the Florida Department of Law Enforcement confirmed the results. “He’s just not connected with this particular incident,” acknowledged State Attorney Jerry Hill.

Under a 2008 Florida law, exonerated prisoners are automatically entitled

to \$50,000 for each year they served in prison. Bain is therefore entitled to \$1.75 million. However, “[n]othing can replace the years Jaimie has lost,” noted Innocence Project attorney Seth Miller.

Like many exonerees, Bain exhibited a forgiving spirit upon his release. “No, I’m not angry. Because I’ve got God,” he stated.

Bain said he looked forward to spending time with his mother and family. “That’s the most important thing in my life right now, besides God.” The last time Bain was free, Nixon was still president. ■

Sources: *Associated Press*, www.huffingtonpost.com, www.floridainnocence.org

Fourth Circuit Holds Individual Capacity Damage Claims Unavailable Under RLUIPA

The Fourth Circuit Court of Appeals has held that the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, does not authorize individual capacity damages actions.

The Court’s ruling came in the appeal of prisoner Scott Lewis Rendelman, who brought a RLUIPA claim against the Maryland Department of Corrections (MDOC) for failing to provide him with a kosher diet at MCI-Hagerstown.

While in MDOC custody, Rendelman was informed that a kosher diet was not available. Instead, to meet the kosher dietary laws of Rendelman’s Orthodox Jewish religious beliefs, the MDOC offered prisoners a choice of two diets: a pork-free regular diet and a lacto-ovo vegetarian diet.

Although the diets were designed “to accommodate a broad spectrum of religious practices,” neither diet complied with the kashrut (the rules derived from the Torah governing food). This resulted in Rendelman being unable to eat many meals, causing him to lose 30 pounds.

The district court, in granting the

defendants’ motion for summary judgment, held that prison officials did not violate the First Amendment or RLUIPA. On appeal, the Fourth Circuit dismissed Rendelman’s injunctive relief claim seeking a kosher diet.

The basis for the dismissal was that Rendelman had been transferred to federal custody. Additionally, as the MDOC was changing its food policies to provide a kosher diet, it was unlikely the problem was capable of repetition.

Turning to Rendelman’s claim for monetary damages, the appellate court noted his allegations were against individual prison officials and not the state itself. The Court of Appeals held that such damages are not allowed by RLUIPA, which applies to the states under the spending clause.

“Legislation enacted pursuant to Congress’ spending power has previously been held to authorize damages actions against state entities receiving federal funds,” the Fourth Circuit wrote. “Our research suggests, however, that it would be a novel use of the spending clause to condition the

receipt of federal funds on the creation of an individual capacity damages action; we can find no instance in which the spending clause has been used in this manner.”

RLUIPA also purports to have an independent basis under the commerce clause, but that issue was not before the Court. As such, Rendelman’s appeal was

dismissed in part and the district court’s summary judgment order was affirmed in part. See: *Rendelman v. Rouse*, 569 F.3d 182 (4th Cir. 2009). ■

Ninth Circuit Holds Prosecutors Immune for Parole Recommendations

by Mark Wilson

The Ninth Circuit Court of Appeals has held that prosecutors are absolutely immune for making parole recommendations.

Liza Brown shot her husband to death and entered into an oral plea agreement. “During the plea colloquy, the prosecutor stated that, if Brown avoided disciplinary problems while in prison, she would be released on parole in ‘half of the 15 years’ that was her minimum sentence.” Despite that assurance, prosecutors attended Brown’s parole hearings and advocated for her continued imprisonment. As a result, she served beyond the promised half of her sentence.

In 2003, the Ninth Circuit granted Brown’s federal habeas corpus petition, holding that since she had served more than seven and one-half years without disciplinary problems she “was entitled to release pursuant to the prosecutor’s promise made

during the plea colloquy,” citing *Brown v. Poole*, 337 F.3d 1155 (9th Cir. 2003).

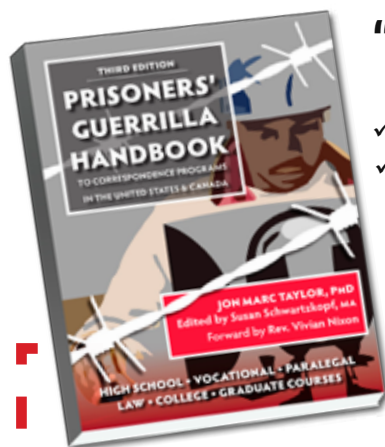
After her release Brown sued in federal court, alleging that the prosecutors who participated in her parole hearings “intentionally interfered with a contractual relationship when they recommended during Brown’s parole hearings that she remain in prison.” She also sued various parole board members, prison officials and the agencies they worked for. The district court granted summary judgment to the defendants.

The Ninth Circuit noted it had “not specifically addressed ... a prosecutor’s immunity for parole recommendations,” but analyzed decisions of the Second, Fifth, Seventh and Eleventh Circuits that addressed the issue. Ultimately, the appellate court joined its “sister circuits in holding that prosecutors should be afforded absolute immunity for parole recommendations,

because parole decisions are a continuation of the sentencing process.”

Citing *Bermudez v. Duenas*, 936 F.2d 1064 (9th Cir. 1991), the Ninth Circuit also found that “the district court properly granted summary judgment on Brown’s claim against the parole board members, as parole board members are entitled to absolute immunity for parole board decisions.”

Finally, the Court of Appeals held that Brown failed to raise a genuine issue of material fact regarding a prison warden’s liability, and “the district court correctly held that the California Department of Corrections and the California Board of Prison Terms were entitled to Eleventh Amendment immunity.” The district court’s summary judgment order was therefore affirmed. See: *Brown v. California Dept. of Corrections*, 554 F.3d 747 (9th Cir. 2009). ■



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Ninth Circuit: Race-Based Prison Lockdowns Must Satisfy Strict-Scrutiny Standard

In a ruling with potentially wide-ranging implications, the Ninth Circuit held that race-based prison lockdowns fail to meet the strict-scrutiny standard announced by the U.S. Supreme Court in *Johnson v. California*, 543 U.S. 499, 505-07 (2005) [*PLN*, July 2005, p.22], at least where no evidence is proffered to show a linkage between the identified perpetrators of violence and the larger racial group of prisoners that is subjected to lockdowns.

In September 2003, Dewayne Richardson, a black prisoner serving a life sentence, filed a § 1983 complaint alleging violations of his Fourteenth Amendment equal protection and due process rights, and his Eighth Amendment right to be free of cruel and unusual punishment, following a series of lockdowns at High Desert State Prison. As a result of the lockdowns, black prisoners remained on lockdown status for all but a few days of a nine-month period, for the sole reason that they were the same race as the alleged perpetrator(s) of an actual or planned assault.

In some cases, prison officials believed they had information implicating members of a prison gang in the incident which precipitated the lockdown. In one such instance, that information proved to have been fabricated by a prison guard. Other cases proved to be isolated disputes. The district court ruled against Richardson on all of his claims.

On appeal, the Ninth Circuit, relying on *Sandin v. Conner*, 515 U.S. 472, 484 (1995) [*PLN*, Aug. 1995, p.1], affirmed the district court's judgment with respect to due process, holding that whatever deprivation of liberty Richardson may have experienced, it did not rise to the level of an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." It reversed, however, with respect to Richardson's equal protection and Eighth Amendment claims.

As to the latter, the Court of Appeals noted the defendants' concession that "exercise is one of the basic human necessities protected by the Eighth Amendment," and observed that while a 30-day emergency lockdown had been held not to violate the Eighth Amendment, the cumulative total of the lockdowns at High Desert State Prison

greatly exceeded thirty days. Whether the facts justified the extended deprivation of exercise, the Court held, required a more fully developed record, precluding summary judgment.

Most significantly, however, the Ninth Circuit remanded Richardson's claim of racially-discriminatory lockdowns for a trial on the merits. The Court flatly rejected the defendants' argument that "without showing any linkage be-

tween the perpetrators and the prisoners subjected to the lockdown, it was enough to assume that race alone tied together the perpetrators and the larger group." The appellate court noted that such an argument would fall short even under a weaker "reasonableness" standard. The case was returned to the district court for further proceedings. See: *Richardson v. Runnels*, 594 F.3d 666 (9th Cir. 2010) (amended opinion). ■

New York Prisoner Gets Mixed Verdict in Retaliatory Beating Ruling

The Second Circuit Court of Appeals delivered a mixed verdict in an appeal by New York state prisoner Cesar A. Espinal. Espinal's § 1983 suit, which was filed pro se, accused a total of 14 guards and other prison officials of the New York State Department of Correctional Services (DOCS) of excessive force, denial of medical services, retaliation and conspiracy.

The district court had granted summary judgment to 12 of the 14 defendants on September 1, 2005, stating that Espinal failed to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act (PLRA), as he had not specifically named them in his grievance. The two remaining defendants, Surber and Frasher, were granted summary judgment on Espinal's conspiracy and retaliation claims, though not on the excessive force claims. In a three-day trial that concluded on November 1, 2006, a jury found Surber and Frasher had not used excessive force, and the court denied Espinal's motion for a new trial.

On appeal, the Second Circuit found the district court had erred in dismissing Espinal's claims against the 12 defendants, because the DOCS grievance procedures do not require that prisoners name specific individuals. Instead, they are directed to provide a "concise, specific description of the problem and the action requested." There is no express requirement that prisoners name specific officials responsible for misconduct; therefore, Espinal's failure to name the individual defendants in his grievance did not preclude their inclusion in his § 1983 complaint.

Similarly, the district court based the dismissal of Espinal's conspiracy claims on his failure to assert a conspiracy in his grievance. Again pointing to the DOCS grievance procedures, the appellate court held that a prisoner is not required to "articulate legal theories" but must only supply a brief, accurate description of the alleged misconduct.

Espinal's retaliation claim was based on the fact that one of the prison guards, Surber, who was involved in a December 17, 1999 assault that resulted in the current lawsuit, also was named in a previous suit filed by Espinal which had been dismissed six months prior to the assault. The district court found that Espinal failed to raise any triable issues of material fact relative to his retaliation claim.

The Second Circuit disagreed, holding that a triable issue of fact existed as to whether the assault by Surber and other guards "would deter a person of 'ordinary firmness' from exercising his rights." The Court of Appeals further determined that "the passage of only six months between the dismissal of Espinal's lawsuit and an allegedly retaliatory beating by officers, one of whom (Surber) was a defendant in the prior lawsuit, is sufficient to support an inference of a causal connection."

In its decision, the Second Circuit reversed the dismissal of Espinal's § 1983 claims and his retaliation claims against Surber and Frasher. However, the district court's denial of a new trial on the excessive force claims was affirmed. The appellate court entered an amended order on February 27, 2009, though the outcome remained the same. See: *Espinal v. Goord*, 558 F.3d 119 (2d Cir. 2009). ■

Federal Circuit Rejects Prisoner's Claim of Copyright Infringement

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal of a federal prisoner's copyright infringement suit filed against Federal Prison Industries, Inc. (FPI, also known as UNICOR), the prison sweatshop arm of the U.S. Bureau of Prisons.

While working at the FPI factory at USP Leavenworth in Kansas, federal prisoner Robert James Walton created a series of calendars that were later produced and sold by FPI and distributed by the General Services Administration.

Walton copyrighted the calendars and brought suit against the United States for copyright infringement. The Court of Federal Claims dismissed his lawsuit for lack

of jurisdiction, finding that Walton's complaint was barred by 28 U.S.C. § 1498(b), which precludes claims of copyright infringement against the United States if the copyrighted work was created while in the "employment or service" of the federal government. The court reasoned that the calendars were created during Walton's "employment or service" to the United States while he worked for FPI.

Walton appealed and the Federal Circuit affirmed. Passing on the question of whether he was an "employee" of FPI within the meaning of § 1498, the appellate court held that Walton's lawsuit was barred because the calendars were created "while in the service of the United States."

Walton designed the calendars at the "direction of and with computers provided by the United States, and was supervised by United States employees in that work," the circuit court wrote. Thus, he could not raise a copyright infringement claim. See: *Walton v. United States*, 551 F.3d 1367 (Fed. Cir. 2009). ■

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Summary Judgment Reversed in Illinois Jail Suicide Suit

The Seventh Circuit Court of Appeals reversed a lower court's grant of summary judgment to Illinois jail officials stemming from the in-custody suicide of a federal pretrial detainee.

On April 13, 2005, Stanley Bell was confined at the St. Clair County Jail in Illinois. At the time he was admitted to the jail he was taking three prescription psychiatric medications.

During his regular weekly visit to the facility, contract psychiatrist Dr. Hetal Amin met with Bell on April 21, 2005 to conduct a psychiatric examination. "Bell, who suffers from bipolar affective disorder, became highly agitated and refused to talk with Dr. Amin in the presence of a jail officer, insisting that he was entitled to a private consultation with the doctor." Jail policy required a guard to be present. "A standoff ensued, with Bell growing increasingly belligerent and refusing to participate in an examination until the jail officer left the room and Dr. Amin refusing to conduct the examination without the jail officer being present."

Amin did not conduct the examination, "discontinued all of Bell's medications and planned to try to examine him again the following week when he returned to the jail." Two days later, on April 23, 2005, Bell committed suicide; he left a note "that said St. Clair County was responsible for his death because it had taken away his medication."

Bell's sister, Elisha Hunter, sued on her own behalf and as personal representative of Bell's estate, alleging constitutional violations, medical malpractice and wrongful death. The U.S. District Court granted the defendants' motion for summary judgment, and Hunter appealed.

On October 1, 2009, the Seventh Circuit affirmed the grant of summary judgment to St. Clair County, finding that Bell "did not have the right to an examination by Dr. Amin without the corrections officer remaining in the room." Accordingly, the appellate court concluded that the county's policy did not violate Bell's constitutional rights, and thus there was no basis for holding the county liable.

However, the Court of Appeals reversed the grant of summary judgment to Dr. Amin on the medical malpractice claim. While "Dr. Amin cannot be held liable for failing to conduct an examination of Bell," the Court explained that Hunter "also alleges that Dr. Amin committed malpractice by discontinuing Bell's medi-

cation ... Bell did not refuse to continue his medication, rather, he refused to submit to a psychiatric examination by Dr. Amin." The Seventh Circuit found "no evidence to support Dr. Amin's bare assertion that it was necessary for Bell to be examined by

him in order for his previously-prescribed medication to be continued." See: *Hunter v. Amin*, 583 F.3d 486 (7th Cir. 2009).

The remaining medical malpractice claims against Dr. Amin settled on remand under undisclosed terms. ■

DC Circuit Reverses CCA/TransCor Non-Exhaustion Dismissal

The U.S. Court of Appeals for the District of Columbia (DC) Circuit reversed a district court's dismissal of a prisoner's lawsuit for failure to exhaust administrative remedies and for conceding summary judgment by failing to respond to the defendants' summary judgment motion.

The District of Columbia contracted with Corrections Corporation of America (CCA) to house DC prisoners at CCA facilities in Ohio and Arizona. TransCor, a CCA subsidiary, was responsible for transporting prisoners to and from those facilities.

DC prisoner Ismail Malik was confined at a CCA prison in Youngstown, Ohio until he and other prisoners were transported by TransCor on July 2-4, 2001 on a forty-hour bus ride to CCA's Arizona facility. According to transport officers, the transfer was punishment for the prisoners' membership in a class-action lawsuit against CCA and DC officials. [See: *PLN*, Aug. 1999, p.14]

During the bus ride the prisoners were handcuffed at the waist with a belly chain that was attached to another prisoner's chain, and they all wore leg shackles. It was impossible for the prisoners to use the restroom due to the restraints, forcing them to urinate and defecate on themselves. The restraints also prevented Malik from using his asthma inhaler, and the prisoners were denied water during the trip.

On July 12, 2001, Malik filed a grievance at the CCA prison in Arizona, "requesting the address and telephone number of the CCA main office in order to pursue a civil action." CCA staff refused to process his grievance because TransCor, not CCA, had transported him. The grievance response included a name and address at TransCor that Malik could contact to submit a complaint. Malik filed two additional CCA grievances requesting paperwork to file an administrative appeal.

On July 27, 2001, Malik submitted a

CCA appeal and also contacted TransCor, requesting that the company process his complaint. TransCor claimed it did not receive his letter.

A CCA warden denied Malik's administrative appeal on August 14, 2001, again stating that CCA did not transport him and informing him that he needed to file a grievance with TransCor.

On July 11, 2005, Malik sued CCA, TransCor and the District of Columbia, alleging cruel and unusual punishment during the 40-hour bus ride. The defendants moved for judgment on the pleadings or, alternatively, for summary judgment, alleging that Malik had failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). Malik responded to the motion.

While that motion was still pending, on August 1, 2007 the defendants filed a second summary judgment motion challenging Malik's claims on the merits. Malik moved for an extension of time to respond and on September 5, 2007 the court granted him until September 25 to submit a response.

On September 6, 2007 the district court granted the first summary judgment motion as to CCA and the District of Columbia, concluding that it had taken Malik eight days to file his CCA grievance but CCA's grievance policy required him to file within seven days. The court denied summary judgment to TransCor, finding there was a genuine issue of material fact as to whether Malik had sent a timely complaint to TransCor for exhaustion purposes.

On September 20, 2007, Malik sought reconsideration of the September 6 order, mistakenly believing it was an order on the second summary judgment motion that he had been given until September 25, 2007 to respond to.

TransCor filed four responses to Malik's September 20 pleading, which Malik replied to on October 23, 2007, "again

evidencing confusion about the import of the ... September 6 opinion.” On March 10, 2008 the district court granted TransCor’s second summary judgment motion, “treating the motion as conceded because Malik had failed to respond.”

Malik appealed and the DC Circuit reversed. The appellate court first reversed the non-exhaustion holding, because the same CCA policy that imposed a 7-day filing limit also rendered Malik’s complaint ungrievable.

As to the second summary judgment motion, the Court of Appeals found that “Malik’s confusion was not unfounded, given the complicated sequence of motions and orders.” It also noted that the district court had acknowledged failing to provide Malik with the standard prose summary judgment notice.

The DC Circuit reversed, finding that given “both the objectively confusing procedural history and the subjective confusion that Malik plainly manifested, ‘it was incumbent upon the district court ...’” to provide Malik with the required notice.

The Court of Appeals also rejected TransCor’s argument “that Malik’s claim to have mailed the [complaint] letter [to TransCor] was not credible,” noting that credibility determinations cannot be resolved on summary judgment. The district court’s summary judgment orders were

therefore reversed, and the case remanded for further proceedings. See: *Malik v.*

District of Columbia, 574 F.3d 781 (D.C. Cir. 2009). ■

California: Indefinite Civil Commitment of Sexually Violent Predators May Violate Equal Protection

In a January 28, 2010 ruling, the California Supreme Court held that Prop. 83, a November 2006 ballot initiative also known as Jessica’s Law, may violate constitutional guarantees of equal protection by subjecting sexually violent predators (SVPs), but not other eligible ex-felons, to indefinite post-incarceration civil commitment. The 5-2 ruling did not invalidate Jessica’s Law, but instead remanded the case to the trial court to give the state an opportunity to present facts to justify its differential treatment of SVPs.

Prop. 83 authorized the civil commitment of people adjudicated to be SVPs for an indefinite period of time, where formerly the law permitted commitment for only a two-year term, subject to applications for two-year extensions. Under Prop. 83, a person’s SVP status must be reviewed annually by the Department of Mental Health (DMH), which can authorize a petition for release. An adverse finding by the DMH does not preclude the possibility of filing a petition for release, but in such cases the

petitioner must prove by a preponderance of the evidence that he or she no longer qualifies for commitment as an SVP (i.e., is no longer both mentally ill and dangerous).

Critical to the California Supreme Court’s analysis was the fact that, by contrast with the treatment of SVPs under Prop. 83, a Mentally Disordered Offender (MDO) is civilly committed for one-year periods and thereafter has the right to be released unless the state can prove beyond a reasonable doubt that he or she still qualifies for civil commitment as an MDO. The Court held that “imposing on one group an indefinite commitment and the burden of proving they should not be committed, when the other group is subject to short-term commitment renewable only if the People prove periodically that continuing commitment is justified beyond a reasonable doubt, raises a substantial equal protection question that calls for sane justification by the People.” See: *People v. McKee*, 47 Cal.4th 1172, 223 P.3d 566 (Cal. 2010), *rehearing denied*. ■

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Reversal of Summary Judgment on 55-Day New York SHU Placement Claim

The Second Circuit Court of Appeals has reversed the grant of summary judgment to a prison hearings officer in a lawsuit concerning a prisoner's improper placement in administrative segregation.

On January 3, 2001, New York state prisoner Samuel Davis was incarcerated at the Elmira Correctional Facility when Sergeant Perry recommended his confinement in administrative segregation. "Perry had received confidential information from four separate sources in the previous two weeks indicating that Davis was involved in fights and extortion. The informants asserted that Davis used a weapon on occasion and targeted weaker inmates from whom he extorted commissary."

At a January 16, 2001 hearing, prison hearing officer David Barrett relied on Perry's report without interviewing Perry or the informants, stating that he trusted Perry's "ability to assess their credibility." Barrett agreed with Perry's recommendation and ordered Davis transferred to administrative segregation in the Special Housing Unit (SHU). Davis remained in SHU for 55 days, from January 3, 2001 until his February 26, 2001 transfer to general population at Attica Correctional Facility.

On March 6, 2001, Davis prevailed on his administrative appeal "based on the absence of testimony from the author of the recommendation (Perry), or an assessment by Barrett of the reliability of the confidential information."

Davis sued Barrett in federal court, alleging that his due process rights were violated at his administrative hearing. The district court granted summary judgment to Barrett, finding "that a 55-day period was insufficient to establish a liberty interest in the absence of conditions more onerous than normal for SHU." The court "concluded that Davis had not demonstrated a liberty interest sufficient to trigger due process protection."

On appeal, the Second Circuit began by rejecting Barrett's argument that Davis failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA). The appellate court held that Davis was not required to file a grievance. "Davis's successful appeal on his administrative hearing constitutes exhaustion under the PLRA for purposes of rendering his due process claim ripe for

adjudication in federal court," the Second Circuit wrote.

The Court of Appeals then reversed the district court's decision that Davis did not possess a liberty interest, because that finding "failed to premise the truthfulness of Davis's allegations concerning the conditions of his confinement (as opposed to the conditions generally mandated by prison regulations), and did not adequately compare those conditions in the general population and other segregated confinement."

The Second Circuit also found "a number of factual disputes about the conditions of Davis's confinement" that could not be resolved on summary judgment.

Finally, the district court had "failed to conduct a thorough comparison of the alleged conditions of Davis's confinement with those of the general population."

Accordingly, the Court of Appeals remanded "for further fact-finding on the issue of the actual conditions of Davis's confinement in comparison to ordinary prison conditions." The Court noted, however, "that a determination that Davis was not subjected to atypical conditions giving rise to a liberty interest would obviate the need to reach the ultimate issue of whether the process employed during his administrative hearing complied with the requirements of due process." See: *Davis v. Barrett*, 576 F.3d 129 (2d Cir. 2009). ■

Mental Health Specialist May be Liable in California Jail Detainee's Suicide

In a tragic case involving a father who signed a citizen's arrest for his son who later committed suicide while in pretrial detention, the Ninth Circuit upheld the grant of summary judgment to two sheriff's deputies and the county that employed them. However, the Court reversed the grant of summary judgment to one of the county's mental health specialists, Margaret Blush, who, it found, may have been deliberately indifferent to the detainee's mental health needs when she took him off suicide watch that had been ordered by another specialist.

On July 26, 2005, Robert Clouthier had an argument with his father, became violent, destroyed a china cabinet and jumped through a plate glass window, causing himself to bleed severely. Robert's family called the police, his father signed a citizen's arrest, and Robert was taken into custody for felony vandalism. Agitated and upset, he was transported by ambulance to a hospital, where he refused to have his wounds stitched.

The next morning, after being booked into the Martinez Detention Facility, Robert was evaluated by Sharlene Hanaway, a Contra Costa County mental health specialist who determined, based on his responses to her questions and his history of suicide attempts, that he was "one of the most suicidal inmates she had ever seen."

Hanaway placed Robert on suicide watch in a safety cell. She informed other mental health workers, including Blush, and the deputies then on duty that Robert was "truly suicidal" and "the real deal." About five hours later, shortly after Hanaway's shift ended, Blush spoke with Robert for a few minutes, determined that his risk of suicide had decreased, and told Deputy Foley that Robert could be removed from suicide watch.

Blush and Foley gave conflicting testimony as to whether Blush had told Foley to keep Robert in the safety cell. Regardless, Robert remained there until the morning of August 1, 2005, when he was moved into general population and placed in a cell with another detainee. That evening, according to Robert's cellmate, Robert fashioned his sheet into a noose. He then hung himself, about half an hour after Deputy Foley came to the cell to let his cellmate out for recreation time. Robert died ten days later.

His parents filed suit under 42 U.S.C. § 1983. Following the Ninth Circuit's ruling, their case for damages can proceed to trial, but only against defendant Blush. One of the appellate judges dissented from the majority's conclusion as to granting summary judgment to Deputy Foley. See: *Clouthier v. County of Contra Costa*, 591 F.3d 1232 (9th Cir. 2010). ■

New York's Catch-All Contraband and Anti-Smuggling Rules Unconstitutionally Vague

In a suit for damages and injunctive relief, the Second Circuit Court of Appeals affirmed the district court's determination that prison prohibitions against "smuggling" and "contraband" were unconstitutionally vague as applied to Mujahid Farid, a New York state prisoner serving a life sentence. Farid was disciplined for possessing and distributing a pamphlet, produced in violation of the internal by-laws of a prisoners' organization, that criticized New York's parole policies and practices. Additionally, the Court of Appeals vacated the district court's grant of qualified immunity to the defendant prison officials on a motion for summary judgment, finding that the rights at issue were sufficiently clearly established and that a reasonable jury could conclude it was objectively unreasonable for the defendants to have acted the way they did.

In April 2000, while conducting random cell searches, Woodbourne Correctional Facility officers found copies of a 21-page booklet entitled *The Politics of Parole: An Analysis by the Woodbourne*

Long Termers Committee. Farid, a member of the Long Termers Committee (LTC), was subsequently charged with violating prison rules governing contraband and smuggling in connection with distributing the booklet. Following a Tier III disciplinary hearing, Farid was found guilty, lost three months of good time credits and was confined to a Security Housing Unit for 90 days.

In September 2001, Farid filed a § 1983 complaint alleging various constitutional and state law violations. In a published opinion, *Farid v. Ellen*, 514 F.Supp.2d 482 (S.D.N.Y. 2007), the district court addressed his First Amendment claims, found the prison's catch-all contraband and anti-smuggling rules to be unconstitutionally vague, and ordered reinstatement of Farid's lost good time credits and expungement of the violation from his disciplinary record. Concluding the defendants were entitled to qualified immunity, however, the district court denied Farid any monetary damages.

On appeal, the Second Circuit upheld

all of the district court's findings except the qualified immunity determination. Central to the Court's analysis was the fact that the defendants had testified the pamphlet in question was not contraband per se but rather it purported to be an official LTC publication, which it was not (because it had not been approved by the group's advisor). Conceding that Farid could have been sanctioned for violating LTC's by-laws, the appellate court stressed that nothing in those by-laws permitted a sanction more severe than expulsion from the group.

The Second Circuit rejected the defendants' argument that, in effect, Farid was required "to engage in some kind of interpretive construction, combining the LTC's bylaws with the prison rules in order to determine whether materials that violate the former might at the will of prison officials be read to constitute contraband under the latter." The case was remanded to the district court for further proceedings. See: *Farid v. Ellen*, 593 F.3d 233 (2d Cir. 2010). ■

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No Liberty Interest Under Utah Parole Scheme

The Tenth Circuit Court of Appeals held that a Utah prisoner had failed to state cognizable due process and equal protection challenges to Utah's parole scheme.

In 1993, Robert Straley was convicted of sex crimes against a child and sentenced to two concurrent one-to-fifteen year sentences. The sentence was stayed and he was placed on probation; however, he violated probation in 1996 and was sent to prison. "On four separate occasions between January 2002 and August 2006, Straley was released from prison on parole. Without fail, though, Straley would violate the terms of his parole and return to prison." He was finally required to serve the remainder of his sentence behind bars.

In 2005, Straley brought a state court challenge alleging that the "Board of Pardon's (Board) authority to set a release date within Utah's indeterminate sentencing scheme violated his federal due process and equal protection rights, Utah separation of powers principles, as well as his right to a speedy trial." When his petition was denied, Straley filed a federal habeas corpus petition under 28 U.S.C. § 2241.

The district court denied the petition and the Tenth Circuit affirmed. Relying on *Malek v. Haun*, 26 F.3d 1013 (10th Cir. 1994), the appellate court noted that Utah's parole scheme does not create a protected liberty interest. The Court of Appeals also held that *Sandin v. Conner*, 515 U.S. 472 (1995) did not undermine the precedential value of *Malek*. "We can dispose of Straley's contention that Utah's 'indeterminate' sentencing scheme is unconstitutional," wrote the Tenth Circuit. "It is not."

The appellate court also rejected Straley's equal protection arguments as "unpersuasive." It noted that "he makes a conclusionary assertion that there are racial disparities in the Board's parole determinations. He also claims the Board shows favoritism towards Mormon sex offenders." The Court of Appeals concluded, however, that "Straley fails to provide any real evidence that he was treated differently," especially because "he was originally given an even shorter sentence than the 'similarly situated' individuals Straley claims were given more lenient treatment by the Board." As Straley failed "to identify

any similarly situated individual that has been given any different or more beneficial treatment," the Court found "his bare equal protection claims are simply too conclusory to permit proper legal analysis."

Finally, the Tenth Circuit rejected

Straley's federal separation of powers argument because "the United States Constitution's separation of powers principles are inapplicable to a state's organization of its own government." See: *Straley v. Utah Board of Pardons*, 582 F.3d 1208 (10th Cir. 2009), cert. denied. ■

No Qualified Immunity for Excessive Force at Ohio Jail

The Sixth Circuit Court of Appeals affirmed the denial of qualified immunity to Ohio jailers on a detainee's excessive force, denial of medical care, equal protection and state law claims.

On April 3, 2004, Ohio State Highway Patrol Trooper Helen McManes stopped William Harris, Jr. for speeding. After smelling alcohol, she administered field sobriety and breathalyzer tests. McManes told Harris that he was near the legal limit but she was not going to charge him with DUI. She said she was going to issue a speeding ticket and returned to her vehicle to write it up.

Trooper R.A. Cooper then arrived on the scene and ultimately arrested Harris for DUI and an outstanding misdemeanor warrant. Harris was upset and cursed at the officers; he was cuffed and transported to the Circleville City Jail. Circleville's population is "primarily white" with only two to five percent of detainees being black, according to a jail employee. Harris was black.

Police officers Glenn Williams, Phillip Roar and Robert Gaines were working at the jail when Harris arrived. Williams directed that Harris be taken to cell no. 3, a "drunk tank." There, outside the view of surveillance cameras, the officers began the booking process.

During that process, a guard yanked Harris's necklace with a ballpoint pen. When he objected, "one of the officers ... kicked Harris's leg out from under him and pushed him in the back, causing him to fall and hit the left side of his head. The officers said nothing ... before taking him to the ground." They then picked him up and walked him out of the cell backwards, into the booking area. There was an officer on each side and one was lifting Harris's cuffed hands behind his back.

Williams ordered Harris to "kneel down," but he couldn't comply due to the officer pulling up on his arms behind him.

"The officers used a 'take down' maneuver to get Harris down on the floor." Gaines struck Harris in the back of the knee and Roar "administered two peroneal strikes to the left side of Harris's leg." Harris was not resisting when he was taken down.

"Harris screamed out in pain, cried 'you broke my neck,'" and "told the officers to stop shocking him because it felt like electricity was running through his arms and legs and he could not move." Harris told the officers, "I can't move. I can't move. I think y'all did something. I can't move."

The officers ignored him and ordered him to stand up. When he continued to claim that he couldn't, he was stripped to his t-shirt, underwear and socks, and dragged back into cell 3 at 10:18 p.m.

An officer entered the cell as Harris continued to plead for help, and ordered him to get up. When he stated he couldn't, the officer said, "Yes, you can," kicked him in the ribs, said "Looks like we got us a broke nigger here," and then left.

McManes later approached the cell to read Harris some paperwork; he was still on the floor pleading for help, but she ignored him. Finally, Corporal Stephanie Kinser checked on Harris and contacted Sergeant Barton, who came to the cell. Upon seeing Harris's condition, Barton called for an ambulance at 11:39 p.m. Tests at the hospital revealed that Harris had suffered a spinal cord injury and he underwent corrective surgery three days later.

Harris filed suit, and the U.S. District Court denied the defendants' motion for summary judgment. They then sought an interlocutory appeal.

The Sixth Circuit affirmed in an October 2, 2009 ruling. The appellate court first rejected the defendants' argument that Harris's excessive force claim should have been assessed under the Fourteenth Amendment rather than the Fourth. The Court concluded that it did not need to

decide which standard applied because the facts were “sufficient to establish a violation of Harris’s constitutional rights under either standard.” Therefore, the “defendants [were] not entitled to qualified immunity.”

The Court of Appeals also affirmed the denial of qualified immunity on Harris’s deliberate indifference claim, finding that he presented sufficient evidence for a

jury to conclude that he had an obvious, serious medical need that the defendants ignored in violation of jail policy.

Likewise, the Sixth Circuit affirmed the denial of qualified immunity on Harris’s equal protection claim. The appellate court agreed “that Harris ... presented sufficient evidence from which a reasonable jury could conclude that [the] defendants used excessive force and delayed medical

treatment because of Harris’s race.”

Finally, finding that “a reasonable jury could conclude [the defendants] acted with a malicious purpose or in a wanton or reckless manner,” the Court of Appeals affirmed the district court’s denial of immunity under Ohio Revised Code § 2744.3(A)(6) on Harris’s state law assault and battery claim. See: *Harris v. Circleville*, 583 F.3d 356 (6th Cir. 2009). ■

Ineffective Attempts to Protect Texas Prisoner Were Sufficient

The Fifth Circuit Court of Appeals reversed a district court’s denial of summary judgment to prison officials who had failed to safeguard a Texas state prisoner, saying their ineffective attempts to protect him were sufficient.

Gregory Moore was incarcerated at the Beto Unit for sex offenses when a guard used the state’s sex offender registry to publish a list of prisoners who had been convicted of sex crimes, and urged reprisals against them. Beto guards brought copies of the list to work and distributed it to prisoners. Multiple assaults against sex offenders at the facility followed, resulting in a month-long lockdown.

During the lockdown, Moore received death threats and filed a life endangerment claim stating that a gang of prisoners had initiated a plan to “eliminate all sex offenders on the Beto Unit,” and that two named prisoners were part of the group. He also said he had overheard threats specifically directed against him. Moore was attacked by one of the prisoners he had identified about three months later. Before then, he was in and out of transient lockdown housing three times while four life endangerment claims were investigated. He was twice recommended for transfer by Unit Classification Committees that included Major Charles D. Lightfoot. Those recommendations were overruled by State Classification Committee member J. P. Guyton.

Five prisoners believed to be in the group planning the assaults, including the ringleader and one other prisoner named by Moore, were transferred from Beto. The other prisoner identified by Moore remained at the facility. Moore was allegedly coerced into returning to general population, whereupon that prisoner assaulted him. Moore filed a civil rights action pursuant to 42 U.S.C. § 1983, alleging that prison officials had failed to protect him. The defendants moved for summary judgment based on qualified immunity, which

the district court denied. They then filed an interlocutory appeal.

The Fifth Circuit held that the defendants’ actions may have been a violation of Moore’s Eighth Amendment rights, but were objectively reasonable because they returned him to general population only after transferring five threatening prisoners, including the alleged gang leader. A reasonable prison official would not have known that was insufficient to protect Moore from assault. Therefore, the defendants were entitled to qualified immunity. The Fifth Circuit reversed the district court’s denial of summary judgment and remanded with instructions to enter an order dismissing the case. See: *Moore v. Lightfoot*, 286 Fed.Appx. 844 (5th Cir. 2008).

Based upon the appellate ruling, the district court dismissed Moore’s case on

remand. Moore moved for reconsideration, arguing that he still had valid claims against two defendants who “did not assert qualified immunity in their motion for summary judgment” The court denied Moore’s motion, holding that it lacked the power to act on the motion given that dismissal of his case was mandated by the Court of Appeals. “While Moore appears to argue that the Fifth Circuit’s decision was incorrect and that the Defendants were not entitled to qualified immunity, that is not a determination which the district court can make.”

Moore appealed from that order, but the Fifth Circuit affirmed the judgment of the district court on November 4, 2009, finding that he had “presented no evidence or argument supporting reconsideration of the issue.” See: *Moore v. Cockrell*, 2009 U.S. App. LEXIS 24235. ■

Sixth Circuit: RLUIPA Does Not Permit Monetary Damages

The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not allow money damages for violations of that statute, the U.S. Court of Appeals for the Sixth Circuit held on April 24, 2009.

The Court entered its decision in an appeal by Gerald W. Cardinal, a Michigan state prisoner who refused to eat non-kosher food after he was transferred to the Kinross Correctional Facility, which did not offer kosher food. Cardinal went without eating for eight days until he was transferred to a prison that served kosher food.

Cardinal sued Warden Linda Metrish, alleging violations of his First and Eighth Amendment rights plus a RLUIPA violation. The district court granted summary judgment to Warden Metrish; Cardinal appealed, and the Sixth Circuit affirmed.

The appellate court rejected Cardinal’s First Amendment claim, holding that his allegations against the warden were not particularized enough to impose supervisory liability. The Court also rejected his Eighth Amendment claim on the basis that Cardinal was offered food, he just refused to eat it. “The plaintiff does not allege that he was denied food, but that he was denied kosher food,” the Court wrote. Finally, the Sixth Circuit ruled that RLUIPA did not permit money damages against the state because the statute did not waive state sovereign immunity. See: *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009).

A petition for certiorari review is pending before the U.S. Supreme Court, which recently granted cert on a similar issue in *Sossamon v. Texas* [see separate article in this issue of *PLN*]. ■

Illinois: Disabled Detainees' Discrimination Claims May Proceed to Trial

In a lengthy and well-reasoned opinion and order, U.S. District Court Judge Elaine E. Bucklo, for the Northern District of Illinois, denied cross-motions for summary judgment in a class-action suit brought by paraplegics and partially-disabled pre-trial detainees currently and formerly housed at the Cook County Department of Corrections. The plaintiffs alleged violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794(a), and Judge Bucklo's order, filed on November 25, 2009, paved the way for a trial on the merits of those claims.

In their amended complaint, the plaintiffs alleged that the defendants – the Sheriff of Cook County and Cook County itself – engaged in discrimination by failing to provide disabled prisoners with accessible toilets, sinks and shower facilities. As a result, they said they suffered a variety of injuries, including bed sores, rashes and infections arising from an inability to maintain proper hygiene. The plaintiffs additionally claimed they sustained injuries from falling while attempting to transfer from their wheelchairs to toilet seats, beds and shower chairs.

The defendants advanced several arguments in support of their motion for summary judgment, including: 1) that plaintiffs' RA claim fails because the defendants are not recipients of federal funds; 2) that the plaintiffs' ADA claim fails because showering and use of a sink do not qualify as "programs" or "activities" covered by the ADA, and in any event the plaintiffs failed to allege intentional discrimination, the plaintiffs cited to Title II rather than Title III of the statute, and because the need to maintain institutional security rendered the defendants' accommodation efforts reasonable; and 3) that the suit was barred by the Prison Litigation Reform Act (PLRA), because the plaintiffs failed to exhaust their administrative remedies and failed to allege any physical injuries as a result of the discrimination.

With respect to exhaustion, the district court explained the PLRA's exhaustion requirement does not apply to former prisoners and that, in any event, under a theory of "vicarious exhaustion,"

the requirement would be deemed satisfied for the entire class if even one member of the class had exhausted available remedies. Moreover, the burden was on the defendants to prove failure to exhaust, and they had not shown that all of the class members had failed to exhaust available remedies. Likewise, the PLRA's physical injury requirement did not apply to plaintiffs who had been released from custody before the suit was filed, and the plaintiffs had in fact alleged physical injuries in the form of bed sores and infections.

The defendants' remaining arguments either failed on the merits or because, at

the summary judgment stage, the court could not decide that a jury would not find in favor of the plaintiffs. The plaintiffs' motion for summary judgment was denied as the district court found that "disputed issues of fact remain concerning the reasonableness of the requested modifications to the Prison's facilities. This conclusion precludes summary judgment in the plaintiffs' favor as much as it precludes summary judgment in favor of the defendants." The court also denied the defendants' motion for reconsideration. See: *Phipps v. Sheriff of Cook County*, 681 F.Supp.2d 899 (N.D. Ill. 2009). ■

No Qualified Immunity for Denial of Protective Custody to Ohio Prisoner

The Sixth Circuit Court of Appeals affirmed a lower court's denial of qualified immunity in an Ohio prisoner's lawsuit raising a failure to protect claim.

Ohio prisoner George Hamilton was the target of a "hit" by the Aryan Brotherhood (AB), "because [a] document from his cell had been used to prosecute Daryl Bockock – who, along with Daryl's brother, Jesse, is a member of the Aryan Brotherhood – for the murder of Hamilton's friend, Sam Huffman." Hamilton first learned of the hit from his ex-girlfriend, Paula Cremeans, the Bockocks' sister.

In November 2003, Hamilton received a letter threatening his life and bearing "two lightning bolts, emblematic of the Aryan Brotherhood." He reported the letter to prison officials, told them about the hit and said AB members had previously assaulted him and repeatedly tried to stab him at another prison.

Prison staff initiated "protective control" (PC) proceedings. Although the PC screening committee "believed that Hamilton had authored the letter himself," it recommended placing him in PC. The recommendation was sent to the Ohio Department of Rehabilitation and Corrections' Bureau of Classification for final approval.

Jack Bendolph reviewed the recommendation and "questioned the risk that Hamilton faced, because Hamilton had kept Cremeans – the Bockocks' sister – on his visitor list, and because some ... staff thought that Hamilton had sent himself the threatening letter."

Bendolph denied PC placement and on December 17, 2003, transferred Hamilton to general population at the Warren Correctional Institution (WCI). At WCI, Hamilton met a prisoner named Sain, "who turned out to be a 'leprechaun,' which is a member of the Aryan Brotherhood without tattoos or other identifying marks."

On July 3, 2004, Sain gave Hamilton some "hooch" and told him "to go into the yard's recreation shed. Inside, members of the Aryan Brotherhood attacked and brutally assaulted Hamilton." The ambush left him with impaired senses of smell, vision, hearing and taste, plus mental health problems and headaches.

Hamilton sued Bendolph in federal court, alleging that he had violated the Eighth Amendment by failing to protect him from a substantial risk of serious harm. The district court denied Bendolph qualified immunity, "holding that a genuine issue of material fact existed as to whether Bendolph's decision not to place Hamilton in PC rose to the level of a constitutional violation." Bendolph filed an interlocutory appeal.

The Sixth Circuit first considered "whether Hamilton was incarcerated under conditions posing a substantial risk of serious harm" and concluded that the record would support such a finding, which satisfied the objective component of his claim.

The appellate court also found that "Bendolph was undisputedly aware of the threatening letter, the Committee's

findings, and the recommendations of both the Committee and the warden that Hamilton be placed in PC.” But most importantly, the Court noted that “Bendolph testified he knew that the Aryan Brotherhood exists throughout the Ohio prison system, and that their ‘hits’ could follow a prisoner from one prison to another.”

Therefore, “a jury could certainly find ... that Bendolph was aware of facts from which he could have inferred that Hamilton faced a substantial risk of serious harm,” satisfying the subjective component of a failure to protect claim.

The Sixth Circuit rejected each of the reasons asserted by Bendolph that “his

decision to transfer Hamilton to WCI’s general population was a reasonable response to the risk that Hamilton faced.” Accordingly, the appellate court affirmed the denial of qualified immunity in an August 2009 ruling, and remanded the case for further proceedings. See: *Hamilton v. Eleby*, 341 Fed.Appx. 168 (6th Cir. 2009). ■

New York City Jail: \$275,000 Settlement in Prisoner-on-Prisoner Assault

The City of New York paid \$275,000 to settle a prisoner’s lawsuit claiming he sustained serious injuries as a result of a guard’s negligence.

The suit was filed by Ryan Scott, who was incarcerated at the George R. Verno Center on Rikers Island on October 17, 2006. Scott claimed that he was attacked by prisoner Gilbert Carrion in retaliation for having previously intervened in Carrion’s assault on another prisoner.

Despite the earlier assault, Scott’s

intervention and Carrion’s propensity for violence – which was evidenced by his indictment for attempted second-degree murder and first-degree assault with a deadly weapon – Carrion was allowed to remain in the cellblock with Scott. Moreover, prison officials returned Carrion’s walking cane after the earlier assault.

The attack on Scott occurred in the presence of guards. Carrion struck Scott several times with his cane on October 17, causing head trauma, a nasal bone

fracture, facial injuries and lacerations to Scott’s right eye and scalp that required sutures and staples, blurring and loss of vision, retinal bruising, traumatic iritis, swelling, bruising and scarring.

Scott’s subsequent lawsuit alleged eleven causes of action, asserting both state and federal claims; the case settled on May 19, 2009. Scott was represented by Brooklyn attorney Brett Klein. See: *Scott v. City of New York*, U.S.D.C. (E.D. NY), Case No. 1:08-cv-00213-RRM-RLM. ■

California: Prison Appeals Coordinator Who Rejected Dental Complaints Held Liable for \$1,500 in Damages

Proceeding pro se, California prisoner Earnest C. Woods II survived a summary judgment motion and was awarded \$500 in compensatory damages and \$1,000 in punitive damages after a jury found that CSP-Solano Appeals Coordinator Santos Cervantes had maliciously violated his Eighth Amendment rights by repeatedly rejecting, on procedural grounds, Woods’ legitimate complaints regarding inadequate dental care.

Woods filed an amended § 1983 complaint in October 2004 alleging that for two years, beginning with his arrival at CSP-Solano in August 2002, he was denied adequate dental care with respect to his broken tooth and a broken partial. He advanced two legal claims: that the insufficient dental care violated his Eighth Amendment rights and that the inadequate administrative appeals process violated his due process rights.

Woods sued Warden Tom L. Carey and CSP-Solano’s two administrative appeals coordinators, T. Dickenson and Cervantes. Ruling on the defendants’ motion for summary judgment, the district court, relying on *Ramirez v. Galaza*, 334 F.3d 850 (9th Cir. 2003) [*PLN*, Jan. 2005, p.36], held that Woods’ due process claim failed because prisoners have no

constitutional right to any specific grievance procedure. The court also dismissed Dickinson as a defendant because there was no evidence linking anyone other than Cervantes to the denial of Woods’ administrative appeals. The district court held, on the other hand, that Cervantes could be found liable for his role in adjudicating Woods’ administrative grievances because the record showed that Cervantes’ rejections of the grievances could reasonably be interpreted as a ratification of a policy at the prison to provide inadequate dental care.

Significant to the court’s conclusion in this regard was the fact that the record did not unequivocally support the procedural grounds that Cervantes had cited when rejecting Woods’ appeals. Cervantes first asserted that Woods had failed to attempt to resolve his problem at the informal level. A second appeal, he argued, was untimely filed. The court relied on statements and dates in the rejected appeals themselves to find that the asserted procedural grounds could be a pretext to cover for Cervantes’ unwillingness to respond to Woods’ legitimate complaints regarding inadequate dental care. Ultimately the jury agreed, awarding \$1,500 in total damages. The parties have both filed appeals. See: *Woods v. Carey*,

U.S.D.C. (E.D. Cal.), Case No. 2:04-cv-01225-LKK-GGH. ■

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News in Brief:

Argentina: Prisoners Maximiliano Pereyra, 25, and Ariel Diaz, 28, escaped from a maximum security facility in early April 2010. The men eluded capture by stealing full sheep skins and blending in with a large herd of sheep on a nearby ranch. Police said spotting the pair among thousands of sheep was “almost impossible.” But one official warned, “They can’t pull the wool over our eyes forever.”

Arizona: John Berry Martin, 53, was sentenced to 14½ years in prison on April 23, 2010 for killing his wife, Kathleen Martin, a sergeant at the State Prison Complex-Lewis in Buckeye. Court records indicate that Martin shot her in the shoulder during an argument on April 15, 2009. She was taken to a local hospital, where she later died.

California: On April 3, 2010, Det. Anthony Nicholas Orban of the Westminster Police Department was arrested on suspicion of kidnapping and rape. Jeff Thomas Jelinek, a guard at the Chino Institution for Men, was arrested as an accomplice. Orban allegedly forced his way into a woman’s car, pointed his service weapon at her, and ordered her to drive to a nearby parking lot where he raped her. The woman escaped, ran to a local business and called police. In the meantime, Orban called Jelinek to pick him up. The pair was subsequently arrested and are being held at the West Valley Detention Center in Rancho Cucamonga in lieu of \$1 million bail.

China: The BBC reported on May 9, 2010 that Zhao Zuohai, who served almost ten years after being convicted of murder, had been released when his supposed victim was found alive. Zuohai had a fight with a neighbor who then disappeared, and was charged when a decapitated body was found 18 months later. He was

convicted based largely on his confession; the police reportedly forced him to drink water mixed with chili peppers and set off fireworks over his head. Zuohai was initially sentenced to death but the sentence was later reduced to 29 years in prison. The neighbor he was accused of killing, Zhao Zhenshang, returned to his village to seek welfare assistance 10 years later. Court officials ordered an investigation and said the original judges in Zuohai’s case would be punished.

Colorado: In the early morning hours of April 14, 2010, all of the cell doors in a segregation unit at the Hudson Correctional Facility inexplicably popped open. Eight to twelve of the 41 prisoners in the unit left their cells and began destroying things, including computers and the sprinkler system. Two guards barricaded themselves in an office during the disturbance, which lasted about six hours. The facility is owned by Cornell Corrections and houses prisoners from Alaska. [See: *PLN*, May 2010, p.22]. The company subsequently hired experts to investigate the incident, who determined the doors were mistakenly opened by a guard in the central control room rather than due to mechanical failure. Cornell refused to release the guard’s name but said he had been transferred to a different job assignment.

Florida: A prison escapee who had been on the run for almost 35 years was captured on April 20, 2010 – her 56th birthday. Paula Eileen Carroll had escaped from what is now the Lowell Correctional Institution in September 1975. She was serving a 5-year sentence on a stolen property charge at the time. Carroll changed her name and was using a different Social Security Number when she was found living in Melbourne, Florida following an anonymous tip. She is being held at the Brevard County Jail and reportedly told officers she was “glad it’s over.”

Illinois: In March 2010, the Illinois Department of Corrections was forced to make a \$200,000 emergency purchase of ammunition because it owed its discount supplier \$6,000. The supplier refused to ship additional ammo until the bill was paid in full. The DOC purchased ammunition from another vendor at full price, and said there were no security lapses because most of the bullets were used for target practice and training. Illinois, like many other states, is facing a huge budget deficit.

Illinois: On April 1, 2010, Kevin A. Smith, 29, formerly a guard at the Will County Jail, was charged with solicitation of murder for hire. Smith allegedly asked a prisoner to kill his ex-girlfriend’s current boyfriend. After being arrested by the FBI, Smith confessed to the crime while speaking to his mother from jail. He is being held on \$2 million bond.

Illinois: 19-year-old Jennifer LaPenta was jailed for contempt of court on May 3, 2010 when she attended a friend’s court appearance wearing a T-shirt that read, “I Have the Pussy, So I Make the Rules.” Judge Helen Rozenberg noticed LaPenta’s shirt, cited her for contempt and sentenced her to 48 hours in jail. La Penta was removed from the courtroom in handcuffs; she is now considering a lawsuit.

Louisiana: On March 30, 2010, Quentin M. Truehill, Kentrell F. Johnson and Peter M. Hughes escaped from the Avoyelles Parish jail in Marksville by holding a shank to a guard’s neck and demanding to be set free. All three escapees were captured in Florida on April 5. Authorities caught up with them after finding evidence inside a stolen truck the trio had abandoned days earlier. They will be returned to Louisiana by the U.S. Marshals Service.

Michigan: The St. Clair County Sheriff’s Office is investigating the death of prisoner James Dudley, 42, who died on April 28, 2010. Dudley was clearing trees in Emmett Township as part of a jail work crew when he was struck by a falling tree. He was serving a 90-day sentence.

Netherlands: In March and April 2010, burglars broke into a minimum-security Dutch prison in the town of Hoorn to steal TVs from prisoners’ cells. The prisoners were on weekend furloughs at the time. Government officials described the facility as a “very modestly protected environment” that provides pre-release programs. No arrests have been made.

Ohio: An unidentified prisoner from the Noble Correctional Facility was taken to Marietta General Hospital on April 25, 2010 after claiming he had been sexually assaulted by another prisoner. Doctors had to perform emergency surgery to remove a bottle of hot sauce from his rectum. The prisoner later acknowledged that he had not been assaulted but had inserted the bottle himself. News reports noted that taxpayers were on the hook for the cost of the prisoner’s surgery and

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medical treatment related to the hot sauce bottle extraction.

Ohio: Joseph Lee Daniels, 28, a work release prisoner with the Licking County Sheriff's Office, died in a single-vehicle accident on May 8, 2010. His blood alcohol level was .250 at the time – more than three times the legal limit. He was on work release while serving a 130-day sentence resulting from a probation violation.

Puerto Rico: On April 7, 2010, porn star Lupe Fuentes, who is 4'9", weighs just 88 pounds and, early in her career,

was marketed as "Little Lupe" and "the world's youngest-looking porn star," appeared in federal court to testify on behalf of Carlos Simon-Timmerman. Timmerman was charged with possession of child pornography after *Little Lupe the Innocent* and other adult DVDs were seized from his luggage during a stop-over in Puerto Rico on his way home to New York from a trip to Venezuela. To the dismay of federal prosecutors, when Lupe took the stand she testified she was 19 years old when she made her first porn film; she also

provided documentary evidence, including her birth certificate. The charges against Timmerman were immediately dismissed. Timmerman's public defender had contacted Lupe through her MySpace page to ask her to testify.

Tennessee: Joseph Heaton, 25, was sent to jail for brutally assaulting and nearly killing a Special Forces soldier in 2006. He told the judge that he was too drunk at the time of the beating to remember what happened. Despite his long history of alcoholism, the Davidson

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News in Brief (cont.)

County Sheriff's Office approved Heaton's request for work release and he went to work at a night club where alcohol was readily available. In early April 2010, Heaton failed to return from his work release job. Not surprisingly, authorities found him passed out in front of a bar; he was arrested for public intoxication and returned to jail. Davidson County Sheriff Daron Hall is now in the difficult position of defending his decision to let Heaton work in the night club. Hall said there are about 50 prisoners in the work release program, and most jobs they can find involve proximity to alcohol.

Texas: On April 2, 2010, Robert Goodley, 50, a guard at the state prison system's Galveston hospital, died of an

apparent heart attack at the Ramsey I Unit in Brazoria County after participating in a rigorous physical fitness test. The test requires employees to perform push-ups, sit-ups, deep squats, a quarter-mile walk or run and other exercises. Goodley completed the test without any apparent difficulties and then went to his truck in the parking lot. He was discovered unconscious by other employees a few minutes later and taken to an area hospital, where he was pronounced dead.

Texas: On April 7, 2010, Robert Luis Loya, a former guard at the Port Isabel Detention Center in Los Fresnos, was sentenced to three years in federal prison and five years of supervised release for sexually assaulting female prisoners. Loya admitted to sneaking into medical isolation rooms at the detention center infirmary to grope female patients. He fre-

quently volunteered for infirmary duty so he could be alone with the prisoners, who were usually asleep when he entered the room. Loya lied to his victims, assuring them that he had been ordered to examine them by a physician and instructing them to disrobe. He then touched them in a sexual manner.

Texas: On April 8, 2010, Woody Densen, a former Harris County state district judge, pleaded guilty to misdemeanor criminal mischief. He was ordered to pay \$1,500 in fines and over \$4,500 in restitution. Densen was charged after he was observed on surveillance video keying his neighbor's SUV. [See: *PLN*, August 2009, p.1]. The judge was apparently upset because the SUV blocked part of the sidewalk in front of his house; his neighbor set up a video camera after his vehicle was repeatedly vandalized. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. 1041

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Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, published by PLN, 221 pages. \$49.95. Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1057

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. \$39.99. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037

Law Dictionary, Random House Webster's, 525 pages. \$19.95. Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. \$14.95. A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046

Legal Research: How to Find and Understand the Law, by Stephen Elias and Susan Levinkind, 568 pages. \$49.99. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 352 pages. \$34.99. How-to handbook for anyone who conducts a deposition or is going to be deposed. 1054

Ten Men Dead: The Story of the 1981 Irish Hunger Strike, by David Beresford, Atlantic Monthly Press, 334 pages. \$16.95. Story of IRA prisoners at Belfast's Long Kesh prison. 1006

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Spanish-English/English-Spanish Dictionary, Random House. \$8.95. Two sections, Spanish-English and English-Spanish. 60,000+ entries from A to Z; includes Western Hemisphere usage. 1034

Writing to Win: The Legal Writer, by Steven D. Stark, Broadway Books/Random House, 283 pages. \$19.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035

Actual Innocence: When Justice Goes Wrong and How to Make it Right, updated paperback ed., by Barry Scheck, Peter Neufeld and Jim Dwyer, 403 pages. \$16.00. Describes how criminal defendants are wrongly convicted. Explains DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct. 1030

Webster's English Dictionary, Newly revised and updated, Random House. \$8.95. 75,000+ entries. Includes tips on writing and word usage, and has updated geographical and biographical entries. Includes recent business and computer terms. 1033

Everyday Letters for Busy People, by Debra Hart May, 287 pages. \$18.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Has numerous tips for writing effective letters. 1048

Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South, by Alex Lichtenstein, 264 pages. \$19.95. Explores how prison slavery was an integral part of the American economy after the civil war and puts today's prison labor practices into historical context. 1012

Roget's Thesaurus, 717 pages. \$8.95. Helps you find the right word for what you want to say. 11,000 words listed alphabetically with over 200,000 synonyms and antonyms. Sample sentences and parts of speech shown for every main word. Covers all levels of vocabulary and identifies informal and slang words. 1045

Starting Out! The Complete Re-Entry Handbook, edited by William H. Foster, Ph.D. & Carl E. Horn, Ph.D., Starting Out Inc., 446 pages. \$22.95. Complete do-it-yourself re-entry manual and workbook for prisoners who want to develop their own re-entry plan to increase their chances of success after they are released. Includes a variety of resources, including a user code to the Starting Out website. 1074

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu Jamal, City Lights Publishers, 280 pages. \$16.95. In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It, by Terry Kupers, Jossey-Bass, 245 pages. *Hardback only; prisoners please include any required authorization form.* \$32.95. Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003

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Hepatitis and Liver Disease: What You Need to Know, by Melissa Palmer, MD, 457 pages. **\$17.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow, exercises to perform, and a bibliography. 1031 ☐

Crime and Punishment In America, by Elliott Currie, 230 pages. **\$16.95**. Effective rebuttal to right-wing proponents of prison building. Fact-based argument shows that crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention. 1019 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin Books, 368 pages. **\$16.00**. From Jack London to George Jackson, this anthology provides a selection of some of the best writing describing life behind bars in America. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson, Lawrence Hill Books, 339 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

Marijuana Law, by Richard Boire, Ronin, 271 pages. **\$17.95**. Examines how to reduce the probability of arrest and prosecution for people accused of the use, sale or possession of marijuana. Info on legal defenses, search & seizures, surveillance, asset forfeiture and drug testing. 1008 ☐

Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pages. **\$16.00**. Analysis of prison labor's roots in slavery, plantations and self-sustaining prisons. 1007 ☐

The Citebook, by Tony Darwin, Starlite, 306 pages. **\$49.95**. This plain-language legal manual lists hundreds of positive cases (cases that give you a right, not take one away) in a variety of subject areas, with a brief synopsis of each case. 1057 ☐

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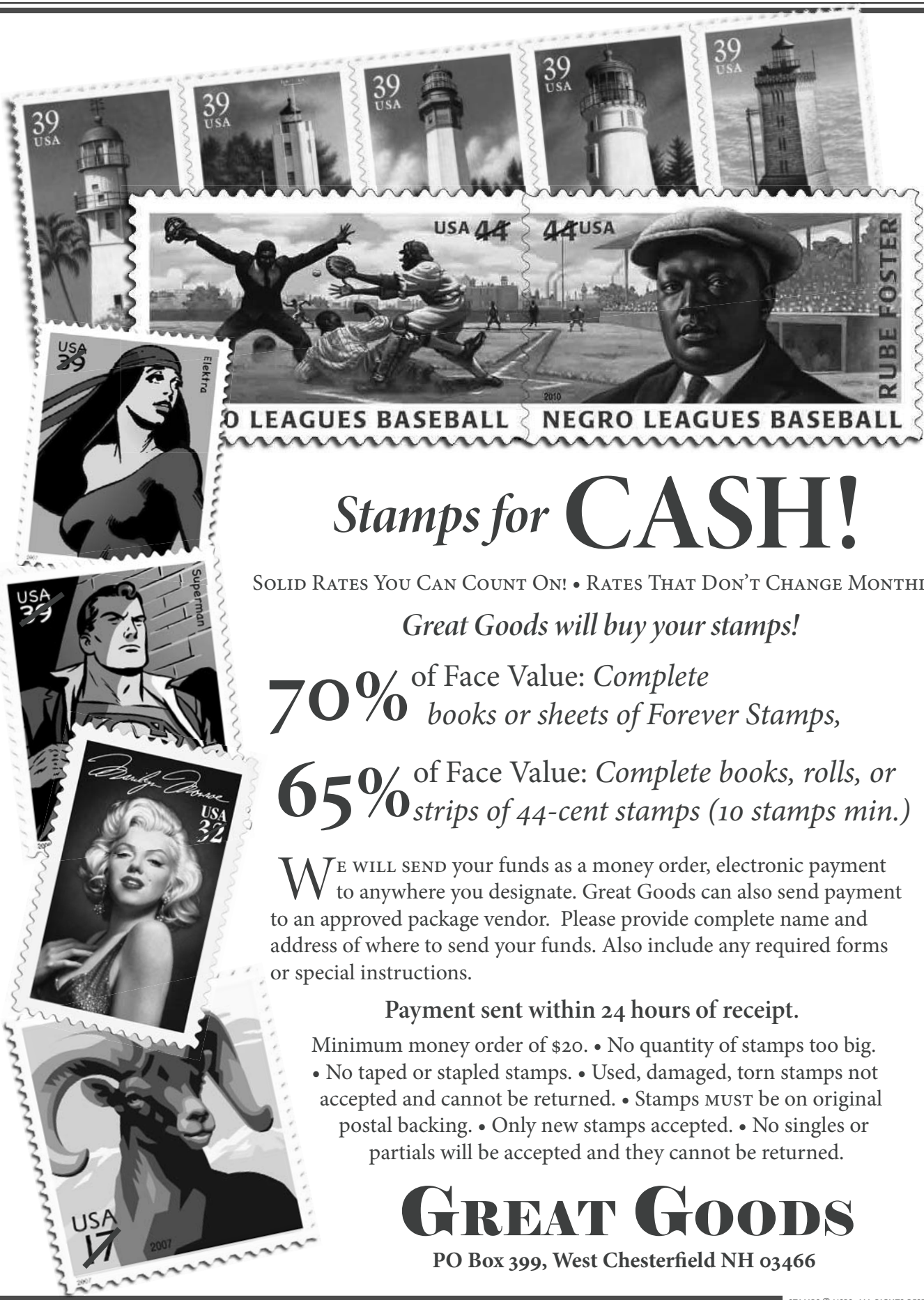
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July 2010

Celebrity Justice: Prison Lifestyles of the Rich and Famous

by Matt Clarke

There are two criminal justice systems in the United States. One is for people with wealth, fame or influence who can afford to hire top-notch attorneys and public relations firms, who make campaign contributions to sheriffs, legislators and other elected officials, and who enjoy certain privileges due to their celebrity status or the size of their bank accounts. The other justice system is for everybody else.

As one example of this dichotomy, for over a decade suburban jails in Southern California have been renting upscale cells to affluent people convicted of crimes in Los Angeles County. These pay-to-stay programs, also called self-pay jails, cost

wealthy prisoners between \$45 and \$175 a day and include such amenities as iPods, cell phones, computers, private cells and work release programs. Some even let prisoners (who are referred to as “clients”) bring in their own food.

This nicer-jail-stay-for-pay scheme not only allows the rich and famous – as well as the more modestly affluent – to avoid the brutality, squalor, abysmal medical care and other unpleasant conditions typical in public jail systems. It also highlights the inequities of a two-track system of justice in the United States in which the wealthy enjoy privileges and perks behind bars while the poor are resigned to less comfortable and more dangerous conditions of confinement.

The disparity in the U.S. criminal justice system begins with arrest. The poor are often arrested during SWAT-type raids in the middle of the night that leave their front doors, and possibly their entire homes, in a shambles. The affluent are frequently allowed to “turn themselves in,” usually accompanied by their attorney. This assumes that people with means and influence are arrested in the first place, of course.

For example, when musician Robert Ritchie (known as Kid Rock) was stopped by a Vanderbilt police officer in Nashville, Tennessee in February 2005, the officer chose not to perform a sobriety test and instead issued a warning. He also got Kid Rock’s autograph. “We don’t have any way of knowing, had the field-sobriety test been done, how that would have come out,” said Vanderbilt Police Captain Pat Cunningham. At the time of the traffic stop Kid Rock was wanted for punching

a D.J. at a strip club earlier that night.

Following arrest, poor defendants often have to sit in jail – sometimes for years while their cases wind through the court system – while those with sufficient funds can afford to make bond. For the very rich, bail can range into the millions of dollars, which they can easily pay.

Indigent prisoners are represented by overworked and underfunded public defenders with huge caseloads, or court-appointed attorneys who may or may not be experienced or competent in criminal cases. Wealthy defendants can hire private counsel or even a team of lawyers. In the O.J. Simpson murder prosecution, Simpson’s “dream team,” headed by late attorney Johnnie Cochran, cost an estimated \$3-6 million.

The one place in the criminal justice system where there was at least an appearance of equality among the economic classes was incarceration. Jail was jail for both the rich and poor. Now even that bastion of equal treatment has fallen with the rise of pay-to-stay jails for well-off prisoners who can afford them.

“It really exemplifies the two-tier nature of the American criminal justice system, where you have one system of justice for the poor and politically unconnected and another system of justice for the wealthy and politically connected,” said *PLN* editor Paul Wright.

Pay-to-Stay Jails at Hotel Prices

Theoretically there are only two situations that call for incarceration: a criminal conviction that results in a prison or jail sentence, or because a defendant awaiting trial is considered a flight risk or danger to

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**NOTICE OF PENDENCY OF CLASS ACTION CIVIL RIGHTS COMPLAINT
AGAINST TRANSCOR AMERICA, LLC.**

TO: ALL INMATES AND DETAINEES WHO WERE TRANSPORTED FOR MORE THAN TWENTY-FOUR (24) HOURS CONTINUOUSLY, THIS NOTICE MAY EFFECT YOUR LEGAL RIGHTS.

If you were transported by TransCor America, LLC, from a jail, prison, or state hospital in restraints, remained in the vehicle for more than 24 hours, and were deprived of overnight sleep in a bed between February 14, 2006, and the present, you are a member of this national civil rights class action now pending in federal court in San Francisco, California.

PLEASE READ THIS COURT-ORDERED CLASS-ACTION NOTICE

WHAT IS THIS CASE ABOUT? There is now pending in the District Court for the Northern District of California a class action entitled *Kevin M. Schilling, John Pinedo, William Tellez, on Behalf of Themselves and All Those Similarly Situated v. TransCor America, LLC, Sgt. John Smith, Officer Blanden, and Does 1 through 100*, Cause No. 3:08-cv-00941 SI. This Notice explains the nature of the litigation and informs you of your legal rights and obligations.

Plaintiffs are pre-trial detainees and sentenced prisoners who were transported by TransCor America, LLC, a private prisoner transport company, who remained in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class includes all pretrial detainees and prisoners who were transported by TransCor, for more than twenty-four (24) hours continuously, except pretrial detainees and prisoners who were transported on behalf of a federal agency.

Plaintiffs have sued TransCor America, LLC, for damages for cruel and unusual punishment for keeping them on the vehicles for twenty-four (24) hours or more and depriving them of overnight rest in a bed.

Plaintiffs allege that conditions on the transport vehicles violated the United States Constitution and the California State Constitution applicable to persons transported in California. Defendant denies that the conditions under which the company transported prisoners and pre-trial detainees violated their rights. The District Court Judge has issued an Order certifying this case to proceed as a national class action.

WHO IS IN THE CLASS? Plaintiffs filed this action on behalf of themselves and all other persons similarly situated. The Court has certified a class consisting of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who remained in restraints in the transport vehicle for more than twenty-four (24) hours continuously without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than twenty-four (24) hours. The class does not include pretrial detainees and prisoners who were transported by TransCor on behalf of a federal agency.

MUST I DO ANYTHING TO REMAIN IN THE CLASS? If you are a member of the class described above, you do not have to do anything to remain in the class. If you do not request exclusion from the class, you will remain a class member. If you wish to exclude yourself from the class, you must follow the procedure set forth in the following paragraph.

MAY I EXCLUDE MYSELF FROM THE CLASS? If you do not wish to be considered a member of this class, or do not wish to be represented by the plaintiffs in this action, you may be excluded from the action by mailing a letter which must be postmarked on or before August 16, 2010, requesting exclusion from the class and addressed to either:

Attorneys for Plaintiffs:

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Karen L. Snell
Attorney at Law
c/o Andrew C. Schwartz, Esq.
2121 N. California Blvd.
Suite 1020
Walnut Creek, CA 94596

The letter should include the name and number of the case, *Schilling et al. v. TransCor America, LLC, et al.*, Case No. C 08-941 SI, your name and address, and a clear statement that you do not wish to be considered a member of the class and do not wish to be bound by the judgment in the action.

WHAT IS THE LEGAL EFFECT OF A DECISION TO REMAIN A CLASS MEMBER? This lawsuit will eventually conclude with a judgment in favor of or against all the members of the class. That judgment, whether favorable or not to class members, will bind the members of the class. That judgment will prevent any class member who does not request exclusion by a letter as described above, postmarked on or before August 16, 2010, from filing his or her own lawsuit to recover damages arising from the conditions of transport which are the subject of this class action.

MAY I HIRE MY OWN SEPARATE ATTORNEY? If you do not request exclusion, this action will be maintained on your behalf by plaintiffs and their attorneys listed above.

HOW CAN I OBTAIN ADDITIONAL INFORMATION? You can obtain further information about this action by contacting the attorneys for the plaintiffs and class members in this action. Their information is provided above.

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Celebrity Justice (cont.)

public safety. In the latter regard, the rich and famous are given the benefit of the doubt as to their level of "risk" while the poor are almost always considered risky. After all, they have fewer resources and thus less to lose if they jump bail.

Even when wealthy offenders have to do jail time, in Southern California they can ameliorate their conditions of confinement by renting cells at pay-to-stay facilities. In Los Angeles and Orange Counties, the cities of Alhambra, Anaheim, Burbank, Culver City, Fullerton, Glendale, Hermosa Beach, Huntington Beach, La Verne, Montebello, Pasadena, San Gabriel Valley, Santa Ana, Seal Beach, South Bay and Torrance offer pay-to-stay jails, some of which amount to incarceration vacations.

Pasadena has the largest program with 2,226 prisoners paying to stay at the city's jail in 2007, which generated about \$234,000. The jail has advertised its program with a pamphlet that echoes holiday resort language. "Serve your time in our clean, safe secure facility! ... We are the finest jail in Southern California," the brochure proclaims. Pay-to-stay prisoners in Pasadena have access to an exercise bike and can watch DVD's. The cost? Just \$135 a day.

The tiny four-bunk jail in La Verne, where actor Christian Slater served 59 days in 1998 for battery and drug offenses, might vie for Pasadena's claim of having the finest pay-to-stay facility. The La Verne jail charges work release prisoners \$45 per day; those who serve "straight time" pay only \$7.50 a day but have to perform work duties such as cleaning or laundry. In both cases the per diem rates are in addition to a one-time \$270 administrative fee. Pay-to-stay prisoners are allowed to have food delivered – a major perk for anyone who has had the misfortune of sampling typical jailhouse fare.

Santa Ana refers to its \$82-a-day self-pay jail as "the most modern and comfortable facility in the region." The jail hosts "a full range of alternatives to traditional incarceration" – with "traditional" presumably referring to conditions experienced by the vast majority of poor prisoners who can't afford to shell out \$82 a day. The Santa Ana jail offers flexible work release schedules for prisoners who work weekends and nights, plus "24-hour on-site medical staff." Addition-

ally, the facility has "helped clients with sentences from other counties as well as other states." So long as they can pay, of course.

When Pasadena began to offer pay-to-stay jail beds in the early 1990's, it realized the need to advertise the program. "Our sales pitch at that time was, 'Bad things happen to good people,'" said Pasadena Police Department spokesperson Janet Givens. Representatives from the jail went to community venues such as Rotary Clubs looking for potential "fee-paying inmate workers" who would pay to stay at the facility. "People might have brothers, sisters, cousins, etc. who might have had a lapse in judgment and do not want to go to county jail," Givens noted.

That attitude is a marked contrast to more traditional jails that hold detainees unable to make bond, much less pay thousands of dollars a month for safer and more comfortable conditions. Indeed, most prisoners are portrayed by law enforcement and corrections officials as incorrigible, dangerous criminals who deserve punishment – even pre-trial detainees who have not been convicted. Apparently that assessment changes when wealthy prisoners are able to pay for their room and board.

Driving the demand for pay-to-stay cells (for those who can afford them) are the deplorable conditions in the Los Angeles County jails, where, according to a *Michigan Law Review* article, "about 21,000 detainees are held in filthy cells so overcrowded – four men in a cell built for two, six to a four-man cell – that federal judge Dean D. Pregerson observed in 2006 inmates must stay in their bunks at all times because there is not enough room for them to stand." Gang activity is rampant in the LA jails, as is gratuitous violence that has led to a number of prisoner-on-prisoner murders.

In 2006, funding cuts forced Los Angeles County Sheriff Lee Baca to reduce staff until there was only one guard per 100 prisoners. The national average is one guard per 10 prisoners. More than 85% of the jail population is composed of pre-trial detainees, most being held on non-violent drug and property charges. Instead of protecting them from violence – a nearly impossible task due to overcrowding and understaffing – guards tell frightened new arrivals they have to "Be a man. Stand up and fight." Given a choice, and sufficient funds, is it any wonder that well-off prisoners would pay

Celebrity Justice (cont.)

to stay elsewhere?

"It seems to be a little unfair," said Mike Jackson, training manager for the National Sheriff's Association. "Two people come in, have the same offense, and the guy who has money gets to pay to stay and the other doesn't. The system is supposed to be equitable."

Celling Celebrities in California

Proponents of self-pay jails often say they are only used for first-time, non-violent offenders. A review of the celebrities who have graced such facilities belies that claim. In 1998, for example, Christian Slater spent 59 days of a 90-day sentence at the La Verne jail for battery and drug violations. He reportedly beat his girlfriend and kicked a police officer down a flight of stairs. Also, rapper and music producer Dr. Dre, whose real name is Andre Young, served five months in the Pasadena jail on a probation violation in 1994 after pleading no contest to DUI. He was on probation for battery after breaking another rap producer's jaw. While at the Pasadena jail, Dr. Dre was allowed to film a music video with late rapper Tupac Shakur.

Other high-profile prisoners who have paid to opt out of the dangerous and crowded Los Angeles County jails include actors Kiefer Sutherland and Gary Collins, and former Orange County Assistant

Sheriff George Jaramillo.

Collins spent a total of 96 hours at the \$85-a-day Glendale jail for a 2008 DUI conviction, while Sutherland served 48 days at Glendale, also for DUI. Sutherland was not in the work release program and thus had to work in the jail's kitchen and laundry details, but he had a single cell. "After Kiefer and Gary, we got inundated with calls, so we actually have people lined up through the summer," said Glendale jail administrator Juan Lopez.

Yet things do not always go smoothly for prominent prisoners even after they're accepted by a pay-to-stay jail. In Jaramillo's case, the prosecutor objected to his plan to serve his one-year sentence at the Fullerton jail because that would allow him to use a cell phone and personal computer, plus bring in his own food.

"We certainly did not envision a jail with cell phone and laptop capabilities where his family could bring him three hot meals," said a spokesperson for the Orange County district attorney's office. "We felt that the use of the computer was part of the instrumentality of his crime, and that is another reason we objected to that."

Fullerton officials denied that laptops were allowed, but said the jail did permit the use of cell phones. "If you're going to be in jail, it's the best \$75 per day you'll ever spend in your life," said Fullerton Police Lt. John Petropulos. "You don't have to worry about getting beat up by a guy with a shaved head and tattoos."

The implication, of course, is that poor prisoners who can't afford pay-to-stay jails *should* be worried about such violence. Jaramillo ended up serving his one-year sentence for perjury and misuse of public funds in the Montebello jail's self-pay program. He later pleaded guilty to charges of tax evasion and money laundering in connection with a corruption investigation into former Orange County Sheriff Mike Carona. [See: *PLN*, Nov. 2009, p.38; Feb. 2009, p.1].

A private company called Correctional Systems, Inc. (CSI), which was acquired by private prison firm Cornell Companies in 2005, runs pay-to-stay programs at city jails in Alhambra, Baldwin Park and Montebello, California, and previously operated a self-pay program in Seal Beach.

"The benefits are that you are isolated and don't have to expose yourself to the traditional county system," said CSI spokeswoman Christine Parker. "You can avoid gang issues. You are restricted in the number of people you are encountering and they are a similar persuasion to you." Presumably, "similar persuasion" means they are wealthy enough to afford rent-a-cells and thus avoid the violence and unpleasant conditions that poor prisoners have to endure while serving time in the county jail system.

The affluent simply want to be incarcerated with those of their own kind, according to Parker. But what does that mean? Jails reserved for prisoners who are rich? Fellow celebrities? The politically-connected? Is it morally or ethically defensible to allow different forms of imprisonment as punishment for crime based on a person's wealth or social status, regardless of their "persuasion"?

This corruption of the notion of equal and impartial justice has extended, in some cases, to corruption among employees at self-pay jails. In June 2007, the city of Seal Beach terminated its contract with CSI after three guards were charged with stealing a prisoner's Sony PlayStation and falsifying documents to cover-up the theft. In 2004 another CSI guard, Alonso Machain, was charged with helping former Seal Beach jail prisoner Skylar Deleon – a former child actor – brutally murder a couple for their \$440,000 yacht. [See: *PLN*, Feb. 2008, p.26]. Deleon and an accomplice were sentenced to death in April 2009; Machain received a 20-year, 4 month sentence in June 2009.

Seal Beach officials said they ter-

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minated the contract with CSI due to poor financial performance. They didn't abandon the pay-to-stay concept, though – the city now operates the program itself, renting out 30 jail beds at rates up to \$120 a day.

Special Treatment for Special People

Jail experts say they aren't aware of self-pay jails outside California. "I have never run into this," said Ken Kerle, editor of the American Jail Association's bimonthly magazine. "But the rest of the country doesn't have Hollywood either. Most of the people who go to jail are economically disadvantaged, often mentally ill, with alcohol and drug problems and are functionally illiterate. They don't have \$80 a day for jail."

While it may be true that pay-to-stay programs are unique to California, affluent and celebrity prisoners are treated with deference in regular jails, too. This is even the case in Los Angeles County's infamous jail system.

The luxury suite at the Los Angeles County jail is Room 7021, known to guards as the "hospital" because it's in the former clinic, though some started calling it "The Heisman" after O.J. Simpson spent

the better part of a year there. Room 7021 has housed its fair share of celebrities, including actors Robert Downey, Jr., Sean Penn, Robert Blake and Kelsey Grammer; musicians Tommy Lee of Motley Crue and Scott Weiland of the Stone Temple Pilots; and comedian Richard Pryor. In fairness, it has also held some of the most infamous prisoners in Southern California, such as "Night Stalker" Richard Ramirez and Kenneth Bianchi, one of the Hillside Stranglers.

According to a November 2002 article in the *New York Times*, Room 7021 offers a luxurious (by jail standards) 80 square feet of white-painted private living space, a steel door with a 9-by-9-inch window, a private phone, and that most precious of commodities for prisoners – solitude.

"This is not a hotel and we don't give celebrities special treatment," claimed Captain Richard Adams, supervisor of the 7,200-bed Men's Central Jail, where Room 7021 is located. But isn't it special treatment to provide a safe, secure, single-man cell to celebrities and other fortunate prisoners while the rest of the jail's population is held in overcrowded conditions where violence is a constant threat?

Adams defended segregating high-

profile prisoners, saying, "The guys in here will prey on them and eat them alive, so off to protective custody they go. I don't want anyone getting hurt in here." Of course by that he really means he doesn't want anyone famous or rich getting hurt at the jail – since non-celebrity prisoners are regular victims of violence and sometimes-fatal medical neglect. [See, e.g.: *PLN*, Jan. 2010, p.40; Jan. 1, 2009, p.27; March 2008, p.40]. In fact, in a six-month period from October 2003 to April 2004, five prisoners were murdered in the Los Angeles County jail system. [See: *PLN*, April 2005, p.16].

Other affluent and well-connected prisoners have been afforded different types of preferential treatment by Los Angeles officials. When Mel Gibson went on an anti-Semitic rant during a DUI arrest on July 28, 2006, details about his derogatory remarks were removed from the original arrest report and placed in a supplemental report not available to the media.

Three Sheriff's Department employees were disciplined for violating policy during Gibson's arrest. They didn't take his palm print when he was released, failed to have him sign a notice-to-appear form,



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Celebrity Justice (cont.)

and drove him to a tow lot to get his car. Gibson spent about 8½ hours in jail before making bond; he was later sentenced to three years' probation and ordered to pay \$1,400 in fines.

The Los Angeles County Office of Independent Review investigated allegations of Gibson's preferential treatment by Sheriff's Department staff, and summarized its findings in the agency's annual report released in December 2007.

"When dealing with celebrities, law enforcement officers must walk a fine line between improper preferential treatment and legitimate, necessary adaptation to the challenges posed by the famous," the report concluded.

Sometimes the line isn't so fine. Wealthy socialite Nichole Richie was released only 82 minutes after her arrival at Los Angeles' Century Regional Detention Facility in August 2007, where she was to serve a four-day sentence for driving under the influence of drugs. She admitted to using marijuana and Vicodin, a prescription pain killer, but never saw the inside of a jail cell. Los Angeles County Sheriff's Department spokesperson Kerri Webb said Richie "was released early due to overcrowding in the jail system. This is standard procedure for nonviolent offenders." Webb did not disclose how many non-wealthy, non-celebrity prisoners spent such a short time in jail.

Not to be outdone, actress Lindsay Lohan served just 84 minutes at the same facility on November 15, 2007, after pleading guilty to two cocaine-related charges and no contest to reckless driving and two counts of DUI. The Sheriff's Department denied any special treatment. She had been sentenced to one day in jail, three years' probation and 10 days community service, and ordered to attend an alcohol abuse program. After Lohan failed to participate in the program, instead of being revoked her probation was extended another year.

In May 2006, actress Michelle Rodriguez, who starred in "The Fast and the Furious," "Resident Evil" and "Avatar," and the TV series "Lost," received a 60-day sentence for violating probation due to a DUI charge. She had been placed on three years' probation several years earlier after pleading no contest to hit and run, DUI and driving with a suspended license. Rodriguez was released from jail after

serving just four hours and 20 minutes of her two-month sentence.

"Needless to say, our prosecutors are not happy about this," said a spokesperson for the City Attorney's office. "But the sheriffs have a policy to let some nonviolent offenders go early, in part due to jail overcrowding."

Rodriguez violated her probation again in September 2007 for failing to complete community service work. The court sentenced her to 180 days in jail, and found her to be ineligible for work release or house arrest. She spent just 18 days at the Century Regional Detention Facility before being released on January 9, 2008, again due to overcrowding.

"The sheriff supports, obviously, the desire to have inmates serve their full sentence," but the county's single women's jail was "bursting at the seams," a Sheriff's Department spokesperson said. Evidently, though, the sheriff doesn't support his desire to have celebrities serve their full jail terms enough to make them do more than a fraction of their sentences.

A well-publicized case of special treatment involved millionaire socialite Paris Hilton, who was released to house arrest in June 2007 after serving only three days of her 45-day sentence for a suspended license offense while on three years' probation for reckless driving. Los Angeles County Sheriff Lee Baca ordered her early release due to an unspecified medical condition – although the jail could apparently accommodate non-celebrity prisoners with medical conditions. Indeed, the Office of Independent Review noted that "it is extremely rare for the Department to release someone from jail early due to medical issues."

Sheriff Baca denied any special treatment. "My message to those who don't like celebrities is that punishing celebrities more than the average American is not justice," he remarked. County officials noted that nonviolent female prisoners serve only a small portion of their sentences due to early release policies.

Regardless, a Superior Court judge ordered Hilton to return to jail; she ended up serving 23 days of her 45-day sentence and was released on June 26, 2007. She was housed in a 12-bed "special needs" unit separate from the jail's other 2,200 prisoners, and issued new jail uniforms that had not been previously worn (purportedly because the facility didn't have any existing uniforms in her size). Hilton was also allowed to make a late-night

phone call from the jail to TV host Barbara Walters.

Preferential treatment was extended to Hilton's parents, who were allowed to cut in front of hours-long visitors' waiting lines, and the visitation area was closed to other prisoners and their families while the Hiltons visited. A spokesman said it was normal for high-profile prisoners to visit when the visitation room was closed during lunchtime. It was later reported that Hilton's grandfather, billionaire William Barron Hilton, had donated \$3,000 to Sheriff Baca's election campaign.

"This is L.A.," noted Sheriff's Department spokesman Steve Whitmore. "The mayor, the City Council and other elected officials all have people in show business who donate to their campaigns."

At least Hilton didn't receive special treatment in one area – she had to eat the same meals as other prisoners. "The food was horrible. It was jail food; it's not supposed to be good," she stated. "Lunch was basically a bologna sandwich. They call it mystery meat. It's pretty scary. Two pieces of bread and some mayonnaise."

Orange County, California has also provided preferential treatment to celebrity prisoners. For instance, Roger Avary, movie director and co-author of the screenplay for the Oscar-winning film *Pulp Fiction*, was sentenced to a year in jail for killing a friend in a car accident while driving drunk in January 2008. Prosecutors had requested a six-year sentence.

Upon reporting to jail on October 26, 2009, Avary was immediately placed in a program that allowed him to work during the day and report to a furlough facility at night and on weekends. He posted tweets describing his supposed time in jail until a blogger questioned how he was accessing Twitter while incarcerated.

Avary was moved to the Ventura County Jail on November 25, 2009 after his placement in the furlough program became known, due to "security issues." He presently remains at the jail, where he is serving the rest of his one-year sentence for gross vehicular homicide and DUI.

Amenities for Favored Few in Arizona

Special treatment for celebrities extends beyond California to neighboring Arizona, where Maricopa County Sheriff Joe Arpaio, the infamous self-proclaimed "toughest sheriff in America," has proven to be not-so-tough on famous prisoners. When Grammy-winning singer Glen Campbell received a 10-day sentence in

June 2004 for extreme DUI and leaving the scene of an accident, he didn't stay at the Maricopa County Jail's infamous Tent City, where prisoners wear striped uniforms and pink underwear, are fed green bologna sandwiches and live in harsh conditions in open-air tents.

Instead, Campbell served his time at an air-conditioned facility that guards call the "Mesa Hilton." He was allowed to leave the jail for 12 hours a day on work furloughs. While incarcerated he had access to his cell phone, a guitar and a therapeutic mattress, and was given a private cell. Perhaps in gratitude for such leniency, Campbell agreed to perform a 30-minute concert for 1,000 prisoners at Tent City and mugged with Arpaio for members of the press. "They put me up to this," he said jokingly ... or perhaps not so jokingly.

Also, in May 2003, Sheriff Arpaio allowed Mandie Brooke Colangelo, daughter of sports celebrity Jerry Colangelo (former owner of the NBA's Phoenix Suns and the MLB's Arizona Diamondbacks), to serve an 11-day DUI sentence at the Mesa Hilton instead of the county's Estrella Jail, which has been described as a "hellhole." Colangelo was allowed her own food and could use a cell phone, and

left for up to 12 hours a day to work and care for her children. Eight months later her father sponsored a major fund-raising event for Arpaio's re-election campaign, attracting hundreds of influential donors and raising \$50,000 for the sheriff.

Similarly, Arpaio allowed Joseph Deihl II, the son of a wealthy business executive, to serve his 15-day sentence at the Mesa Hilton in January 2004. Deihl had been convicted of solicitation of prostitution, and his family donated \$11,700 to Arpaio's re-election campaign while the case was on appeal. Deihl was allowed to leave the facility from 9:00 a.m. until 9:00 p.m. to work, and reportedly brought his own food and a cell phone to the jail. [See: *PLN*, March 2007, p.14].

When former basketball star Charles Barkley had to serve three days for drunk driving in March 2009, he didn't get the five-star treatment at the Mesa Hilton. However, he did get his own private tent in Tent City and his meals were delivered to him. Barkley's sentence started at 8:00 a.m. on Saturday when he reported to jail. He was allowed to leave on Sunday from 8:00 a.m. until 8:00 p.m., then left on Monday at 8:00 a.m. and did not return. Thus his 10-day sentence, which

had been reduced to 3 days by the court, was further cut to 36 hours. Barkley gave an inspirational talk to other prisoners during his brief stay at Tent City, with Arpaio at his side. Ironically, Barkley had endorsed Arpaio's autobiography twelve years earlier.

Former heavyweight champion Mike Tyson had to serve his sentence for felony cocaine possession and misdemeanor DUI at the Tent City jail, too – all 24 hours of it. Although he faced more than 4 years in prison, Tyson spent only one day at the jail in November 2007; he also received three years' probation and was ordered to perform 360 hours of community service. He was kept in a separate area of Tent City apart from other prisoners and met with Arpaio for a photo op. Tyson did have to wear a striped uniform and pink underwear, pink socks and pink handcuffs – a small price to pay for serving one day behind bars on a felony drug charge despite being a repeat convicted felon.

Paying-to-Stay at Home

The East Coast has its own version of pay-to-stay: well-to-do prisoners stay in their own homes instead of jail if they can afford security guards to watch over

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Celebrity Justice (cont.)

them. When 70-year-old former NASDAQ chairman Bernie Madoff was facing a lengthy prison sentence for defrauding billions of dollars from investors in a massive Ponzi scheme, legitimate questions were raised as to whether he was a flight risk and should be denied bail.

Regardless, Madoff was allowed to stay out of jail under house arrest in his \$7 million Manhattan penthouse, so long as he footed the bill for around-the-clock private security guards to both protect him from harm and prevent him from fleeing. Madoff was also required to post bond, wear an electronic monitor and surrender his passport.

The security firm that provided Madoff's "bail monitoring," Casale Associates, was founded by former New York police detective Nicholas Casale – who, incidentally, had been fired from his high-ranking security position at New York's Metropolitan Transportation Authority in May 2003 after being accused of misleading investigators in connection with a corruption probe.

Madoff eventually pleaded guilty and was sentenced on June 29, 2009 to 150 years in prison – an unusual outcome for someone so wealthy, but then the extent of his crime was unusual, too. Estimated actual losses for the individuals and organizations defrauded by Madoff were \$18 billion. The JEHT Foundation, a major funder of criminal justice reform efforts, had to shut down due to Madoff's scam. [See: *PLN*, June 2009, p.34].

A similar stay-at-home bail monitoring arrangement was allowed in the case of Marc S. Dreier, a New York attorney who stole \$700 million from clients and investors in an elaborate fraud scheme. Dreier was released from jail and placed on house arrest in February 2009 after he agreed to pay \$70,000 a month for full-time live-in guards from Pathfinder Consultants International, a private security firm. Dreier's family co-signed a \$10 million personal recognizance bond and paid for the guards. He had to remove all cell phones, computers, knives and potential weapons from his home, visitors were pre-approved and pre-screened by court officials, and he was required to wear an electronic monitor.

There was also the 2007 case of Mahender and Varsha Sabhnani, a New York millionaire couple charged with enslaving

and torturing two Indonesian domestic workers. According to prosecutors their crimes involved "incomprehensible brutality and violence and inhumanity," and constituted "modern day slavery." Although initially incarcerated, they were released on \$4.5 million bail with the condition that they post private guards inside their home.

When reviewing the Sabhnani case, the Second Circuit Court of Appeals recognized the implications of such house arrest arrangements. "The government has not argued and, therefore, we have no occasion to consider whether it would be 'contrary to principles of detention and release on bail' to allow wealthy defendants 'to buy their way out' by constructing a private jail," the court wrote. See: *United States v. Sabhnani*, 493 F.3d 63 (2d Cir. 2007).

When asked about his role as a "bail sitter," Ed Stroz, a former FBI agent and co-founder of security firm Stroz Friedberg LLC, which replaced Casale Associates as Madoff's private guard detail, was unequivocal. "The client is the court," said Stroz. "This is not a valet service. This is like jail outside."

Addressing the same question, Nicholas Casale wasn't as sure. "It's a complex issue," he stated. "Would you, as a bail guard, reprimand the man who signs your paychecks? Lock him in a bathroom? Tackle him if he ran out the door?"

Former FBI agent and Pathfinder president Robert M. Hart made the astonishing comment that house arrest is as bad as being locked up. "If anyone believes it's better to be at home than at [a federal jail], he's never been at home with armed guards in his living room 24 hours a day. You can't go out, you've got no access to computers and you're living in earshot of someone paid to watch your every move," he explained.

Hart's statement begs the question of why clients pay so much for his company's bail monitoring service if it is no better than being in jail. Perhaps because it is, of course, much better to be safe and secure in your own home, preparing meals in your own kitchen and sleeping in your own bed with your lover than it is to be in an overcrowded, dangerous jail with terrible food and a small cell with a steel bunk.

There are many ethical and moral implications concerning pay-to-stay jails and in-home bail monitoring for affluent offenders who can afford such services.

Taken to the logical extreme, should we let rich prisoners build personal private prisons so they can serve their sentences in relative comfort?

More Privileges for the Privileged

There are many other examples of wealthy and celebrity offenders whose experiences with the criminal justice system smack of favoritism.

Consider radio personality Rush Limbaugh, who was investigated in 2003 for illegally obtaining prescription drugs, including oxycodone. He acknowledged that he had an addiction to pain killers and entered a rehab program. A warrant was issued for Limbaugh's arrest in April 2006 on a charge of doctor shopping for prescription medication; according to his medical records, he had obtained 2,000 painkillers from four doctors over a six-month period.

Limbaugh turned himself in to the Palm Beach County Jail in Florida and was released on \$3,000 bail about an hour later. Under a settlement deal, prosecutors agreed to dismiss the charge if he complied with the terms of the agreement for 18 months. Those terms included not owning a gun, submitting to drug tests, continuing to participate in substance abuse treatment, and paying \$30,000 to cover the cost of the doctor-shopping investigation. Poor defendants who can't afford high-priced attorneys to negotiate such lenient deals instead face long terms of incarceration.

On June 30, 2008, billionaire investment banker Jeffrey Epstein pleaded guilty to felony charges of solicitation of prostitution and procuring a person under the age of 18 for prostitution. Girls as young as 14 were brought to his mansion in Palm Beach, Florida, where they would strip to their underwear and give him erotic massages while he was nude. According to a probable cause affidavit, he masturbated during the massages, used sex toys on the girls and sometimes had intercourse with them.

Epstein accepted an 18-month sentence as part of a plea agreement, and a federal investigation was dropped. He served approximately one year in the Palm Beach County Jail before being released in July 2009 to spend another year on house arrest. Epstein's legal team included former U.S. Solicitor General Ken Starr and renowned attorney Alan Dershowitz.

Actor Charlie Sheen was arrested in Aspen, Colorado on December 25, 2009

following a domestic violence incident involving his wife that resulted in one misdemeanor and two felony charges. Despite it being Christmas Day, when most courts were closed, Sheen posted \$8,500 bond and was released from the Pitkin County Jail within 8 hours. When contacted by *PLN*, jail officials denied he had received special treatment.

Sheen, whose real name is Carlos Estevez, quickly checked himself into rehab. He agreed to plead no contest to a misdemeanor offense on June 7, 2010 in exchange for a 30-day sentence with work release. That plan hit a snag, however, because Sheen reportedly objected to the jail's no-smoking rule. Also, Pitkin County Jail administrator Beverly Campbell objected to his placement in the work release program, saying the actor was ineligible for that program even though it had been approved by prosecutors and the sheriff. Sheen's attorneys are now trying to renegotiate the plea deal down to probation in lieu of incarceration.

Not that serving time in the affluent-friendly resort town of Aspen would be so bad. According to news reports, the Pitkin County Jail allows male and female prisoners to mingle together in shared living areas, and on Christmas Day, when Sheen was arrested, the jail served prime rib for lunch and Cornish hen for dinner.

Cameron Douglas, son of actor Michael Douglas, was arrested on federal

drug charges in July 2009 when he was busted with a half-pound of meth. Although initially placed on house arrest, he was jailed after his girlfriend tried to bring him heroin.

Cameron was sentenced on April 20, 2010 to five years in federal prison plus \$300,000 in fines. While that sounds like a stiff sentence, it was only half the ten-year term required under mandatory minimum sentencing laws. His sentence was reduced because he had cooperated with law enforcement officials, though the fact that his famous father, his equally famous grandfather, actor Kirk Douglas, and his stepmother, actress Catherine Zeta-Jones, all sent letters to the judge requesting leniency probably didn't hurt either. Cameron is serving his sentence at FPC Lewisburg in Pennsylvania – a minimum-security camp with no perimeter fence.

When former Detroit mayor Kwame Kilpatrick was initially sent to prison on May 25, 2010 to serve an 18 month-to-five-year sentence for trying to avoid \$1 million in court-ordered restitution in an obstruction-of-justice case, he was housed in an air-conditioned room with a private shower in the medical unit at the Charles Egeler Reception and Guidance Center. Warden Heidi Washington, who knew Kilpatrick from the time they worked at the state Capitol together, said he was isolated from other prisoners for "management reasons," adding, "it makes things run more

efficiently, more calmly and more smoothly to keep him separated."

An anonymous guard who contacted the *Detroit News* claimed Kilpatrick was being treated "like a rock star." Prison officials denied the allegations. About two weeks after Kilpatrick reported to prison, the Department of Corrections recommended him for a boot camp program that would make him eligible for release on parole in 90 days. The sentencing court rejected the boot camp recommendation.

Well-connected Washington, D.C. lobbyist Jack Abramoff received a 70-month federal prison sentence in March 2006 after pleading guilty to conspiracy, fraud and tax evasion charges. His sentence was reduced to four years for cooperating in a federal investigation that resulted in other convictions and guilty pleas, including those of former U.S. Dept. of Justice deputy chief of staff Robert Coughlin (sentenced in November 2009 to one month in a halfway house, three years' probation and a \$2,000 fine) and former Ohio congressman Bob Ney (who served 17 months of a 30-month prison sentence).

Abramoff was released from FPC Cumberland, a minimum-security facility, on June 9, 2010 after serving 43 months. He reported to a halfway house in Baltimore, Maryland where he was supposed to remain until he completed his sentence in December. Instead he was released to

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Celebrity Justice (cont.)

home confinement after spending only a few days at the halfway house. He is presently working at a pizzeria.

Another example of justice for the rich and famous is Noelle Bush, daughter of former Florida Governor Jeb Bush, who was sent to a court-ordered rehab program in February 2002 following her arrest on a felony charge of attempting to use a fake prescription to buy Xanax. Noelle was ordered to spend 10 days in jail in Orange County, Florida for contempt of court after she was found with crack cocaine at the rehab center. However, she was not charged with possession of crack, a felony offense.

When millionaire business mogul Martha Stewart was sentenced in July 2004 to five months in federal prison plus two years' supervised release following her conviction on charges of conspiracy, making false statements and obstruction, she served her time at FPC Alderson, a fenceless prison known as "Camp Cupcake." After her release on March 4, 2005 she spent 5 months on house arrest at her \$15 million estate in Bedford, New York. She described home confinement at her mansion as "hideous."

In January 2008, Grammy-winning rapper Lil Wayne (Dwayne Carter) was charged with four felonies in Yuma, Arizona when marijuana, cocaine, ecstasy and a handgun were found in his tour bus. He was released on \$10,185 bond 8 hours after his arrest and allowed to travel out of state. Lil Wayne pleaded guilty to the charges on June 22, 2010 – via video from Rikers Island Jail in New York, where he is serving one year on an unrelated gun charge – and is expected to receive probation as part of a plea agreement.

Singer Chris Brown turned himself in to Los Angeles police in February 2008 and was charged with felony assault and making criminal threats for hitting, choking and biting his girlfriend, R&B singer Rihanna. Brown pleaded guilty to the felony assault charge on June 22, 2009. He was sentenced to five years' probation, six months of community work and domestic violence counseling, and was allowed to serve the sentence in Virginia where he resides.

PLN previously reported preferential treatment given to rapper Foxy Brown (Inga Marchand) at Riker's Island when she was serving a one-year sentence in

2007-2008 for violating probation in an assault case. Brown was allowed to participate in a magazine interview and photo shoot, and wore designer clothes while in jail. She served 8 months. Separately, a catered bar mitzvah ceremony was performed at the Manhattan Detention Complex for the son of prisoner Tu-via Stern, who was facing charges related to a \$1.7 million financial scam. The event included sixty guests, a singer and a band, and visitors were allowed to keep and use their cell phones in violation of jail policies. [See: *PLN*, Feb. 2010, p.24].

And the list goes on.

Pay-to-Stay Jails for the Rest of Us

The flip side of pay-to-stay jails for wealthy prisoners is requiring poor defendants to pay daily fees for the privilege of being housed at regular lock-ups. In contrast to self-pay programs for the rich, such fees are imposed on impoverished prisoners who remain in jail because they can't afford to make bond. In part driven by budget shortfalls, some jails are seeking to recover the costs of incarceration from all prisoners whether they can pay or not. [See: *PLN*, April 2008, p.1].

For example, jails in Douglas County, Oregon and Warren County, Kentucky charge prisoners \$20 a day, while Springfield County and Klamath County in Oregon charge a \$60 per diem jail fee. If prisoners can't pay while incarcerated they receive a bill after they're released, which can be turned over to a collections agency.

The Kane County jail in Illinois imposes a sliding scale of \$20 to \$100 a day depending on a prisoner's income. At the aptly-named Purgatory Correctional Facility in Washington County, Utah, prisoners are charged \$45 per day – though they get a 50% discount if they pay their bill in full when they are released.

"It's really a drop in the bucket in comparison with the total cost of operating the jail," said Springfield City Council President Dave Ralston. "But anything is better than nothing."

"They're publicity stunts," countered *PLN* editor Paul Wright. "They recoup very little money in the real world, but it makes politicians look tough on crime and it gives the illusion to the public that they're 'doing something.'"

In perhaps the most extreme case to date, the Sheriff's Department in Hillsborough County, Florida filed a lawsuit against former prisoner Aaron Brookins

in May 2010 to recover \$60,550 in costs and booking fees. He had served 1,200 days at the county jail.

In some cases it probably costs more to try to collect fees from ex-prisoners than the amount of money actually collected. There are also the questions of whether it is appropriate to impose large debts on just-released prisoners, many of whom were unemployed or indigent before they were jailed, and the impact that such financial pressures may have in terms of increased recidivism. Former offenders already have a hard time finding jobs and achieving post-release stability – does it make sense to saddle them with jail fees they can't afford?

In May 2010, prisoners' rights advocates in Massachusetts protested a legislative budget amendment that would allow county jails to impose a \$5 daily fee. "We object to [the amendment] because it has the possibility of increasing and perpetuating a resurgence of criminals and inmates, cultivating an institutionalized prison culture, legitimated by economic and budgetary policies, increasing crime and violence, and increasing poverty, economic and social disparity, immediately reflected in racial and ethnic demographics," said Rev. George Walters-Sleyon, director of The Center for Church and Prison in Dorchester.

The \$5-a-day jail fee proposal was approved by the House, but the Massachusetts Senate passed a different amendment in late May that allows the state's 14 county jails to collect an unspecified amount from prisoners to defray expenses. The debt would be forgiven if they stay out of jail for two years after release.

While some prisoners may be able to pay per diem jail fees, they are the exception rather than the rule. After all, the entire concept is counterintuitive. Those who can afford to pay while sitting in jail could likely afford to make bond, and thus wouldn't be incarcerated. Poor and indigent prisoners who can't pay will simply rack up bills that become due following their release, which sets them up for financial failure.

Also, money deducted from prisoners' jail accounts to pay the fees is usually deposited by friends and family members. Thus, they are the ones who are actually paying. "It's the spouses, children and parents who pay the fees. They are the people who contribute to prisoners' canteen accounts," noted Sarah Geraghty, with the Southern Center for Human

Rights (SCHR). The SCHR successfully opposed efforts in Georgia to charge jail prisoners \$40 a day.

Having prisoners' families – who are often themselves impoverished – pay for their loved ones' imprisonment is poor public policy. Consider that it is not only parents with school-age children who have to pay the cost of public schools. That cost is paid through taxes imposed on everyone because public education, like our criminal justice system, is a public service. Thus, why should prisoners and their families be singled out for the cost of incarceration?

As Much Justice As You Can Afford

In summary, wealthy defendants, assuming they are arrested in the first place, can usually make bond while poor prisoners remain in jail. Celebrities and others with financial means have the option of booking themselves into pay-to-stay facilities, where they enjoy sundry amenities and are separated from the common riff-raff, or can even stay at home in some cases by hiring private security guards to watch over them.

When wealthy and famous offenders are convicted, their punishments tend to be on the more lenient end of the sentencing spectrum – such as probation, community service or short stints behind bars, even for serious crimes. For example, Mike Tyson's 24-hour jail stay for felony drug possession and DUI, or Roger Avey's one-year sentence for vehicular manslaughter that initially included work release.

The well-to-do and well-connected often receive preferential treatment while incarcerated, are usually housed at less-dangerous minimum-security facilities, and are frequently released from custody early – such as the 82 minutes that Nichole Richie spent in jail or the 84 minutes served by Lindsay Lohan.

Any doubt that celebrities get special treatment, or are sometimes able to pay their way out of prison, was dispelled by a 1984 incident involving Motley Crue singer Vince Neil. Neil was driving drunk when he lost control of his car and hit another vehicle head-on, killing his

passenger, drummer Nicholas "Razzle" Dingley, and seriously injuring two people in the other car. He pleaded guilty and was sentenced to 30 days in jail, five years probation, community service and \$2.5 million in restitution.

In a 2005 interview with *Blender* magazine, Neil said, "I wrote a \$2.5 million check for vehicular manslaughter when Razzle died. I should have gone to prison. I definitely deserved to go to prison. But I did 30 days in jail and got laid and drank beer, because that's the power of cash. That's fucked up."

At least he's honest about it, except that he actually served only 20 days in jail, not 30. In January 2007 Neil was arrested for DUI in Las Vegas, but the charge was reduced to reckless driving. He was arrested again in Las Vegas on suspicion of DUI on June 27, 2010, and released on \$2,000 bond an hour after being charged.

Pay-to-stay jails, "bail sitting," lenient sentences and early releases for wealthy and celebrity offenders pervert our criminal justice system by dispensing disparate treatment based on financial worth and social standing. Further, such privileges for the rich and famous help perpetuate the crowded, violent and sometimes deadly jails that poor prisoners must endure. If affluent prisoners had to serve time under similar abysmal conditions of confinement, perhaps improvements would be made.

"The bottom line is that we live in a plutocracy with special treatment for the rich, and we have Paris Hilton [and other celebrities] to thank for making the message clear – we get as much justice as we can afford," *PLN* associate editor Alex Friedmann wrote in a June 2007 editorial.

Pay-to-stay programs do not significantly disadvantage the rich, but the per diem fees that regular jails are increasingly imposing on prisoners economically devastate the poor. Until this disparity is addressed, self-pay jails, stay-at-home bail monitoring and other perks available only to wealthy offenders will remain morally and ethically indefensible in a criminal

justice system that prides itself on the motto inscribed on the front of the U.S. Supreme Court building: "Equal justice under law."

But honestly, what can we expect from a wealth-driven justice system when, according to financial disclosure statements released in June 2010, at least five Supreme Court Justices are millionaires? Money and celebrity status talk, and our criminal justice system listens. ■

Sources: *Michigan Law Review*, *National Public Radio*, *Los Angeles Times*, *New York Times*, *Associated Press*, www.marginalrevolution.com, *Fox News*, www.kval.com, *Orange County Register*, *Tennessean*, *San Gabriel Valley Tribune*, *Reuters*, www.law.com, www.tmr.com, www.insidesocal.com, www.cnn.com, www.msnbc.com, *BBC News*, www.usmagazine.com, www.nydailynews.com, *Palm Beach Post*, <http://badpress.wordpress.com>, *Phoenix New Times*, *USA Today*, www.people.com, www.crxs.com, www.msnbc.msn.com, www.dailymail.co.uk, www.thesmokinggun.com, *Orlando Sentinel*, www.reasonoffreedom.com, *Detroit News*, www.mlive.com, www.contactmusic.com, www.associatedcontent.com

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From the Editor

by Paul Wright

The cover story of this month's issue of *Prison Legal News* is no surprise to our readers. The pay-to-stay luxury jails in Southern California first came to my attention over a year ago when a reporter from the *Los Angeles Times* called to ask me for a comment on the practice. I duly pointed out the inherently unequal and discriminatory practice of this obvious two-tiered jail system and he commented "You know, you're the only person I can find to go on record and say something bad about these pay-to-stay jails. Not even the ACLU will criticize it." Most likely because when they or their loved ones face a jail sentence they would much rather have the option of doing time in a cushy luxury jail than the cesspool of violent corruption and disease known as the Los Angeles County jail. Even a rapper like Dr. Dre who has made his millions "keepin' it real" knows it's far better to write about jail from afar than doing hard time in one.

This very two-tier system of injustice is one of the factors that make reform all the harder. When everyone, rich and poor alike, are subject to the same penalties and the same miserable conditions of confinement it helps ensure that neither gets too repugnant to basic standards of decency. But when only the poor get paramilitary policing, mandatory minimums and hard time the result is the current state of affairs where anti "crime" and anti-prisoner legislation roars along unopposed by anyone in a position of power to effect change because they know that neither they nor their families or social circles of friends will be subject to them. An interesting trend that proves this point is the current push to lessen the penalties for those defendants convicted of possessing child pornography. In congressional hearings and in the media judges and prosecutors are urging the repeal of harsh sentences for possession of child pornography. The main issue seems to be simply that a large number of the defendants charged in federal court with possessing child pornography are middle and upper class white men. Presumably if they were mostly poor black or Latino men the concern would not be there.

We have finished our move to Vermont and I would like to thank everyone who has helped with that transition. Adam Cook is our staff attorney and he works

in our Vermont office primarily on *PLN* censorship cases but also the occasional catastrophic injury case as well. Mail sent to our Seattle address is forwarded to us weekly but please use the Vermont address for a speedier response. We have gotten behind in our publishing schedule due to the move but we hope to be back on schedule by the end of the summer. Please excuse the delays but we don't plan to move again anytime soon.

I would like to thank readers who continue to send us news about the cases they win and settle. This is very important and one of the favorite news items that we report as far as readers are concerned. If you win a case please send us the last complaint in the case and the verdict or settlement and release, and we will report it in an upcoming issue of *PLN*.

Enjoy this issue of *PLN* and please encourage others to subscribe as well. 🐾

California Uses \$1.08 Billion in Federal Stimulus Funds to Pay Prison Guard Salaries

by Michael Brodheim

In a November 2009 letter to Governor Schwarzenegger and legislative leaders, California State Auditor Elaine Howle reported that corrections officials had greatly overstated the number of jobs they saved using \$1.08 billion in federal stimulus money, claiming they retained thousands of positions that were never in jeopardy.

Faced with an economic crisis the likes of which the United States had not experienced since the Great Depression, on February 17, 2009, President Obama signed the American Recovery and Reinvestment Act into law. The Recovery Act set aside \$787 billion in federal funds to retain and create jobs; other objectives included assisting those most affected by the recession and stabilizing state and local government budgets.

The latter goal was to be achieved through the State Fiscal Stabilization Fund Program. Under the terms of the Recovery Act, a certain percentage of stabilization funds (18.2%) could be used for public safety and other governmental services; the remainder had to be allocated to education-related programs.

California applied for initial funding under the State Fiscal Stabilization Fund Program in April 2009. In its application, the state explicitly indicated that it planned to spend the entire governmental services portion of its allotted stabilization funds on public safety. And it did just that, using \$1.08 billion in federal money to cover payroll expenses for the California Department of Corrections and Rehabilitation (CDCR).

The State Auditor found that the use of Recovery Act funds to reimburse CDCR payroll costs was "allowable" in light of the CDCR's public safety mission. What the Auditor questioned, however, was the CDCR's report—required of all recipients of Recovery Act funding—that the money had been used to "retain" the jobs of 18,229 employees.

For purposes of the Recovery Act, a "job retained" is defined as an existing position that would have been eliminated absent funds received under the Act. By that definition, the State Auditor concluded the CDCR had significantly overstated the number of jobs that were saved.

As of August 2009, the CDCR had issued approximately 5,000 layoff notices—less than one-third the number the agency reported to federal officials as jobs retained. "Corrections simply reported how many correctional officers' salaries were paid with Recovery Act funding," the Auditor wrote, "regardless of whether these positions were truly at risk of being eliminated without federal funding."

Corrections Undersecretary Mary Fernandez defended the CDCR's calculations. "We followed the federal formula," she stated. "Who knows what could have happened in May and June if we hadn't gotten the money?"

That would be a moot question had California officials decided to spend over a billion dollars in federal stimulus funding on other governmental services instead of salaries for prison employees. 🐾

Sources: *Associated Press, California State Auditor Report No. 2009-002.1b*

New Medical Director at Texas Jail Previously Sanctioned

In December 2009, McLennan County, Texas commissioners Lester Gibson, Kelly Snell and Joe Mashek admitted that a candidate for the medical director's position at the McLennan County Jail had previously been sanctioned by the Texas Medical Board. That didn't stop them from hiring him, though.

A background check of Dr. John Wells revealed that in August 2006 he had been ordered to take 16 hours of additional education in the areas of medical records and ethics and pay a \$500 fine for failing to turn over a woman's medical records to an insurance company despite repeated requests. As a result, she lost a medical disability claim.

Wells belittled the disciplinary action, saying the records weren't released because he was out of town tending to a sick relative and had an office policy of not releasing records unless he was personally in the office. "I don't see what this has to do with me taking this job as a medical director [for the jail]," he complained. "This is a dead issue."

The disciplinary sanction was dis-

cussed during a closed-door executive session of the County Commissioners Court. The commissioners said Wells had committed to work 30 hours a week at the jail and promised to be personally involved in management and administrative duties, which overrode their concerns about his disciplinary record.

Gibson said the sanction was "nothing substantial," adding that if Wells had "left a spoon in a patient after surgery, or he didn't graduate from medical school, some major infraction related to patient care, then let it be known, because that would mean something of major concern."

Texas Medical Board spokesperson Jill Wiggins said Wells' sanction was for a minor administrative infraction, noting that around 65 Texas doctors are disciplined for administrative infractions each year.

However, the Texas Commission on Jail Standards (TCJS) did not take the disciplinary action quite as lightly. "Certainly, anytime any medical director or medical attending physician for a county facility, anytime he or she is under some

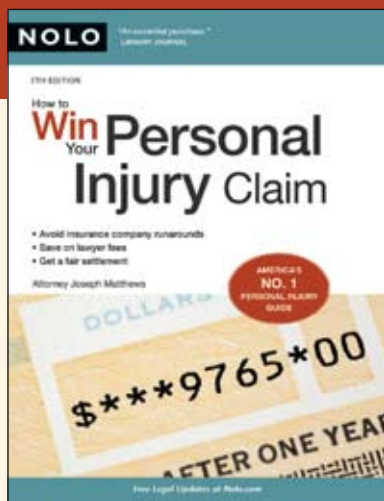
sort of watch for any respective medical board, it should be concerning for us, but it should be even more concerning for the people that have them employed," stated TCJS executive director Adan Munoz. The TCJS has no say in hiring decisions at local jails.

Obviously, it should be a matter of concern when county commissioners want to put a recently-sanctioned physician in charge of their jail's medical services. Of equal concern should be whether to hire an arrogant doctor with little regard for his patients. Further, if the disciplinary action against Wells was so trivial, why was it discussed in a closed session instead of during a public hearing?

Over the opposition of County Judge Jim Lewis and Commissioner Ray Meadows, Dr. Wells was offered a one-year, \$250,000 renewable contract, which was approved by a majority of the McLennan County Commissioners Court in late December 2009. Wells began working as medical director at the jail on March 1, 2010. 📰

Source: *Waco Tribune-Herald*

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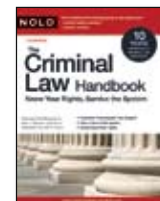
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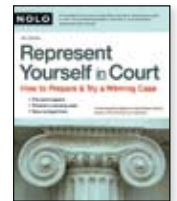
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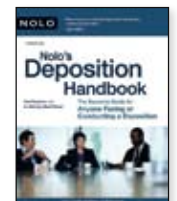
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U.S. Supreme Court to Review California Prison Population Reduction Orders

by John E. Dannenberg

On June 14, 2010, the U.S. Supreme Court (USSC) agreed to review orders entered by a three-judge federal district court panel in California that would relieve overcrowding in that state's prison system by requiring a reduction in its 172,000 prisoner population by 46,000 over the next two years. [See: *PLN*, Sept. 2009, p.36].

The USSC's review caps two decades of litigation in the federal courts that culminated in a provision of the Prison Litigation Reform Act (PLRA) that allows a three-judge panel to rule on alleged violations of prisoners' constitutional rights, including issuing a "prison release order" under 28 U.S.C. § 3626(g)(4), subject only to an appeal to the Supreme Court.

In *Coleman v. Schwarzenegger*, U.S.D.C. (E.D. Cal.), Case No. CIV S-90-0520 LKK JFM P, Senior U.S. District Court Judge Lawrence K. Karlton found a substantive number of prisoners in the California Dept. of Corrections and Rehabilitation (CDCR) who suffered from mental illness were not receiving constitutionally adequate mental health care. Indeed, Judge Karlton was driven to provide relief based upon documented preventable suicides and conditions that exacerbated the prisoners' mental illnesses.

In *Plata v. Schwarzenegger*, U.S.D.C. (N.D. Cal.), Case No. C01-1351 TEH, Senior U.S. District Court Judge Thelton E. Henderson, after observing the rate of preventable deaths resulting from constitutionally inadequate medical treatment, and after ordering the CDCR to abate the constitutional violations to no avail, finally resorted to appointing a Receiver to take over the CDCR's healthcare system. The Receiver, in turn, ordered massive upgrades to the state's prison medical facilities and increases in staff pay to attract and retain qualified medical personnel.

When the CDCR failed to follow the orders of the Receiver and the federal courts – in part due to California's financial crisis, which has led to a \$20 billion budget deficit in the current fiscal year – a three-judge district court panel was convened that ultimately ordered a massive reduction in the state's prison population. This was determined to be the only viable solution to overcrowding in the CDCR,

which was the underlying cause of the continuing constitutional violations.

The district court rulings were anything but snap judgments. After years of litigation, involving numerous on-site visits by the judges to CDCR facilities, and after repeated orders attempting to judiciously prod state officials to take remedial action, the exasperated federal courts ran out of options and took charge. Even then they did so in a tempered manner, literally beseeching the CDCR to take "baby steps" to implement the changes that even state prison officials agreed were needed.

However, deadline after deadline was met with inaction by the CDCR, which finally admitted it was simply unable to comply. In response, Judge Henderson appointed a Receiver and gave him authority to write checks on the state's account to get things moving. This resulted in measured improvement. Ancient and dilapidated clinical treatment areas – some lacking such basic necessities as running water – were remodeled. Staff vacancies were filled when mandated pay increases for medical employees were implemented. A new hospital was built at San Quentin State Prison, replacing the existing condemned building that had been constructed in 1884.

Still, progress was limited. Preventable deaths continued to occur; overcrowded housing areas in state prisons, such as converted gyms crammed with triple-bunks, were not closed as ordered; and the CDCR's population remained at the 170,000 level – hovering near 200% of design capacity. Although California lawmakers authorized the transfer of more than 10,000 prisoners to out-of-state private prisons, overcrowding problems persisted.

The only solution was to unilaterally reduce the state's overcrowded prison system. This could be done by building more prisons, which California cannot afford, or decreasing the prisoner population to constitutionally acceptable levels. The three-judge panel determined the CDCR should operate at no more than 137% of design capacity, which translated to a reduction of some 46,000 state prisoners.

Not surprisingly, Governor Schwarzenegger found this solution to be politically unappetizing, and continued to fight the court

orders. After losing at every judicial level for decades, it now comes down to a showdown in the U.S. Supreme Court. The USSC's order granting review of the three-judge panel's decision stays any prison population reductions for six to twelve months. The Supreme Court formally framed the issues it will consider as follows:

- Whether the three-judge court properly determined that overcrowding was the "primary cause" of continuing violations of prisoners' constitutional right to adequate medical care, and that no remedy existed other than issuance of prisoner release orders pursuant to the Prison Litigation Reform Act, 18 U.S.C. § 3626;

- Whether the system-wide prisoner release orders issued by the three-judge court are "narrowly drawn, extend no further than necessary to correct the violation of the Federal right, and [are] the least intrusive means necessary to correct the violation of the Federal right" in compliance with the PLRA; and

- Whether the three-judge court properly gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" in ordering a reduction of the state's prison population by 46,000 prisoners.

Since the three-judge panel had carefully parsed the language of the PLRA, and had applied evidence obtained through extensive evidentiary hearings and trials, the Supreme Court's review amounts to a *de novo* examination of the case below. The USSC's ruling will be significant, as this will be the Court's first interpretation of the three-judge panel provision of the PLRA.

The prisoners in the *Coleman* and *Plata* cases have been ably represented by the indefatigable efforts of the Berkeley, California-based Prison Law Office (PLO) and the law firm of Rosen, Bien and Galvan. PLO director Donald Specter commented "There was always a danger" that the district court panel would be reversed by a conservative majority of results-oriented Supreme Court justices. "But the three-judge panel did exactly what Congress told them to do in these situations, and the three judges are also doing what the governor has tried to [do]

in each of the past three years” in terms of reducing the CDCR’s population and expenditures, Specter observed.

Putting it bluntly, ensuring constitutional prison conditions takes a back seat to California politicians who fear the public backlash that would attend reducing

the state’s prison population. The USSC is insulated from such political retribution, and hopefully will send a message to all prison systems in the country that failure to provide adequate medical care to prisoners due to overcrowding, resulting in preventable deaths, violates the U.S.

Constitution. The Supreme Court will issue a ruling in this case by June 2011. See: *Schwarzenegger v. Plata*, U.S. Supreme Court, Docket No. 09-1233. ■

Additional source: *San Francisco Chronicle*

Florida Prison Psychiatrist Resigns; License Revoked Over Sex with Patient

by David M. Reutter

Prisoners often believe that prison health care personnel are second-rate and incompetent, and likely couldn’t find work in non-correctional settings. The December 2, 2009 resignation of a Florida Department of Corrections (FDOC) psychiatrist whose license was revoked lent credence to that belief.

Emanuel John Falcone was hired in April 2008 as a psychiatrist at the Florida State Prison, and was promoted to a full-time position in August 2009. He obtained the \$188,000-a-year job despite the FDOC interviewer being advised that Falcone had lost his New York medical license for having sex with a mentally ill patient.

In 2003, Falcone’s girlfriend, a licensed clinical social worker in Manhattan, began treating a woman who suffered from multiple personality disorder. The patient-client relationship continued after Falcone and his girlfriend married and moved to Florida in 2005.

When his wife shared the patient’s information with him, Falcone became “fascinated” by her alternative personalities, some of which were children. He began communicating with the woman by phone, took over her treatment, and prescribed medication for her. A sexual relationship began when Falcone and the woman met in New York in 2006; it continued during a weekend trip to Florida later that year.

At a New York Bureau of Professional Medical Conduct hearing in September 2008, Falcone said he never considered his interactions with the woman to be therapy or treatment. The Bureau rejected that explanation and permanently revoked Falcone’s medical license in October 2008 due to professional misconduct, gross and repeated incompetence and negligence, and failing to maintain medical records.

“He was too selfishly motivated and lost sight of his oath,” the Bureau stated.

“... We saw no remorse, no humility, no sign that he understood the great harm that he caused despite his attempt to present a speech that was supposed to convince us otherwise.”

Although the FDOC was aware of the revocation of Falcone’s medical license in New York, he was still promoted to provide full-time psychiatric services to prisoners. It was only after the *Florida Times-Union* questioned Falcone’s history of professional misconduct that the FDOC decided to look into the situation, which led Falcone to resign.

“It was a poor judgment and once the [FDOC] secretary learned about it, he asked that we talk to Dr. Falcone to learn more and once we began talking to him, he resigned,” said FDOC spokesperson Gretl Plessinger.

Meanwhile, the Florida Department of Health had initiated an investigation of Falcone in December 2008 and began proceedings to revoke his Florida medical license in April 2009; however, that information evidently was not shared with the FDOC at the time Falcone was promoted to a full-time position.

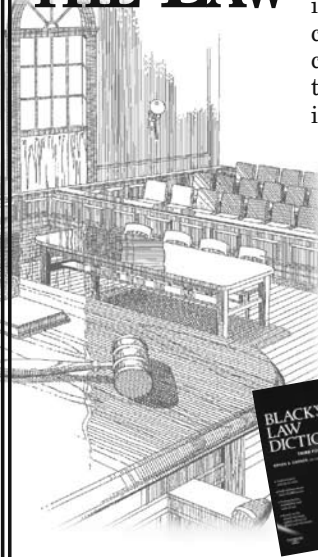
On December 4, 2009 the Florida Board of Medicine voted unanimously to revoke Falcone’s license to practice

in that state. “If he’s not qualified to practice in New York, he’s not qualified to practice here,” said Board member Jason Rosenberg. “I don’t see where we have a choice,” added Elisabeth Tucker, another Board member. “We may disdain prisoners, but they deserve quality health care.”

In theory, anyway. After all, it is unknown how many other medical employees in Florida’s prison system have past records of professional misconduct, incompetence and negligence. ■

Sources: *Florida Times-Union*, www.jacksonville.com, www.panhandleparade.com

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Florida's Civil Rights Restoration Process Insufficiently Funded

by David M. Reutter

With Florida continuing to face budget shortfalls due to the economic crisis, Governor Charlie Crist is looking for ways to slash government spending. However, his efforts are drawing fire from those who question cutting the budget of the Florida Parole Commission (FPC).

When Crist became governor, one of his first acts was to fulfill a campaign promise to restore the civil rights of ex-felons who were no longer under correctional supervision. He met resistance from his cabinet, which forced him to compromise. As a result only certain classes of felons – mostly convicted of non-violent crimes – received automatic restoration of their rights. Still, from 2007 to 2009 more than 115,000 former felons have had their rights restored. [See: *PLN*, Jan. 2009, p.26].

Those not granted automatic restoration have to trudge through the clemency process, which requires a review and recommendation by the FPC. As of June 30, 2009 the FPC had 63,000 pending cases, and it expects 60,000 more annually due to prisoner releases. The State Auditor estimated it would take 71 staff members a full year to eliminate the backlog; the Auditor also blamed errors in some FPC cases on a lack of sufficient personnel.

The FPC's \$8 million budget for FY 2009-10, which funds 128 full-time employees, represents a 20 percent reduction from previous years – the largest cut of any Florida criminal justice agency. Critics claim that such a significant budget reduction contradicts the stated policies of Governor Crist's administration.

Actually, had Crist's desire to automatically restore all felons' civil rights upon their release from correctional supervision been fulfilled, there would be no backlog of clemency requests. In each of his annual budget proposals, Crist has recommended zero-budgeting the FPC and integrating it into the Florida Department of Corrections.

The FPC, however, has continued to survive, and even sought a budget increase of \$1.2 million in FY 2010-11 to hire 20 more parole examiners. "Obviously, the greater the resources, the greater the ability for us to process cases in a more timely manner," said FPC chairman Fredrick

Dunphy. While the FPC's appropriation for FY 2010-2011 stayed the same at \$8 million and 128 positions, at least its funding was not reduced.

Stuck in the middle of the economic crisis and Florida's budget debate are former prisoners seeking restoration of their rights to vote, run for public office, serve on a jury and hold state-issued professional licenses.

"Several hundred clemency investigations remain ahead of your clemency request," FPC examiner Tawanna Hays wrote in a letter to Humberto Aguilar,

an attorney who applied for restoration of his rights after completing a federal sentence for money laundering. "There is no information available that I would be able to provide to you regarding how long the process may take."

Unfortunately, given the lack of funds to reduce the FPC's backlog of tens of thousands of clemency applications, many other ex-prisoners in Florida will likely be waiting a long time to have their civil rights restored, too. ■

Source: *The Miami Herald*

Dallas County Jail Settles Three Medical-Related Suits for \$795,000

In April 2009, a federal jury in the U.S. District Court for the Northern District of Texas awarded \$355,000 to Robert Duvall for injuries he suffered when he was denied medical treatment at the Dallas County Jail. Less than three months later, Dallas County settled two similar lawsuits for a total of \$440,000.

Duvall was incarcerated at the jail on December 11, 2003. For a full week after his arrival he was bedridden with a high fever, sweats, nausea and swelling in his feet and legs. Although he repeatedly sought medical attention, he was never treated or even seen by the jail's medical staff.

By the time Duvall was released on December 26, 2003 he was still experiencing a high fever, uncontrolled vomiting and blindness in one eye. He had completely lost the use of one of his legs, and both his feet and legs were grossly swollen.

Duvall immediately admitted himself to the Medical City Dallas Hospital emergency room, where he was diagnosed with pneumonia, treated and released. When his condition did not improve by the next day he made his way to the Parkland Hospital emergency room, where he waited for 12 hours without being seen.

In desperation, Duvall went to Lake Pointe Medical Center. There he was diagnosed with Methicillin Resistant Staphylococcus Aureus (MRSA) and immediately placed in isolation. Duvall spent the next 30 days in the hospital's

"clean room." Doctors removed a gallon of fluid from his right leg and two-and-a-half quarts from his left leg. He suffered a total loss of vision as a result of the MRSA infection.

Duvall filed an out-of-time grievance against the Dallas County Jail. Then, on May 24, 2007, he filed a 42 U.S.C. § 1983 civil rights claim in federal court alleging his constitutional rights had been violated under the 4th, 8th and 14th Amendments. Duvall accused the jail of perpetuating "policies, procedures, practices and customs, as well as the acts and omissions" which deprived him of proper treatment during the two weeks he was incarcerated. He also presented proof that the Dallas County Jail had for years been the subject of documented deficiencies in the area of medical care. [See, e.g.: *PLN*, Feb. 2009, p.28; Nov. 2007, p.14].

Duvall informed the court that on October 29, 2002, Dallas County had hired the University of Texas Medical Branch (UTMB) to provide health care services for prisoners. Yet by the end of 2003, UTMB still had not implemented an infection control program, and the "management of Methicillin-resistant Staph aureus was virtually inadequate or non-existent and the hygiene in the jail was abysmal." He also alleged that medical staff at the jail deliberately ignored "signs of medical distress and infectious disease ... and failed to provide appropriate medical care for [] prisoners."

On April 16, 2009, following a three-day trial, a federal jury rendered a verdict

in Duvall's favor. The U.S. District Court issued judgment against the defendants on April 21, noting that both parties had "stipulated that 'no legitimate governmental purpose was served by the allowance of the [MRSA] infection to be present in the Dallas County Jail'" The court awarded Duvall "\$40,000 for physical pain and suffering in the past; \$30,000 for mental anguish and emotional pain and suffering sustained in the past; \$75,000 for physical impairment sustained in the past; \$75,000 for physical impairment that, in reasonable probability, will be sustained in the future; \$10,000 for medical care and rehabilitation services sustained in the past; \$20,000 for loss of capacity for enjoyment of life sustained in the past; and \$15,000 for loss of capacity for enjoyment of life that, in reasonable probability, will be sustained in the future, for a total award of \$355,000."

Duvall was represented by Dallas attorney Edward H. Moore, Jr. The county has since appealed the judgment to the Fifth Circuit. See: *Duvall v. Dallas County*, U.S.D.C. (N.D. Tex.), Case No. 3:07-cv-00929-L.

In June 2009, Dallas County Commissioners agreed to settle two separate lawsuits for a total of \$440,000. The first suit, filed on behalf of Rosie Sims, settled for \$250,000. Sims, 60, suffered from paranoid schizophrenia. She spent a year and a half at the jail waiting to go to trial and, according to the complaint filed by her family, did not receive "even a routine medical exam" during that time. On one occasion guards discovered her collapsed on the floor lying in her own feces, yet did nothing to help. She eventually died at the

jail of untreated pneumonia in 2005.

"No amount of money can replace Mrs. Sims in the hearts of her family," said Scott Medlock, an attorney with the Texas Civil Rights Project, who litigated the case against Dallas County. See: *Lee v. Valdez*, U.S.D.C. (N.D. Texas), Case No. 3:07-cv-01298-D.

In the second lawsuit, Bruce A. McDonald received \$190,000 to compensate

for the loss of sight in one eye after he was assaulted by another prisoner at the jail in 2005. McDonald was told by doctors that he needed surgery for the eye injury, yet for seven weeks jail personnel denied him medical treatment. See: *McDonald v. Dallas County*, U.S.D.C. (N.D. Texas), Case No. 3:06-cv-00771-L. ■

Additional source: *Dallas Morning News*

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Texas Youth Commission Ombudsman Resigns Following Smuggling Indictment

by Matt Clarke

On November 30, 2009, Catherine S. Evans, a former Dallas state district judge and the newly-appointed ombudsman for the Texas Youth Commission (TYC), resigned after she was indicted on a third-degree felony charge for smuggling a prohibited weapon into a TYC facility. [See: *PLN*, March 2010, p.28].

In 2007 the TYC was rocked by a scandal involving the widespread physical and sexual abuse of juvenile offenders, which led to a complete overhaul of the agency. [See: *PLN*, Feb. 2008, p.1]. As a result of remedial efforts, the Office of the Ombudsman was created with a mandate to protect juvenile prisoners from abuse.

The Ombudsman's Office has charted a stormy course since its inception in May 2007. After it was found that Will Harrell, the first ombudsman appointed by Governor Rick Perry, had a prior arrest for reckless driving that disqualified him from the position, the hiring policy was changed to accommodate his arrest record. However, he resigned on June 1, 2009 to become the TYC's director of special projects, leading Gov. Perry to appoint Evans to the ombudsman's job in September 2009.

A pressing issue in Texas prisons at that time was contraband smuggling, especially cell phones. Evans claimed that she became interested in investigating how contraband could be smuggled into TYC facilities. In a preliminary official report filed by Evans and deputy ombudsman Susan Moynahan, Evans said she had entered the Al Price State Juvenile Correctional Facility in Beaumont carrying "a brown canvas bag containing a weapon, an iPhone, prescription medicine and \$300."

According to the report, "Ms. Evans carried her bag through the metal detector and the alarm sounded. Ms. Evans opened her bag and the guard glanced in, but none of the items listed above were identified. The guard made no further effort to identify what set off the detector's alarm."

Evans stated that subsequent conversations with Al Price security personnel revealed that "dorm staff often work the gatehouse and are not trained in conducting proper searches." It is against TYC rules for visitors to carry weapons, cash or

cell phones into state juvenile facilities.

Evans said she hoped the report would spark an investigation into lax security by TYC staff. Instead, it sparked an investigation into Evans. According to Gina DeBottis, director of the TYC's Special Prosecution Unit, during a separate incident when Evans visited the Crockett State School her handbag was found to contain a "Swiss Army-type knife" and a vial containing a powder that initially tested positive for illegal drugs but was later found to be dishwashing detergent.

In October 2009, TYC Executive Director Cherie Townsend prohibited Evans from entering any TYC facilities pending the outcome of an investigation into the contraband smuggling. Moynahan stepped down on October 8, and Evans resigned when she was indicted for the Crockett State School incident in November 2009 – just two months after her appointment.

"Security officers found a very small Swiss Army knife that I had completely forgotten was in my handbag," Evans said. "What should have been the simple matter of disposing of it has now become a much more serious issue. It was a regrettable mistake. I am very sorry it happened, but I am now prepared to defend myself until this is resolved. I am confident that I did not violate the law."

Gov. Perry accepted Evans' resignation, and in March 2010 appointed John Moore, a former U.S. Marshal, as the TYC's latest ombudsman. Presumably Moore has neither an arrest record nor intentions to smuggle weapons or other contraband, which will let him concentrate on protecting juvenile offenders from abuse – which should be the ombudsman's primary concern. ■

Sources: *Austin American-Statesman*, *Dallas Morning News*

Convictions Upheld in Appeal of Lynne Stewart, Attorney to Blind Sheikh, but Case Remanded for Resentencing

by Justin Miller

On December 23, 2009, a federal appeals court upheld the convictions of disbarred defense attorney Lynne Stewart and criticized what it called a "strikingly low sentence" for her offenses, which were related to providing material support in a terrorism conspiracy. [See: *PLN*, Sept. 2005, p.14; Sept. 2002, p.20].

Judges Robert D. Sack and Guido Calabresi of the Second Circuit Court of Appeals questioned the reasonableness of her 28-month sentence, which Stewart had told the *Los Angeles Times* she could do "standing on her head," and remanded the case to the district court for resentencing. The government had sought a sentence of 30 years for Stewart – the statutory maximum.

In particular, the appellate court cited the sentencing judge's failure to make findings regarding charges of perjury, or to assign proper weight to Stewart's abuse of trust of her position as an attorney,

when considering the appropriateness of her sentence. The ruling threatens to have a significant impact on future right-to-counsel issues.

Stewart, along with co-defendants Mohammed Yousry and Ahmed Abdel Sattar, were convicted in 2005 for providing assistance to her client, Sheikh Omar Ahmed Ali Abdel Rahman, otherwise known as the "Blind Sheikh." Rahman had himself been convicted in 1995 of a number of terrorism-related crimes, most notably the 1993 bombing of the World Trade Center in New York.

Stewart's convictions stemmed from her facilitation of communications between the Blind Sheikh and a terrorist organization in Egypt, al-Gama'at, to which he served as a spiritual leader. In November 1997, al-Gama'at massacred over 60 people in Luxor, Egypt and demanded Rahman's release.

The U.S. Bureau of Prisons had

implemented severely restrictive Special Administrative Measures, or SAMs, to prevent Rahman from “directing or facilitating yet more violent acts of terrorism from his prison cell,” by prohibiting him from contacting or disseminating information to al-Gama’at. However, Rahman was allowed contact with his legal team with fewer restrictions.

At the heart of much of the case against Stewart was her signing affirmations in which she agreed to abide by the terms of the SAMs, under penalty of perjury, when she had no intention of doing so.

The government argued that Stewart knowingly and repeatedly violated the SAMs. Specifically, Stewart, with the aid of Yousry, who was employed as a translator, helped pass messages back and forth between the Blind Sheikh and members of al-Gama’at through Sattar, a former paralegal in Rahman’s criminal case who was in contact with the terrorist organization. The messages concerned Rahman withdrawing his support for the group’s cease-fire.

Stewart also gave interviews to the press to communicate Rahman’s statements, in direct violation of the terms of the SAMs. While he was not charged, Ramsey Clark, a former U.S. Attorney General who served as another of Rahman’s defense attorneys, gave a similar media interview.

The thrust of Stewart’s appeal to the Second Circuit concerned her assertion that, as an attorney, she was not bound by the SAMs; that they were in fact unconstitutional; and in any event her defiance of the SAMs was open, not deceitful. She further argued that she was merely attempting to serve as a “zealous advocate” for her client which should have provided her with immunity from prosecution.

The Court of Appeals rejected those claims. The Court declined to consider either the authority of the Attorney General to implement the SAMs or the constitutionality of the restrictions that the defendants elected to challenge only after violating them. While it agreed that insofar as her statements to the press were concerned Stewart’s defiance had been open, her facilitation of messages to al-Gama’at was not, as both she and Yousry had gone to great lengths to conceal the purpose and content of those communications.

Further, the appellate court found that without affirming her agreement to abide by the SAMs – conditions Stewart said she never intended to respect – she would not have gained access to Rahman in the first place.

Stewart testified at trial that she had an understanding that there was a “bubble” built into the SAMs whereby attorneys could issue press releases containing Rahman’s statements. She argued on appeal that she had simply passed along Rahman’s “pure speech,” and did not participate in a terrorism conspiracy as the government alleged.

However, the Second Circuit found that due to the dangerous implications of Rahman’s message, his statements did not amount to “protected speech” under the First Amendment. Additionally, the Court held that her testimony in regard to the “bubble” argument was in fact perjurious, and should be reconsidered as such by the district court.

As for Stewart’s contention that she had acted as a “zealous advocate,” the Court of Appeals observed that even if true, it “gave her no license to violate the law.” Indeed, the Court noted that her “actions tended ultimately and ironically to subvert the same fundamental right of

which she took advantage – the constitutional right to counsel – by making it less likely that other incarcerated persons will have the same level of access to counsel that her client was given.”

While the district court held Stewart had “abused her position as a lawyer,” it did not impose an abuse-of-trust enhancement. The Second Circuit found the sentencing judge had failed to adequately explain what effect her use of her privileged status as an attorney had in terms of her sentence. That, coupled with the lack of findings related to the perjury charges, called into question the substantive reasonableness of the sentence imposed by the district court.

In affirming Stewart’s conviction but remanding for resentencing, the sentences of her co-defendants also were remanded, though only for consideration in light of any changes in Stewart’s sentence. Sattar, who was charged with the more serious crimes of conspiring and soliciting persons to commit murder, received a sentence of 288 months, while Yousry, who was considered less culpable, was sentenced to 20 months.

In a dissenting opinion, Circuit Judge John M. Walker argued that the Court should have gone further than simply remanding the case. He wrote that Stewart’s “extraordinarily serious, indeed horrendous, criminal conduct” warranted a sentence more in line with Sattar’s than Yousry’s. He said he was “at a loss for any rationale” for what he deemed “a breathtakingly low sentence,” and recommended that it be vacated as substantively unreasonable. See: *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009), *cert denied*. Stewart awaits resentencing in federal custody as this issue goes to press. ■

Additional source: www.law.com

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Kentucky Lethal Injection Protocol Adopted in Violation of APA

by Brandon Sample

The lethal injection protocol adopted by the Kentucky Department of Correction (DOC) was promulgated in violation of the state's Administrative Procedure Act (APA), the Kentucky Supreme Court decided on November 25, 2009.

Kentucky, like most other states that have the death penalty, uses a three-drug lethal injection protocol to carry out executions. Death row prisoners Thomas Bowling, Ralph Baze and Brian Moore sought a declaratory judgment in 2006 that the three-drug protocol was enacted in violation of the APA.

On May 26, 2006, a Franklin Circuit Court judge agreed, ordering the DOC to promulgate its execution protocol in accordance with the APA. The court later reversed itself, finding the protocol was not subject to the Administrative Procedure Act.

While that litigation was pending, Bowling and Baze were challenging the constitutionality of the lethal injection process. Ultimately, the U.S. Supreme Court held that Kentucky's three-drug protocol did not offend the Constitution. See: *Baze v. Rees*, 553 U.S. 35 (2008) [*PLN*, Dec. 2008, p.37].

After losing in the Supreme Court, Bowling and Baze turned to their appeal in the declaratory judgment suit over whether the protocol was adopted in violation of the APA. The Kentucky Supreme Court, however, decided that they had already had their shot at challenging the protocol, and found their declaratory judgment action under the APA was barred by *res judicata* principles.

Moore, the other petitioner in the APA suit, was not affected by this procedural roadblock, though. Accordingly, the Kentucky Supreme Court proceeded to the merits of whether the execution protocol was promulgated in violation of the APA.

The DOC argued that its protocol was not required to be promulgated in accordance with the APA because lethal injection procedures are "matters of internal management ... not affecting private rights." The Kentucky Supreme Court disagreed, finding the DOC's position did not "withstand careful scrutiny."

Joining the analysis of Maryland's highest court – which struck down that

state's lethal injection protocol on APA grounds – the Kentucky Supreme Court held that the protocol was not subject to the "internal management" exception of the APA.

"[T]he lethal injection protocol is not an issue 'purely of concern' to the [DOC] and its staff," the justices wrote. "Nor is there any basis for concluding that the Kentucky General Assembly intended for the Department to be able to modify, at will, without any oversight, the manner in which the Commonwealth's most serious punishment is meted out."

Accordingly, the Kentucky Supreme Court ordered the DOC to promulgate its lethal injection protocol in accordance with the APA. Until the DOC adopts a protocol consistent with the

APA, no executions in Kentucky will be conducted. The Court issued a corrected ruling on January 4, 2010 that had the same outcome. See: *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009).

Supreme Court Justice Bill Cunningham wrote a dissenting opinion in which he said, "We have executed 165 persons in this state without the regulation now deemed required by the majority," and noted "[t]here is no end to the creative mind of the condemned" in terms of finding ways to delay their execution. Apparently he failed to understand that if citizens are expected to follow rules and regulations promulgated by the state, then the state must adhere to those rules and regulations, too. ■

Pennsylvania County Jail Settles Medical Indifference Suit for \$55,000

Butler County, Pennsylvania has agreed to settle a medical deliberate indifference lawsuit for \$55,000. In April 2006, James Raub was arrested and taken to the Butler County Prison. During the booking process, he told guards and a nurse that he was in pain and wanted to be sent to a hospital. Prison staff ignored his request.

Over the course of the next week, Raub kept complaining of pain and asking to go to the hospital. Instead, prison employees treated him for drug withdrawal despite being told by both Raub and his mother that he did not have a drug or alcohol problem.

Eventually, Raub's condition deteriorated to the point where all he could say was "I don't know. I don't know." His blood pressure was 122/0 and he had a heart rate of 128.

On April 19, 2006, Raub was finally taken to a hospital. He only stayed long enough to have his blood drawn, though, and was then returned to the prison. According to notes from the prison's nurses, Raub was "mentally vague," "unable to answer any questions appropriately" and "totally out of touch with reality" when he was examined the following day.

On April 20, nursing staff played "phone tag" with the prison's doctor, Simon L. Wilcox, trying to get permission

to return Raub to the hospital. When he was finally reached, Wilcox ordered Raub to be sedated with drugs used for treating acute alcohol withdrawal. Wilcox did not examine him in person before making this diagnosis.

Raub's blood test results came back on April 21, 2006. They weren't good. He had enterococcus faecalis – a bacterial infection – in his blood, and further tests revealed that he had suffered a stroke and needed an immediate aortic valve replacement. He was hospitalized and underwent emergency surgery four days later.

Raub sued Butler County and numerous prison employees in federal court under 42 U.S.C. § 1983 for deliberate indifference to his serious medical needs. The county settled the case in January 2010 for \$55,000, without admitting liability.

Alexander Lindsay, Raub's attorney, called the settlement agreement fair. The fairness of the paltry settlement is questionable, however, because according to Raub's complaint he now has "permanent brain injury, permanent cognitive deficits, and is permanently disabled" as a result of the misdiagnosis and delay in medical care by Butler County Prison staff. See: *Raub v. County of Butler*, U.S.D.C. (W.D. Pa.), Case No. 2:08-cv-00511-DWA-CB. ■

Additional source: *Associated Press*



Survivor portraits by James Stenson



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Valley Fever Cases at California Prison Increase in 2009

According to *The Fresno Bee*, the number of cases of Valley Fever among California prisoners at the Pleasant Valley State Prison in Coalinga nearly doubled from 2008 to 2009. Data reported by prison officials to the Fresno County Public Health Department indicate that 311 prisoners were diagnosed with Valley Fever in 2009, compared with 159 in 2008.

Regardless, the Fresno County grand jury released a report on January 25, 2010 claiming the number of Valley Fever cases at the prison had dropped by more than half. Although it did not reveal the

source of its information, the report stated, "Statistics show a definite drop in cases and the grand jury believes that the medical staff [at Pleasant Valley] should be commended."

Researchers believe environmental factors play a role in the spread of Valley Fever, a soil-borne fungus that is prevalent in Coalinga and nearby communities in both California and Arizona. According to Richard Hector, director of the Valley Fever Vaccine Project and a researcher at U.C. San Francisco, little can be done to prevent Valley Fever, which is incurable and potentially

fatal, though not contagious. [See: *PLN*, Aug. 2007, p.1; June 2008, p.22].

Prison officials are reportedly making efforts to ensure that prisoners with poor immune systems are not sent to Pleasant Valley State Prison. Other preventive measures also have been taken, such as using gravel to cover open areas to prevent the soil from being disturbed, which can spread fungal spores. For more information about Valley Fever, see: www.valleyfever.com. ■

Source: *The Fresno Bee*

Eighth Circuit Upholds \$2,501 Retaliation Judgment Against Arkansas Prison Guard

The U.S. Court of Appeals for the Eighth Circuit has affirmed a \$2,501 award to an Arkansas state prisoner who was subjected to retaliation by an Arkansas Department of Correction (ADC) guard.

On June 23, 2007, ADC prisoner Walter Haynes filed a grievance against Sgt. Patrick L. Stephenson, who had cursed him out the day before. Once Stephenson learned about Haynes' complaint he filed a disciplinary report accusing Haynes of lying in the grievance. ADC regulations, however, prohibit guards from filing disciplinary reports against prisoners who file false grievances, and Stephenson knew that.

Haynes was initially subjected to various sanctions before the disciplinary report was dismissed. He then filed a 42 U.S.C. § 1983 action against Stephenson, alleging that the disciplinary report constituted retaliation in violation of the First

Amendment.

Following a two-day bench trial, the district court found in favor of Haynes and awarded him \$1 in nominal damages plus \$2,500 in punitive damages. Stephenson appealed.

Because the disciplinary report was dismissed before any formal sanctions were imposed, Stephenson argued that Haynes had failed to state a cognizable claim of retaliation. The Eighth Circuit disagreed.

"[W]e have held that 'the filing of a disciplinary charge ... is actionable under section 1983 if done in retaliation for [the inmate's] having filed a grievance pursuant to established procedures,'" the appellate court wrote in a December 16, 2009 opinion. "Because the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory

conduct itself."

Stephenson also argued that Haynes failed to show he would not have filed the disciplinary report but for Haynes' grievance. Rejecting this argument, the Eighth Circuit noted that Stephenson had filed the report almost immediately after Haynes submitted his grievance.

Finally, Stephenson argued that the award of punitive damages was too high because his conduct was not reprehensible and because the ratio of punitive to nominal damages was more than 100-to-1.

The Court of Appeals dismissed both arguments, holding the district court's finding of reprehensibility was not clearly erroneous. Further, although the punitive damages award represented a 2500:1 ratio, the Eighth Circuit concluded that Stephenson's "willful, malicious, and deceitful conduct" supported the award. See: *Haynes v. Stephenson*, 588 F.3d 1152 (8th Cir. 2009). ■

Indiana Sex Offender Registration Law Can Not Be Retroactively Applied

The Indiana Sex Offender Registration Act (ISRA) can not be applied to offenders who committed their crimes before the statute's enactment, the Indiana Supreme Court decided on January 6, 2010.

Gary M. Hevner was convicted in 2008 of possessing child pornography after downloading illegal images to his computer. In addition to being placed on probation for two-and-a-half years, Hevner was ordered to register as a sex

offender consistent with the ISRA, which took effect on July 1, 2007.

Hevner appealed the sex offender registration requirement, arguing the ISRA could not be retroactively applied to him because his offense was committed before the effective date of the law. In a six-page opinion, the Indiana Supreme Court agreed.

Relying primarily on its prior ruling in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) [*PLN*, Nov. 2009, p.14], the Court concluded that the statute could not be applied to

Hevner. The ISRA was punitive in effect, and as such, retroactive application of the law violated the Indiana Constitution's "prohibition on ex post facto laws," the Court wrote.

However, the Indiana Supreme Court approved a residency restriction prohibiting Hevner from residing within 1,000 feet of a school, holding that trial judges "enjoy [] wide latitude in fashioning the terms of a defendant's probation." See: *Hevner v. State of Indiana*, 919 N.E.2d 109 (Ind. 2010). ■

Release Conditions Requiring Defendant to Tell Probation Officer about Romantic Relationships Vacated

On January 7, 2010, the U.S. Court of Appeals for the Second Circuit vacated a condition of supervised release that required a federal defendant to notify probation officials each time he entered into a "significant romantic relationship." A related condition that required the defendant to inform anyone he was romantically involved with about his conviction also was vacated.

Lamont Reeves was convicted of theft of Social Security funds and possession of child pornography, and sentenced to 40 months in prison plus five years on supervised release. After sentencing, without prior notice to any of the parties, the dis-

trict court imposed a special condition of supervised release that required Reeves to "notify the Probation Department when he establishe[d] a significant romantic relationship and ... inform the other party of his prior criminal history concerning his sex offenses." Additionally, Reeves was required to give probation officials any "significant other's address, age, and where the individual may be contacted."

On appeal, the Second Circuit held those requirements were unreasonably vague and inconsistent with statutory limits on special conditions of supervised release. The requirement that Reeves notify the Probation Department upon entering into a "significant

romantic relationship" was unduly vague, the appellate court wrote, because it lacked any "guidance as to what constitutes a 'significant romantic relationship.'"

Further, the conditions were not "reasonably related" to any statutory sentencing objectives. In fact, the Court of Appeals concluded, they would most likely impair Reeves' rehabilitation because they risked socially isolating him. The Court also found that the conditions unduly infringed on Reeves' First Amendment associational rights. The special conditions of supervised release were accordingly vacated. See: *United States v. Reeves*, 591 F.3d 77 (2d Cir. 2010).

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Only Three States in Compliance with Unfunded Federal Sex Offender Mandates

by Matt Clarke

In 2006 Congress enacted the Adam Walsh Act, which requires states to institute stricter monitoring of sex offenders or face losing 10% of their federal crime-prevention grants. Although all states were supposed to comply with the Act by July 2009, as of May 18, 2010 only Ohio, Delaware and Florida were “in substantial compliance,” according to the U.S. Department of Justice.

Among other things, the Act, which is also known as the Sex Offender Registration and Notification Act (SORNA), requires states to narrow sex offender classifications to three “tiers” ranked by dangerousness, and to impose strict reporting requirements based on an offender’s classification.

“We have states being very laid back and states where legislators are pulling out their hair trying to comply,” stated Alisa Klein of the Association for the Treatment of Sex Abusers. “And there’s lots of states waiting for another state to bust a move and say, ‘We’re not going to comply.’”

One might think that the reason for this foot-dragging is the fact that sex offender registration laws do not reduce the rate of sex offenses. [See: *PLN*, Dec. 2009, p.28; Aug. 2008, p.16]. Such is not the case. Rather, the delay is due to a more fundamental issue – the lack of money among cash-strapped states for yet another unfunded and expensive federal mandate.

The California Sex Offender Management Board estimates the cost of implementing the new sex offender reporting requirements at \$38 million for that state. Federal crime-prevention grants typically range from a few hundred thousand dollars up to \$1 million. Thus, in some states the cost of complying with the new rules will exceed the 10% loss of federal grant funds for non-compliance. “Obviously this funding loss pales in comparison with the cost of complying with the act,” noted California Dept. of Justice spokesperson Dana Simas.

Legal challenges to the Adam Walsh Act are also causing delays in the implementation of the sex offender regulations and driving up costs. For example, Gary Reece, 50, is mounting a legal challenge to Ohio’s new sex offender registration

rules. Previously he had to register in person only once a year and would have been removed from the state’s registry after 10 years of good behavior. Under the federally-mandated requirements of the Adam Walsh Act, however, Reece must register in person once every three months for the rest of his life.

“It’s a tremendous burden, no doubt about it,” said Reece. “Every 90 days you have to take off work and go register – and if you miss once, you’re going back to jail.”

Add to that the fact that sex offender registration laws don’t reduce the rate of sex crimes, and the absurdity of spending millions of dollars to enact such requirements becomes apparent. *PLN* has reported several successful challenges to the Adam Walsh Act, and other cases, including Reece’s, are still pending.

On June 3, 2010 the Ohio Supreme Court struck down portions of that state’s

sex offender registration law which had been enacted to comply with the Adam Walsh Act. In a 5-1 ruling, the Court held that registration requirements for about 26,000 Ohio sex offenders would revert to less onerous conditions that were in effect prior to January 1, 2008. *PLN* will report this case in greater detail in a future article. See: *State v. Bodyke*, Ohio Supreme Court, Slip Op. No. 2010-Ohio-2424.

Nationwide, compliance with the Adam Walsh Act was extended until July 2010, and most states are expected to miss that deadline, too. Besides Ohio, Delaware and Florida, only two other jurisdictions have substantially complied with the Act: the Confederated Tribes of the Umatilla Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation. ■

Sources: *Associated Press*, www.ncsl.org, www.dispatch.com

DNA Exonerations in Georgia Result in Disparate Compensation Awards

by David M. Reutter

The disparity in compensation awards for prisoners exonerated by DNA evidence in Georgia demonstrates the need for evenhanded compensation laws.

Five wrongly convicted prisoners, Clarence Harrison, Robert Clark, Douglas Echols, Samuel Scott and Willie Otis “Pete” Williams, spent a combined 82 years in Georgia prisons for crimes they didn’t commit. All were proven innocent by DNA evidence.

Three of those five received compensation from the state – Harrison, who served 17 years for the abduction, robbery and rape of a woman waiting for a bus; Clark, who served almost 24 years for rape, kidnapping and robbery; and Williams, who served 21 years for kidnapping, rape and aggravated sodomy before being exonerated in 2007.

Harrison, who was 44 when released from prison in 2004, was awarded \$1 million by state lawmakers. Clark received \$1.2 million after the Georgia

legislature passed a resolution approving the payment in March 2007. He had contracted hepatitis C while in prison. Williams was awarded \$1.2 million in compensation.

“Can you even fathom in your wildest imagination what it must be like for this man to lose his entire adult life, until now, incarcerated in prison, literally excommunicated from free society, beat down emotionally and probably physically, too?” asked state Rep. Larry O’Neal, who sponsored the resolution for Clark’s compensation payment.

Echols and Scott, however, had a prosecutor who still insists they are not “factually innocent” despite the DNA evidence. They were cleared in 2002 of raping a woman in Scott’s home.

The victim claimed Scott held her down while Echols raped her. A third assailant was never identified. Scott served 5 years before being paroled, while Echols was imprisoned for 15 years.

Their prosecutor, Spencer Lawton,

was made famous by John Brendt's book, *Midnight in the Garden of Good and Evil*. Lawton wrote a letter to state legislators asserting that Echols and Scott were never exonerated and are not factually innocent despite DNA evidence to the contrary.

The lawmaker who sponsored the legislation to compensate Scott and Echols said he felt "blindsided" by Lawton's letter. "He wasn't man enough to admit he may have convicted the wrong guys," observed former state Rep. Tom Bordeaux. "It was wrong in the most fundamental way. It was indecent."

Echols has sued Lawton for violating his constitutional rights by lobbying against Bordeaux's compensation legislation. See: *Echols v. Lawton*, U.S.D.C. (S.D. Ga.), Case No. 4:08-cv-00023-WTM-GRS. Meanwhile, Echols and Scott have said the fact that their conviction records were not expunged has made it hard for them to find work, as they are still technically convicted felons.

Georgia is one of 23 states that do not have laws governing compensation for the wrongly convicted. Instead, exonerees have to find a lawmaker willing to introduce legislation requesting compensation

on their behalf – a process that has had disparate results.

"Rather than the emotional aspect on a case-by-case basis, I think we ought to have some guidelines to help us in the future," said Georgia Governor Sonny Perdue.

Beyond fair compensation laws, one state lawmaker, Rep. Stephanie Stuckey Benfield, repeatedly introduced measures to reform Georgia's eyewitness identification procedures, since faulty eyewitness testimony has been implicated in a high percentage of wrongful convictions. Although her legislation failed to pass, on December 10, 2008 the Georgia Peace Officers Standards and Training Council voted to require training for law enforcement officers on new eyewitness identification rules.

"We needed to step up to the plate," said Ken Vance, the Council's director. "This is good for law enforcement in Georgia." It's also good for defendants who risk being wrongly convicted based on faulty eyewitness identification.

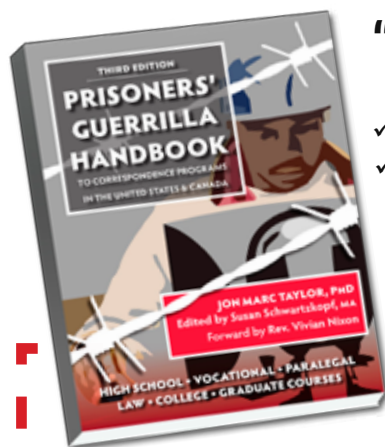
Other recent wrongful convictions in Georgia include those of John Jerome White and Michael Marshall. White served a total of 22 years for the rape,

robbery and assault of a 74-year-old woman before being exonerated by DNA evidence on December 10, 2007. In April 2009 state lawmakers approved \$500,000 in compensation for White; however, it included provisions requiring him to undergo drug testing, remain employed and stay out of trouble. Also, despite clear evidence that he had been wrongly convicted, his compensation award just barely passed the state senate on a vote of 29 to 21 (a minimum of 29 votes were required).

The most recent Georgia DNA exoneree, Michael Marshall, was proven innocent in December 2009 after serving 1½ years of a 4-year sentence for vehicle theft. He had been homeless at the time of the crime, and was arrested because he looked like a sketch of a suspect who stole a truck at gunpoint. His compensation request is pending.

There have been eight DNA exonerations in Georgia since 1999, most involving the efforts of the Georgia Innocence Project. ■

Sources: *The News Tribune*, www.jacksonville.com, *Atlanta Journal-Constitution*, www.ga-innocenceproject.org



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Guilty Pleas in Angola Horse Selling Scheme

by David M. Reutter

A federal investigation uncovered a fraudulent scheme at the Louisiana State Penitentiary at Angola in which horses were sold to private parties, bypassing required public auctions. Two indictments were handed down that resulted in guilty pleas.

On September 19, 2007, a federal grand jury returned an indictment that charged Angola worker Julius Harold “Buddy” Truax with four counts of mail fraud. According to the indictment, which remained sealed until 2009, Truax colluded with director of Prison Enterprises James H. Leslie and other individuals to sell horses directly to private buyers. Prison Enterprises raises horses at Angola for use in prison agricultural programs and for sale to state agencies and certain non-profit organizations, through competitive bidding at public auctions.

In one case, however, a horse was taken to a stockyard, remained in a state-owned trailer while a private buyer delivered a check, and then taken by state employees to the buyer’s home. Paperwork was fabricated to indicate it had been sold at auction. Truax was allegedly involved in the illegal sale of at least seven horses between 2005 and 2006.

A second indictment named Leslie, who was charged with using intimidation or force against a witness. Leslie reportedly tipped off Dan Klein, the state contractor for the Angola Prison Rodeo, about an FBI investigation. The FBI was investigating an incident in which Leslie had provided free fertilizer-seed to Klein from Prison Enterprises, which had been purchased with state funds. Leslie agreed to wear a wire and record a meeting with Klein. However, he informed Klein about the FBI investigation and told him to “shut up and never say nothing,” explaining “if they ever found out that I told you ... I’d go to prison.”

Truax pleaded guilty to mail fraud and was sentenced on December 8, 2009 to one month on probation, suspended. According to the factual basis for his guilty plea entered into court by the U.S. Attorney’s Office, had the case proceeded to trial the government would have shown that Truax sold horses from Angola directly to a third party on multiple occasions, circumventing required public auctions. See: *United States v. Truax*,

U.S.D.C. (M.D. Louisiana), Case No. 3:07-cr-00226-TLM-CN.

Leslie pleaded guilty and was sentenced on May 12, 2010 to five months imprisonment plus two years supervised release, and ordered to pay a \$10,000 fine. He was not charged in connection with the horse selling scheme, even though

he reportedly bought one of the Angola horses himself, because he had agreed to cooperate with federal officials in that case. See: *United States v. Leslie*, U.S.D.C. (M.D. Louisiana), Case No. 3:06-cr-00028-FJP-SCR. ■

Additional source: *The Advocate*

San Francisco Settles Wrongful Incarceration Cases for \$7.5 Million

by Michael Brodheim

Nearly six years after his release from prison, Antoine Goff received a measure of belated justice – a \$2.9 million settlement for almost 13 years of wrongful incarceration. Goff and his co-plaintiff, John “J.J.” Tennison, had filed complaints under 42 U.S.C. § 1983 that alleged numerous *Brady* violations [*Brady v. Maryland*, 373 U.S. 83 (1963)] by both the police and the assistant district attorney involved in their first-degree murder prosecution. Tennison, who was also wrongly incarcerated for 13 years, settled his lawsuit for \$4.6 million.

In 1990, Goff and Tennison were charged with the August 19, 1989 murder of Roderick “Cooley” Shannon in San Francisco. Shannon was the victim in one of a series of reprisal killings between residents of Hunter’s Point and Sunnydale. Local residents were unable to identify Shannon’s assailants but provided the police with descriptions of several of the cars involved. Based on those descriptions, homicide inspectors Napoleon Hendrix and Prentice Earl Sanders (who was later named San Francisco’s Chief of Police) developed a theory of the case connecting Goff and Tennison to the crime.

Dissuaded by neither facts nor physical evidence that discredited their theory, Sanders and Hendrix coached an 11-year-old girl who witnessed the shooting until she was able to implicate Goff and Tennison. They also secretly paid \$2,500 to the girl as a cooperating witness; urged her to find a corroborating witness (to compensate for the fact, unknown to the inspectors initially, that Tennison’s car had been impounded at the time of the murder); arranged to pressure the 14-year-old corroborating witness to retract her re-

cantation of a statement implicating Goff and Tennison; ignored subsequent witness statements that definitively identified the shooter; and suppressed a Mirandized, video-taped post-trial confession by Lovinsky Ricard, the actual killer.

As a result, Tennison, who was 17 at the time, and Goff, 18, were convicted and sentenced to 25 years to life and 27 years to life, respectively. Their convictions were later overturned and they were declared innocent in Superior Court after the district attorney declined to retry the case. They filed suit in federal court in April 2004, seeking damages for their wrongful incarceration.

The defendants moved for summary judgment, which was denied in part. Significantly, the U.S. District Court held the prosecutor had a duty to ensure that a defendant receives *Brady* evidence that comes to light post-conviction. The court also found that the prosecutor was entitled only to qualified (not absolute) immunity in the post-conviction context because, at that stage of the proceedings, the case was assigned to the Attorney General’s office. See: *Tennison v. City and County of San Francisco*, 2006 WL 733470 (N.D. Cal. 2006).

The defendants appealed, and in a lengthy amended opinion filed on June 23, 2009, the Ninth Circuit affirmed the district court’s summary judgment order. See: *Tennison v. City and County of San Francisco*, 570 F.3d 1078 (9th Cir. 2009).

Following remand, Goff and Tennison settled their lawsuits in September 2009 for a combined total of \$7.5 million. See: *Tennison v. City and County of San Francisco*, U.S.D.C. (N.D. Cal.), Case No. 4:04-cv-00574-CW; *Goff v. City and County of San Francisco*, U.S.D.C. (N.D. Cal.), Case No. 4:04-cv-01643-CW.

"We think the proposed settlements weigh the costs and risks of litigating the case, in addition to the costs that could be incurred on appeal," said city attorney spokesman Matt Dorsey. "We think finan-

cially it's a good settlement for the city."

Of course, it would have been an even better outcome for the city, for San Francisco taxpayers who will foot the bill for the settlement, and for Goff and Tennison had

they not been wrongly convicted and imprisoned for 13 years in the first place. ■

Additional source: *San Francisco Chronicle*

Canyon County Jail in Idaho Settles Conditions Suit With Consent Decree and \$190,000 in Attorney's Fees

by *Brandon Sample*

On November 12, 2009, Canyon County, Idaho agreed to settle a federal class-action suit against the Canyon County Jail (CCJ) that raised a myriad of claims related to unconstitutional conditions.

Filed in March 2009 by the American Civil Liberties Union (ACLU) on behalf of prisoners at the jail, the lawsuit alleged overcrowding, inadequate ventilation, shoddy sanitation, poor plumbing, inadequate temperature control, lack of bedding, deprivation of recreation, inadequate staffing, insufficient fire protection, poor medical care, arbitrary enforcement of rules, and failure to provide special meals for prisoners with food allergies.

The case was settled with a consent decree entered by the district court. The terms of the decree eliminate overcrowding problems by requiring the CCJ to adhere to its functional capacity except in rare circumstances. When capacity is exceeded, the jail's population must be reduced to functional capacity within 48 hours.

To resolve problems related to humidity, foul odors and mold, the consent decree requires that all ducts, vents and ceiling grates be inspected by HVAC

professionals and that all ducts be professionally cleaned.

Sanitation also will be improved under the decree. Cleaning activities must be logged and supplies maintained, and routine maintenance and cleaning of drains and showers is required. Additionally, washing machines must no longer be overloaded and torn mattresses, if not repairable, have to be discarded. Razors will be collected and disposed of daily to prevent redistribution.

Temperatures at the jail must now be maintained between 65 and 80 degrees. Further, each prisoner shall receive two blankets upon intake, and must be afforded outdoor recreation.

Faucets, sinks, toilets and showers have to be checked weekly per the consent decree. Functioning hot and cold water must be provided to prisoners, and water temperatures for the showers must be maintained at 100 to 106 degrees Fahrenheit.

Plumbing at the jail remained broken for weeks or months at a time prior to the lawsuit, and prisoners were routinely scalded while showering.

Finally, the decree requires the CCJ

to maintain appropriate staffing levels, to post prisoner rules and grievance procedures, to provide special meals to prisoners with verified food allergies, to reduce the co-pay for medical care visits from \$10.00 to \$5.00, and to eliminate sex discrimination in work release programs for female prisoners.

The consent decree in this case represents one of the most sweeping jail remediation plans since the enactment of the Prison Litigation Reform Act in 1996. Following the court's entry of the decree, the ACLU and the county settled the ACLU's request for attorney's fees for \$190,000.

The consent decree was later amended to specify that "security checks in the Canyon County Jail shall be performed in accordance with the applicable policies and procedures," including training jail staff as to the "need to comply with the policies and procedures to perform security checks." The revised decree was entered on May 3, 2010. See: *Davis v. Canyon County*, U.S.D.C. (D. Idaho), Case No. 1:09-cv-00107-BLW. ■

Additional source: www.idahostatesman.com

ATTENTION MISSOURI INMATES WITH HEPATITIS C

The ACLU is seeking information from Missouri inmates who have been diagnosed with Hepatitis C. We want to know whether Hepatitis C positive inmates are receiving treatment for the disease and, if so, what treatment they are receiving from the Missouri Department of Corrections and its medical contractor, Correctional Medical Services.

All information received will be kept confidential. To receive a questionnaire, please write to:

Legal Director, ACLU-KSWMO
Attn: Prison Medical Project
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U.S. Department of Justice Releases Report on HIV in Prisons

In December 2009, the Bureau of Justice Statistics of the U.S. Department of Justice released a report entitled *HIV in Prisons, 2007-08*. The report indicates that while the number of prisoners with HIV increased in some states and decreased in others, overall the number of HIV-positive prisoners in the U.S. remained fairly stable.

The report compares statistics on prisoners with HIV for 2006, 2007 and 2008. Discounting data from Illinois, Indiana, Alaska and Oregon due to incomplete reporting by those states, the number of prisoners reported to have HIV increased slightly from 21,644 in 2007 to 21,987 in 2008.

This represents 1.5% of the total prisoner population, which is slightly less than the 1.7% reported in 2006. Notably, the rate of HIV infection among female prisoners was 1.9% in 2008 compared to a 1.5% rate for male prisoners.

Nationwide, an estimated 5,733 prisoners were reported to have confirmed cases of AIDS in 2008, though not all jurisdictions report whether HIV-positive prisoners have AIDS, thus that estimate is likely low. In 2007, 120 AIDS-related deaths among state prisoners were reported. This is down from an estimated 155 deaths in 2006. The highest number of AIDS-related prisoner deaths were reported in Florida, Texas and New York.

The AIDS-related death rate per 100,000 state prisoners in 2007 was 9 for males, 8 for females, 5 for whites, 14 for Blacks and 7 for Hispanics.

The AIDS-related death rate for state prisoners fell from 3.5 times the rate in the general U.S. population in 1995 to 1.5 in 2006, the most recent data available. That is, the AIDS death rate among prisoners is 50% higher than the rate of such deaths in the general population. The states with the highest rates of AIDS-related prisoner deaths were Maryland (35 per 100,000) and New Hampshire (34 per 100,000). Federal prisoner deaths from AIDS-related causes increased to 13 in 2008 from 10 in 2007.

In 2008, Florida, New York and Texas accounted for 24% of the total state prisoner population nationwide but had 46% of all prisoners with HIV. The largest increases in the number of HIV-positive prisoners between 2007 and 2008 were in California (up 246) and Florida (up 166). The largest decrease was in New York

(down 450).

In 2008, 24 states reported testing all prisoners for HIV at some time during their incarceration. Twenty-three of those states tested at admission, 5 while in custody and 6 upon release. All states and the BOP test prisoners who have clinical indications of HIV or who request testing. Forty-two states and the BOP test prisoners involved in HIV-exposure incidents, while 18 states and the BOP test prisoners who belong to specific "high-risk" groups, which were not specified.

The good news buried in the report is that the improved availability of HIV treatment in state and federal prisons has led to a precipitous drop in the rate of AIDS-related prisoner deaths and a stabilization of the rate of HIV infection among prisoners. There is still room for improvement, however, as both rates remain significantly above that of the general U.S. population. ■

Source: "*HIV in Prisons, 2007-08*," available online at www.prisonlegalnews.org.

U.S. Senator's Girlfriend, In-Law Get Department of Justice Jobs

by Brandon Sample

Melodee Hanes, the live-in girlfriend of U.S. Senator Max Baucus, who chairs the Senate Finance Committee, has received a high-level political appointment with the Department of Justice (DOJ).

Hanes' new job at the DOJ comes on the heels of a brewing scandal concerning her nomination for U.S. Attorney for Montana. Senator Baucus had submitted Hanes' name for the U.S. Attorney position after "extensive evaluation" by a third party and consultation with Montana's other senator, Jon Tester. However, Baucus reportedly did not inform White House or DOJ officials that Hanes was his girlfriend.

Hanes later withdrew from the nomination after reports of her relationship with Baucus became public. "While her personal relationship with Senator Baucus should in no way be either a qualifier or a disqualifier for the position, during the nomination process and after much reflection, both Senator Baucus and Ms. Hanes agreed that she should withdraw her name from consideration because they wanted to live together in Washington, D.C.," said Ty Matsdorf, a spokesperson for Baucus.

In June 2009, Hanes was hired by the DOJ as acting Deputy Administrator for Policy in the agency's Office of Juvenile Justice and Delinquency Prevention. Hannah August, a DOJ spokesperson, said Hanes was hired based on her qualifications. She has "decades of experience in the field," August observed.

A statement released by Senator

Baucus said he was not involved in Hanes' hiring at the DOJ. "Mel applied independently with the Department of Justice, and, not surprisingly to anyone who'd looked at her resume, got the DOJ job on her merit." The senator also objected to reports that he had an affair, saying he was separated from his wife when he and Hanes, who had worked as his state director, became romantically involved.

The Republican National Committee has called for a Senate ethics investigation into Hanes' DOJ appointment, questioning whether Baucus had used "his Senate office to advance a taxpayer-funded appointment for his staff-member girlfriend." The situation "raises a whole host of ethical questions," the Committee noted.

Senate Majority Leader Harry Reid issued a statement supporting Baucus. "Max is a good friend, an outstanding senator and he has my full support," Reid said.

Coincidentally, another acquaintance of Senator Baucus also holds a position with the Dept. of Justice. Stephanie Denton Baucus, the senator's daughter-in-law, is associate director of the DOJ's Office of Intergovernmental and Public Liaison, which coordinates the agency's activities with state and local authorities. She is married to Zeno Baucus, the senator's son. Stephanie Baucus began working for the DOJ in June 2009 – the same time that Hanes was hired. ■

Sources: *Associated Press*, *CNN*, www.mainjustice.com, www.nydailynews.com

If you were arrested by the Chicago Police Department between March 15, 1999 and May 14, 2010, you could get a payment from a class action settlement.

A settlement has been proposed in a class action lawsuit about the detention and conditions of confinement policies of the Chicago Police Department ("CPD"). The settlement will pay people who were arrested by the CPD and were detained in a CPD interview room for more than 16 hours, or were detained in any CPD facility throughout the hours of 10:00 p.m. to 6:00 a.m. without a mattress, or were arrested by the CPD and did not receive a judicial probable cause hearing within 48 hours of their arrest. The settlement will provide up to \$16,500,000 to pay these claims and to pay the costs of class notice and settlement administration, attorneys' fees and costs to Class Counsel, and incentive awards to the Plaintiff Class Representatives.

The United States District Court for the Northern District of Illinois authorized this notice. The Court will have a hearing to decide whether to approve the settlement, so that the benefits may be paid.

Who's Included?

You may be a Class Member and could get a payment if you were arrested by the CPD between March 15, 1999 and May 14, 2010, and (1) were detained in a CPD interview room for more than 16 hours ("Class I"), or (2) were detained in any CPD facility throughout the hours of 10:00 p.m. and 6:00 a.m. without a mattress ("Class II"), or (3) did not receive a judicial probable cause hearing within 48 hours of your arrest ("Class III").

What's This About?

The lawsuit claims that Defendant, the City of Chicago, violated the Class Members' rights by engaging in the practices described above. Defendant denies it did anything wrong. The settlement is not an admission of wrongdoing or an indication that any law was violated. The Court did not decide which side was right, but both sides agreed to the settlement to ensure a resolution and to provide payments to the Class Members.

What Does the Settlement Provide?

Defendant has agreed to pay a total of up to \$16,500,000 to pay claims to Class Members, pay administrative costs of the settlement, pay incentive awards of up to \$25,000 to each of the Plaintiff Class Representatives, and pay Class Counsel's attorneys' fees and expenses of up to \$5,070,000. Each Class

Member who makes a valid claim will receive a share of this Settlement Fund.

You can make claims for each class you believe you are in as well as for each separate time you have been arrested. Class I members who submit valid claims are eligible for a payment for each detention of \$2,000; Class II members are eligible for a payment of \$90 for each detention; and Class III members are eligible for a payment of \$3,000 for each detention. The amount that each Class Member receives will be reduced proportionally if the amount left in the Settlement Fund is not enough to pay the full amount of all valid Class Member claims after payment of the costs and fees of Class Counsel, the Plaintiff Class Representative incentive awards, and administrative costs.

How Do You Ask For Payment?

A detailed Notice and Claim Form package contains everything you need. Just call 1-888-398-8212 toll free (or 312-224-7041 non-toll-free) or visit the settlement website, www.dunnsettlement.com, to get a Notice and Claim Form package. To qualify for a payment, you must send in a Claim Form. **Claim Forms are due by October 25, 2010.**

What Are Your Other Options?

If you don't want the settlement payments or don't want to be legally bound by the settlement, you must exclude yourself by **September 9, 2010** or you won't be able to sue, or continue to sue, the Defendant about the claims in this case. If you exclude yourself, you can't get any payment from this settlement. If you stay in the settlement, you may object to it by **August 10, 2010**. The detailed notice, available by calling or visiting the website below, explains how to exclude yourself or object.

The Court will hold a hearing in this case (*Dunn v. City of Chicago*, case no. 04-CV-6804) on **October 6, 2010**, at 10:00 a.m. to consider whether to approve the settlement and a request by the lawyers representing all Class Members (Michael Kanovitz and the firm of Loevy & Loevy, Chicago, IL) for attorneys' fees and costs. You may ask to appear at the hearing, but you don't have to. For more information, call 1-888-398-8212 toll-free (or 312-224-7041 non-toll-free), visit the settlement website www.DunnSettlement.com, e-mail info@dunnsettlement.com, or write to Dunn Settlement, c/o Rust Consulting, Inc., P.O. Box 2341, Faribault, MN 55021-9041.

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South Carolina Settles Prisoner Stabbing Death Lawsuit for \$47,500

In October 2009, the South Carolina Department of Corrections (DOC) paid \$47,500 to settle a survivorship suit related to a fatal stabbing.

Justin Bregenzer, 22, a DOC prisoner, was stabbed to death by another prisoner in July 2005 at the Lieber Correctional Institution. Bregenzer's mother, Sandra Carter, filed a survivorship suit in state common pleas court under the Tort Claims Act, individually and as the personal representative of Bregenzer's estate.

The complaint alleged gross negligence because the DOC had failed to properly supervise, restrain, classify and

segregate prisoners; allowed prisoners to possess deadly weapons; failed to take reasonable precautions for Bregenzer's safety; failed to properly search for and discover dangerous weapons; failed to come to Bregenzer's aid; failed to provide adequate security and supervisory staffing; and failed to exercise due care and caution – or even slight care and caution – in safeguarding Bregenzer.

The DOC, which was represented by private counsel, settled the case for \$47,500. The agency did not admit any wrongdoing nor did it agree to change the method it uses to classify prisoners.

"It's not a big settlement," said Carter. "But they know they screwed up." She was represented by Beaufort attorney Jared S. Newman and Charleston attorney Steven E. Goldberg. See: *Carter v. South Carolina DOC*, Court of Common Pleas, Richland County (SC), Case No. 2006-CP-40-7472.

DOC prisoner Kenneth Henry Justice, 42, who was already serving two life sentences, pleaded guilty to murdering Bregenzer and was sentenced to death. ■

Additional source: www.postandcourier.com

Virginia Sheriff's Office, PHS Settle Wrongful Death Suit for \$1.6 Million

Prison Health Services (PHS), a private for-profit company that provides medical care to prisoners, has agreed to pay \$1.5 million to the family of a man who died at a Virginia jail, with the sheriff's office paying another \$100,000.

Joseph Combs, 57, a Vietnam veteran who suffered from bipolar disorder, was arrested and taken to the Portsmouth City Jail in June 2006 after mental health workers were unable to find a bed for him at a hospital.

Police were called by Combs' wife after he threatened her; he had stopped eating and taking care of himself several days earlier, and was believed to be suffering from a bipolar episode at the time. He was charged with a misdemeanor offense.

Combs was found dead six days after he was booked into the jail, naked and lying in his own feces, which he had smeared on himself and in his cell. His death was caused by dehydration and pneumonia.

Combs' widow, Granada, sued PHS, Sheriff Bill Watson and other defendants in circuit court for failing to prevent her husband's death. After jurors were unable to reach a verdict following a November 2009 trial, PHS, two PHS employees and Dr. Luis F. Ignacio offered to settle the case for \$1.5 million.

Of that amount, \$600,000 went to Allen & Allen and Bricker Anderson, the law firms representing Combs' family. An additional \$192,711 was allocated to cover costs and expenses in the case. Granada Combs received \$424,373.27,

while Combs' four adult children each received \$70,728.88.

The family's claims against the sheriff's office were scheduled to be tried again in May 2010, but the case settled on the day of trial for \$100,000. Sheriff Watson, who blamed PHS and medical personnel for Combs' death, called the situation tragic. "Any way you look at it, a man lost

his life. That's the bottom line," he said. PHS is no longer the medical provider at the Portsmouth City Jail. See: *Combs v. Prison Health Services*, Portsmouth County Circuit Court (VA), Case No. CL07001643-00. ■

Sources: *The Virginia Pilot*, www.hamptonroads.com

California County Jail Settles Wrongful Death Suit for \$600,000

In December 2009, the Board of San Joaquin County, California approved a \$600,000 settlement to resolve a federal lawsuit filed by the family of a 71-year-old man who died of a heart attack following his release from jail.

On March 4, 2006, Guillermo Davila was arrested by Tracy City Police for public intoxication after he was found in someone else's home. He was taken to the San Joaquin County Jail.

During the booking process, jail guard Thomas Kendrick allegedly failed to perform a required medical screening. According to the suit filed by Davila's family, Kendrick checked "no" to questions on a screening form related to whether Davila suffered from diabetes or heart disease, was under the care of a physician or was taking any medications, without actually asking him those questions. As a result, an on-duty nurse never personally examined Davila.

Davila was released several hours later after sobering up. Before his release,

jail staff did not make sure he had transportation home. He was found dead a few days later about a mile from the jail, having died due to a heart attack.

Davila's family argued the heart attack was brought on by hypothermia, as it was cold outside on the night that he was released. Thus, the family argued, Davila's death was preventable had Kendrick properly screened him and had the jail staff ensured that he was not released until first verifying that transportation had been arranged or was available.

The county's decision to settle the case followed an order by Senior U.S. District Court Judge Lawrence K. Karlton, who granted in part and denied in part a motion for summary judgment. Judge Karlton decided the case could go forward after finding there were disputed issues of material fact regarding whether Kendrick had properly screened Davila. The county's lack of a release policy for prisoners with medical conditions was

also a factor in the court's decision.

According to an internal memo from the County's Chief Deputy Counsel, Kristen Hegge, "timely economic resolution" of the Davila family's claims was "in the best interest of the county." The total

settlement amount was \$600,000.

The case is presently on appeal on Judge Karlton's grant of summary judgment to other defendants, including the City of Tracy and individual police officers. Davila's family was represented by

attorneys Walter H. Walker III and Wilda L. White of Walker, Hamilton & Koenig, a San Francisco law firm. See: *Davila v. County of San Joaquin*, U.S.D.C. (E.D. Cal.), Case No. 2:06-cv-02691-LKK-EFB. ■

CCA Pays \$70,000 in Damages, Attorney Fees to Settle PLN Censorship Suit

by Alex Friedmann

On June 7, 2010, Prison Legal News announced that it had settled a federal censorship suit against Corrections Corp. of America (CCA), the nation's largest private prison company.

PLN filed the lawsuit in September 2009, claiming that CCA's Saguaro Correctional Center in Eloy, Arizona only allowed prisoners to order books from Amazon or Barnes & Nobles under the facility's mail policy in effect at the time. [See: *PLN*, May 2010, p.12].

PLN argued that its inability to send books to prisoners at the CCA prison violated its rights under both the First Amendment and the Arizona Constitution. PLN sells over 40 book titles, including self-help books, dictionaries, educational books and books on legal topics (see pp.53-54 for PLN's book list).

CCA staff claimed books sent to prisoners by PLN constituted "a serious danger to the security of the facility," and said PLN was an "unapproved vendor." CCA also failed to notify PLN that its books were being censored, and prohibited prisoners' family members from purchasing books and other publications on their behalf.

CCA changed its mail policy at Saguaro soon after PLN filed suit and agreed to settle the case in March 2010.

The settlement was finalized in early June. As part of the settlement, CCA agreed that PLN will not be placed on a prohibited vendor list, nor will PLN be subject to a blanket ban by prison staff. Further, prisoners at Saguaro will be allowed to receive books and publications ordered by their family members or other third parties, CCA must post notices of the settlement at the Saguaro facility in areas where prisoners can read them, and CCA has to notify PLN of future censorship.

The settlement will be enforceable by the U.S. District Court for the District of Arizona for a period of 18 months ending on December 5, 2011. CCA also agreed to pay \$70,000 to PLN in damages, attorney's fees and costs.

"It is always unfortunate when corrections officials ignore the First Amendment by prohibiting publishers from sending books to prisoners," stated PLN editor Paul Wright. "This settlement will ensure that CCA employees respect our rights, and that prisoners and their family members can order books from PLN and other publishers. As the nation's largest private prison company, CCA should have known better than to censor our books and violate our rights."

"The fundamental right to send and

receive written material is basic for an informed society," added Dan Pochoda, Legal Director of the ACLU of Arizona. "[Prison] administrators too often act as if prisoners check their constitutional protections at the prison door, and the ACLU was pleased to assist PLN in challenging that view in this case."

PLN was represented by attorneys Ernest Galvan, Sandy Rosen and Blake Thompson with the San Francisco law firm of Rosen, Bien & Galvan, LLP, and Daniel Pochoda with the ACLU of Arizona. See: *Prison Legal News v. Corrections Corp. of America*, U.S.D.C. (D. Ariz.), Case No. 2:09-cv-01831-PHX-ROS. ■

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Prison-based Call Centers Open in Austria, India

by Matt Clarke

In an attempt to bridge a budget shortfall, the Austrian Justice Ministry has set up call centers in prisons and contracted them out to private companies that might otherwise outsource the work overseas. The move has prompted criticism about prisoners handling private customer information.

Austrian prison officials say they have call centers at seven facilities, including the Karlau prison near Graz. The companies contracting to use the centers are primarily German telecommunications service providers. Christian Sikora, a representative for employees at Karlau, said "We have filed a protest with the ministry, on moral, legal and ethical grounds. But our complaint was rejected because of the 'enormous' economic advantage" to using cheap prison labor.

Sikora claimed that prisoners are told to use fake names and falsely say they are employed by companies like Telekom Austria or Deutsche Telekom to get personal information that is used for marketing. Telekom Austria has filed legal action against one prison call center contractor. Sikora also said the contractors preferred to hire prisoners convicted of fraud, because they are "experienced sales geniuses."

The Karlau program employs 26 prisoners who generate 40,000 Euros (\$57,300) a year for the prison. Other call centers at facilities in Jakomini and Sonnberg report similar success. Austrian prison officials promote the centers as a way to train prisoners in legitimate jobs other than traditional vocational training in careers like locksmithing and joinery.

However, Sikora said that such potential benefits do not justify giving convicted criminals access to citizens' personal information and hiring them to do work similar to the fraudulent offenses "they have been locked up for in the first place."

Approximately 4,000 miles across the globe, a call center is being set up at the Cherlapally Central Jail in Hyderabad, India. Radiant Infosystems, a private company, plans to run the jail-based center in three shifts; initially 250 prisoners will be employed to process bank account applications and insurance forms. The prisoners can earn up to 120 rupees a day (approximately \$2.61). The company stated in a press release that the call center

would "boost the morale of criminals and ... improve their workplace skills," plus "enhance further their career prospects."

Of course U.S. prisoners have worked in call centers for many years. *PLN* has previously reported that AT&T, former airline TWA and a Washington lawmaker have used prisoner labor for call center and telemarketing work. [See: *PLN*, April 1993, p.8; May 1995, p.23; August 1998, p.16]. Prison telemarketing programs in Washington state and Utah were shut down after problems developed, including prisoners' misuse of customers' personal information. [See: *PLN*, Dec. 2001, p.1; August 2000, p.11].

Currently, around 1,100 federal prisoners – most of them women – are employed by Federal Prison Industries (more commonly known as UNICOR) to handle outbound business-to-business calls, answer calls at help desks and pro-

vide directory assistance.

According to UNICOR spokesperson Julie Rozier, prisoners who work at the centers do not let callers know they are incarcerated and do not have access to sensitive customer information. UNICOR's contracts include non-disclosure provisions, so the names of businesses that use prison-based call centers are kept secret – though UNICOR boasts it has performed work for "some of the top companies in America."

UNICOR refers to its services business group, which includes the call centers, as "the best kept secret in outsourcing." After all, why exploit prisoner labor overseas when it can be done at home in the U.S.? ■

Sources: www.timesonline.co.uk, www.prlog.org, www.cio.com, www.unicor.gov/services/contact_helpdesk

New York Prisoner Beaten, Guards Convicted, GEO Settles Suit for \$80,000

by Matt Clarke

On July 7, 2009, three private prison guards were convicted of charges involving the unjustified beating of a New York prisoner in 2007. [See: *PLN*, Sept. 2009, p.50; July 2009, p.50]. A fourth guard was convicted of related charges in January 2010.

Rex Egurido, 28, a Nigerian national, was a pretrial detainee working the laundry detail at Queens Private Correctional Facility, a private prison in Jamaica, New York operated by GEO Group, when he told GEO guard Krystal Mack, "Hello baby, you look beautiful today." In response to Egurido's friendly comment, Mack ordered him to wait against a wall while she told her supervisor, Lt. Marvin Wells, what he had said.

Two guards arrived and handcuffed Egurido. He was taken to another location where he was met by Wells. Wells removed the handcuffs and took Egurido to another room, where he ordered him to strip naked. The two escort guards, Mack and another female guard also were present. Wells told Egurido that he had insulted Mack and then proceeded to beat him – punching him multiple times

in the throat and upper chest. He ordered Egurido, who was still naked, to kneel before Marks and apologize. In fear for his life, he did so.

Egurido filed a 42 U.S.C. § 1983 civil rights action against the guards and GEO Group in U.S. District Court, alleging violations of his federal constitutional rights and asserting state law claims. GEO settled the suit for \$80,000 in February 2009. New York attorney Brett H. Klein represented Egurido in that action. See: *Egurido v. GEO Group*, U.S.D.C. (E.D. N.Y.), Case No. 1:08-cv-01388-SJF-RER.

Wells, Mack and GEO guards Stephen Rhodes and Kirby Gray were indicted by a federal grand jury for conspiring to obstruct justice by covering up the incident. Wells was also indicted for using excessive force. Mack was acquitted of the conspiracy charges and Wells was acquitted of using excessive force at trial. However, Wells, Rhodes and Gray were convicted of other charges that stemmed from their making false entries in reports and lying to federal agents investigating the incident.

Wells, Rhodes and Gray were sentenced in March 2010. Wells received one year and one day in prison, plus three years supervised release. Gray was sentenced to six months and three

years supervised release, while Rhodes was placed on probation for three years. Mack was charged in a superseding indictment in October 2009, and found guilty of attempted corrupt persuasion

on January 8, 2010. She has not yet been sentenced. ■

Additional sources: *New York Post*, *New York Daily News*

California Counties Vie to House ICE Prisoners

by Michael Brodheim

Santa Clara County, California – where local law enforcement authorities have policies against cooperating fully with Immigration and Customs Enforcement (ICE) in terms of enforcing immigration laws – has turned a blind eye to its pro-immigration values and contracted with federal officials to incarcerate immigrant detainees.

The decision to go into the rent-a-bed jail business, made six years ago, enabled the county to avoid severe budget cuts. Today, Santa Clara County houses not only federal immigrant detainees but also state prisoners, plus a small number of prisoners from other local jurisdictions. These revenue-generating prisoners account for nearly 10 percent of the county's jail population, which now stands at 4,500 – making it the 15th largest county jail

system in the nation.

While saying that he would “prefer not to have federal and state prisoners and inmates from other counties” in his jail, Edward Flores, chief of Santa Clara County's Department of Correction, admitted that given the economic reality of tight budgets, the county had little choice but to continue its current practice.


Indeed, a 2009 management audit found that Santa Clara County reaped a net annual benefit of \$11.1 million – nearly 6 percent of its corrections budget – by housing federal and state prisoners.

That revenue stream is now in jeopardy, however, as ICE, looking for cheaper beds for its detainees, found a better deal in Yuba County. While Santa Clara County charges \$103 per diem to house ICE prisoners, Yuba County

charges just \$71 – 30 percent less. Given what ICE spokesperson Virginia Kice described as the agency's “obligation to use taxpayers' money in the most efficient way possible,” it isn't surprising that Santa Clara County, which housed 150 ICE prisoners in 2008, held fewer than 60 by the end of 2009.

The reduction in ICE prisoners means the county will fall short of the revenue it had budgeted by at least \$1 million. That, in turn, could lead to major budget cuts. *PLN* previously reported that county jails in Missouri, Minnesota and Florida were in financial difficulty after ICE cut back on housing immigrant detainees at those facilities, too. [See: *PLN*, April 2010, p.18]. ■

Source: *The Mercury News*



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Erroneously Released Texas Prisoner Entitled to Credit on Sentence

by Matt Clarke

On February 4, 2009, the Texas Court of Criminal Appeals held that a state prisoner who had been erroneously released through no fault of his own, and who had not violated any of the conditions of his release, was entitled to credit against his sentence for the time he spent on the street.

Kevin Rowe, a Texas prisoner, was convicted of possession of a controlled substance in San Antonio and sentenced to three years in the Texas Department of Criminal Justice (TDCJ). Before being transferred to the TDCJ he was extradited to Georgia, where he was released on probation. Shortly thereafter he transferred his probation to San Antonio, Texas.

Rowe told his probation officer that he should be serving a TDCJ sentence. The probation officer checked for outstanding warrants and, finding none, did nothing. Three months later, a TDCJ parole officer called the probation officer and informed him that Rowe should be in prison and that she would contact him to tell him when Rowe should surrender himself. The parole officer never called back, but a premature-release warrant was issued for Rowe several days later. Rowe was arrested on the warrant when he tried to renew his driver's license, which was more than two years after he had been sentenced on the controlled substance charge.

The TDCJ refused to give Rowe any credit for the time he spent on release. He filed a state petition for writ of habeas corpus pursuant to Article 11.07, Texas Code of Criminal Procedure. The state responded that, in light of *Ex parte Hale*, 117 S.W.3d 866 (Tex.Crim.App. 2003), Rowe was not entitled to credit for time on the street while he was erroneously released. On appeal, the Court of Criminal Appeals held that the state had misinterpreted its prior ruling in *Hale*.

Hale had been erroneously released on mandatory supervision, then violated the conditions of his release. The Court of Criminal Appeals ruled in that case that Hale was subject to § 508.283 of the Texas Government Code, which required loss of credit for time spent on the street when parole or mandatory supervision was revoked.

Rowe, however, was arrested on a

premature-release warrant, not revoked for violating conditions of his release. "In fact, [Rowe] has far exceeded any requirements that this Court has placed on those who were erroneously released from custody. It would be unreasonable to require those released from custody to inform the authorities that they should in fact be detained. Yet, in this case, Applicant informed the Texas probation officer who administered his Georgia probation that he had an outstanding conviction and should be in the custody of TDCJ," the Court wrote.

The TDCJ knew where Rowe was yet failed to arrest him. Thus, he should not be punished for obeying the conditions of his supervised release – rules that would have been in place had he been properly released. Accordingly, the Court of Criminal Appeals ordered the TDCJ to credit Rowe with all of the time he spent on the street since he was sentenced, plus any pre-sentence credit to which he was entitled. Rowe was represented by San Antonio attorney Kevin L. Collins. See: *Ex parte Rowe*, 277 S.W.3d 18 (Tex.Crim.App. 2009). ■

New Jersey DOC Agrees to Let Prisoner Preach

In November 2009, the New Jersey Department of Corrections (DOC) settled a lawsuit brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The suit, filed by the ACLU on behalf of a New Jersey state prisoner, alleged the DOC had violated RLUIPA by refusing to let prisoners preach.

Howard Thompson has been incarcerated at the New Jersey State Prison (NJSP) since 1986. During more than 20 years of confinement he has been a devout and active adherent to the Pentecostal faith, often participating and preaching at Sunday church services and other religious events.

In October 2000, Thompson was formally ordained as a Pentecostal minister. Over the next several years he preached more regularly and led other activities, such as Bible study, without incident. Indeed, the prison's chaplaincy staff often encouraged Thompson to preach, believing he was a positive influence on his fellow prisoners.

In June 2007, shortly after Reverend Pamela Moore took over as chaplain at NJSP, she told Thompson that he would no longer be allowed to preach. According to Moore, the NJSP administration had decided to ban all prisoner preaching.

With the help of the ACLU of New Jersey, Thompson filed a federal lawsuit against the DOC on December 3, 2008. By denying Thompson the ability to preach, the DOC was substantially burdening his sincerely held belief that he was called to

"preach and lead others in worship, study and prayer," the complaint stated. Further, the DOC's outright ban on prisoner preaching violated RLUIPA, the suit argued, because it did not meet the statute's least restrictive means requirement.

The case settled on November 24, 2009, with the DOC agreeing that Thompson could continue to preach provided the chaplain or an approved volunteer consents and is present during the preaching, and an outline of the sermon or message Thompson wants to deliver is reviewed and approved in advance.

"All I have ever wanted was to have my religious rights restored so that I could continue working with men who want to renew their lives through the study and practice of their faith," Thompson said.

"The decision by prison officials in New Jersey to allow Mr. Thompson to resume practicing his faith is a welcome acknowledgment that religious freedom in this country extends to all," stated Daniel Mach, Director of Litigation for the ACLU Program on Freedom of Religion and Belief. "The ban on prisoner preaching was clearly at odds with the law and the American value of religious liberty, and this decision was long overdue."

Thompson was represented by Mach and ACLU attorneys Heather L. Weaver, Edward Barocas and Nadia Seeratan. See: *Thompson v. Ricci*, U.S.D.C. (D. NJ), Case No. 3:08-cv-05926-AET-DEA. ■

Additional source: www.aclu-nj.org

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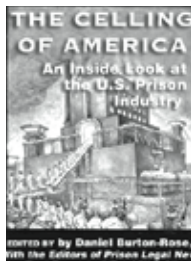
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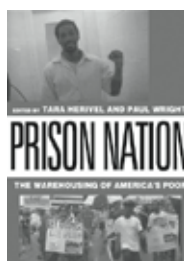
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Media Agencies Intervene to Unseal Records in Prisoner's Wrongful Death Suit

by *Brandon Sample*

On November 4, 2005, Earl Krugel was killed while exercising on the recreation yard at the Federal Correctional Institution (FCI) in Phoenix, Arizona, a medium-security facility.

Krugel, an activist for the Jewish Defense League, had been prosecuted and convicted for his role in a plot to bomb a California mosque and the office of Republican Lebanese-American Congressman Darrell Issa. He was sentenced to 20 years.

His untimely death came at the hands of David Frank Jennings, a known white supremacist. Krugel was murdered a mere three days after his transfer to FCI Phoenix, when Jennings bludgeoned him to death with a piece of concrete.

Prison officials had failed to classify Jennings as a member of the Aryan Brotherhood despite his gang-related tattoos, and had downgraded his initial high-security designation so he could participate in a substance abuse program at FCI Phoenix. Jennings was charged with murdering Krugel and received a 35-year prison sentence in March 2008.

Following Krugel's death, his widow sued the United States under the Federal Tort Claims Act, alleging that the Bureau of Prisons had improperly classified Jennings by sending him to a medium-security facility.

A two-day bench trial was held in July 2009, and the federal judge over the case, Stephen V. Wilson, ruled in favor of the government. Almost all of the proceedings were held in secret and the courtroom was closed to the public and the press. Even the court's written decision explaining why it had ruled for the defendants was placed under seal.

The *Los Angeles Times*, Associated Press, California Newspaper Publishers Association and Reporters Committee for Freedom of the Press intervened in Krugel's lawsuit in August 2009, seeking to unseal the trial documents.

"It's quite remarkable, I don't think I've seen anything like it in my 25-plus years of practice," said Kelli Sager, a spokesperson for Davis Wright & Tremaine, the law firm representing the media agencies. "Other than hearing that the ruling was for the government,

we can't find out why."

According to prior reports, Judge Wilson decided to seal most of the proceedings in the case to protect the Bureau of Prisons' policies related to gang management from becoming part of the public record.

On September 16, 2009, the district court ordered the trial transcript and various other documents to be unsealed, with

redactions "to protect the Government's compelling interests" in "maintaining confidentiality regarding its [gang] validation procedures or protecting the safety of a confidential informant." See: *Krugel v. United States*, U.S.D.C. (C.D. Cal.), Case No. 2:06-cv-05116-SVW-PLA. ■

Additional sources: www.law.com, *LA Weekly*, *Los Angeles Times*

Sacramento County Partially Settles Taxpayer Suit Alleging Illegal Conditions of Confinement in Juvenile Facilities

by *Michael Brodheim*

The parties to a taxpayer lawsuit seeking declaratory and injunctive relief, which alleges that conditions in Sacramento County's juvenile detention facilities violate state statutory, constitutional and regulatory laws, reached a partial settlement and signed a stipulated consent decree in December 2009.

Plaintiff David Porter, a resident of Sacramento County, California, brought suit as a taxpayer in Sacramento County Superior Court, pursuant to sections 525, 526a and 1060 of the Code of Civil Procedure, seeking to enjoin the expenditure of funds by the Chief Probation Officer of Sacramento County, and by the county's Superintendent of Schools, to promulgate, administer and enforce allegedly illegal practices and policies in Sacramento County's juvenile facilities (the Warren E. Thornton Youth Center, the Youth Detention Facility and the Carson Creek Boys Ranch).

The stipulated consent decree "resolves plaintiff's claims with respect to the Chief Probation Officer, who is designated by statute as operator of the juvenile detention facilities, without addressing or in any way resolving plaintiff's claims with respect to the Superintendent of Schools, who is responsible for the educational instruction of minors in those facilities."

While entering into the consent decree the Chief Probation Officer admitted no liability and continues to deny the alle-

gations in the complaint, but did agree to pay reasonable attorneys' fees and costs to the plaintiff (who was represented by, among others, Donald Specter of the Prison Law Office in Berkeley and Monty Agarwal of Arnold & Porter LLP in San Francisco).

The basis for the complaint is the allegation that, in contravention of section 851 of the Welfare & Institutions Code, Sacramento County's juvenile facilities are not being operated as "safe and supportive homelike environment[s]" but are instead treated in many respects as penal institutions. The complaint chronicles the frequent use/abuse of a practice known as "dipping," in which staff twist a youth's arm behind his or her back, flip the youth facedown on the ground, and place a knee in his or her back. According to the complaint, juveniles are dipped for disciplinary and punitive purposes, including for such minor infractions as talking back to staff and failing to maintain their fingers in an interlocked position, and frequently sustain bloody lips, chins or noses as a result of the take-down procedure.

The complaint sets forth six causes of action: (1) illegal endangerment of physical safety; (2) mental and emotional abuse; (3) illegal living conditions; (4) illegal conditions in segregated units; (5) illegal failure to obtain parental consent for medical procedures; and (6) illegal failure to fulfill duties of education

and rehabilitation. The consent decree addresses issues related to overcrowding; the use of force, pepper spray and chemical agents; verbal abuse; mental health; isolation room confinement practices; rehabilitative programming and discipline; environmental issues such as access to toilets, facility cleanliness and sanitary living conditions; and the use of performance-based standards to gauge and improve the effectiveness of juvenile facility practices.

By its terms the consent decree will last for three years, subject to extension for substantial non-compliance with any of its provisions. While plaintiff's counsel will monitor compliance with the decree, the defendant Chief Probation Officer will provide plaintiff's attorneys with a status report every 180 days. Any disputes that arise, if not resolved informally by the parties, will be subject to resolution by the court.

Among the consent decree's more significant provisions, the defendants agreed to operate each juvenile facility, and each unit within each facility, at a population

level at or below its operational capacity; to disband the Special Emergency Response Team; to ensure that a supervisor responds in person whenever possible to each incident involving use of force; to ensure that such incidents are videotaped and administratively reviewed; and to install a video recording system to monitor common areas where staff-youth interactions occur (excluding areas in which youth have a right to privacy).

The decree also mandates the development and implementation of policies to reduce use of force and minimize the unnecessary, improper or excessive use of force, including the use of pepper spray and other chemical agents; the creation of a Youth Advocate position; and the retention of an outside expert to assist in the review and development of appropriate and adequate rehabilitative programming, including discipline at Sacramento County's juvenile detention facilities.

See: *Porter v. Speirs*, Sacramento County Superior Court (CA), Case No. 06AS03654. ■

Oregon Offers Early Release to Illegal Immigrants Who Consent to Deportation

by Michael Brodheim

Seeking to cut costs in the face of a recession that has forced many states to reconsider their criminal justice priorities, Oregon officials have signed a memorandum of understanding with the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE), under which illegal immigrants who waive their right to contest deportations will have their prison sentences commuted and then be quickly returned to their home countries.

The program is available only to offenders who have less than six months remaining on their sentences and have not been convicted of a violent crime, sexual offense or any crime identified in a provision of state law known as "Measure 11." Aside from having to waive their right to challenge deportation proceedings, prisoners who agree to take part in the early release program also face stiff penalties – a 20-year federal prison sentence – if they are caught in the United States again illegally.

According to state records, as of

January 2010 there were 206 prisoners eligible to participate in the early release and deportation program; of those, the vast majority were Mexican nationals. About 1,200 illegal immigrants are held in the state's prison system.

Oregon hopes to save \$2.1 million by transferring 175 prisoners to ICE over a period of two years. There was a delay in implementing the program because federal authorities said Oregon's constitution bars sentences from being set aside without a court hearing or a commutation from the governor. The delay was described as a "glitch" by state officials. Under legislation authorizing the early release program, the governor will commute the sentences of illegal immigrants who agree to deportation.

Last year, *PLN* reported a similar arrangement between Arizona and ICE officials. [See: *PLN*, April 2009, p.48]. Other states that participate in the early release and deportation program include Georgia and Rhode Island. ■

Source: *The Oregonian*

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The Politics of Death: Throwing Mumia Abu-Jamal Under the Bus

by Dave Lindorff

*"I would unite with anybody to do right
and with nobody to do wrong."*

– Frederick Douglass

On the evening of February 25, 2010, participants at the Fourth World Congress Against the Death Penalty in Geneva, Switzerland had assembled from all over the globe for a dramatic Voices of Victims evening. It got more dramatic than they had anticipated though, when suddenly a cell phone rang and Robert R. Bryan, lead defense attorney for Mumia Abu-Jamal, jumped up on the stage to announce that his client had called him from death row in Pennsylvania.

The audience sat in rapt silence as the emcee held the phone up to the microphone. Abu-Jamal, on death row for 28 years after a widely disputed conviction for the murder of Philadelphia police officer Daniel Faulkner, greeted the delegates and then, as he has done on many occasions before, described to them the horrors of life in prison for the 20,000 people around the world who are awaiting execution.

A small group of American death penalty abolitionist leaders, led by Renny Cushing, executive director of Murder Victims' Families for Human Rights, stalked out of the hall. Two members of MVFHR, however, remained in the hall: Bill Babbitt, whose brother Manny, a Vietnam vet suffering acute post-traumatic stress disorder, was executed in California; and Bill Pelke, whose grandmother was murdered by a girl whom he later befriended and helped to spare from execution. Babbitt even joined Bryan onstage during Abu-Jamal's brief address.

What neither Babbitt nor Pelke, nor Abu-Jamal and his attorney, Bryan, knew at the time was that in December 2009, leaders and individual board members of several of the organizations in the U.S. abolitionist movement had signed – without their full boards' or their memberships' knowledge – a confidential memorandum, which they then sent to the French organizers of the World Congress, stating bluntly that, "As international representatives of the U.S. abolition movement, we cannot agree to the involvement of Abu-Jamal or his lawyers in the World Congress beyond attendance."

Purporting to be from "the U.S. members of the Steering Committee" of the World Coalition Against the Death Penalty (though hardly an inclusive list of that committee's membership), and titled "Involvement of Mumia Abu-Jamal endangers the U.S. coalition for abolition of the death penalty," the memo claimed that the French organizers of the World Congress, Together Against the Death Penalty, had arranged to have Abu-Jamal speak at the event "over objection."

The memo further asserted that the abolitionist movement in the U.S. was trying to "cultivate" the support of the ultra-conservative and staunchly pro-death penalty Fraternal Order of Police (FOP), an organization representing some 35,000 police officers in the U.S. that advocates the execution of Abu-Jamal and all other prisoners convicted of killing police officers. The FOP, said the memo, had "announced a boycott of organizations and individuals who support Abu-Jamal," and therefore anything done by the Congress to aid his cause would be "dangerously counter-productive to the abolition movement in the U.S."

ThisCantBeHappening!, a news blog site founded "to give you the stories you aren't getting from the corporate media," obtained a copy of that secret memorandum.

When it was shown to some other members of the boards of the organizations whose officers or individual board members had signed the memo, the responses ranged from consternation to outrage. Babbitt's brother Manny was killed as a direct result of a corrupt law enforcement system in California that pressed for execution, even though it was clear from medical testimony that the elderly grandmother he allegedly killed actually died of shock when she discovered him breaking and entering her apartment. Left in the dark about the memo despite his being on the MVFHR board, Babbitt said, "My brother Manny's last words to me were to always take the high road, and to me that means telling the truth and being open and transparent." He added, regarding the content of the memo, "I think throwing Mumia under the bus is not the way to go in the abolitionist movement. You don't make bargains with a wolf whose motive is to devour."

Robert Meeropol, a son of Ethel and

Julius Rosenberg, who were executed as spies in 1953, is also a member of the MVFHR board. While traveling on behalf of the organization in Asia, he said through a staffer in the U.S. that he did not know about the memo, and added that he still stands "fully in support of a new trial for Mumia Abu-Jamal."

Several calls seeking a comment from Cushing or MVFHR staff member Kate Lowenstein went unanswered, though a staffer at the MVFHR's Cambridge, Massachusetts office, Susannah Sheffer, said, "This is a complicated thing. You need to understand the depth and texture of this."

Also surprised at the memo was actor Michael Farrell, president of the California abolitionist group Death Penalty Focus. Farrell, a long-time supporter of the call for a new trial for Abu-Jamal, said he had never seen the memo, though it was signed by a DPF representative, attorney Elizabeth Zitirin.

Other signers of the memo were Thomas H. "Speedy" Rice of the National Association of Criminal Defense Lawyers, Kristin Houle of the Texas Coalition to Abolish the Death Penalty and Juan Matos de Juan of the Puerto Rico Bar Association.

Bryan, a veteran death penalty defense lawyer who served 10 years on the board of the National Coalition to Abolish the Death Penalty – three of them as the organization's chair – said, "In all my years as an activist opposing the death penalty, I have never heard of any individual or group in that fight singling out anyone as an exception to our campaign to abolish capital punishment. Everyone is treated equally. To single someone out and say they don't count is chilling. Where do you draw the line? At people accused of killing cops? At people accused of killing old ladies? People accused of killing children? Where does it stop? It's appalling!"

Heidi Boghosian, executive director of the National Lawyers Guild, an organization that has long been in the forefront of the campaign to end the death penalty in the U.S., and which was not advised of the plan to circulate the memo on behalf of the U.S. Steering Committee to the World Coalition Against the Death Penalty, despite the NLG's being a member of the Coalition, roundly condemned the secret effort to silence Abu-Jamal at the

World Congress.

"Mumia Abu-Jamal's case is emblematic of the inherent flaws in the capital punishment system," she said. "That he is castigated by leaders in the abolitionist movement shows precisely what is wrong with the system – it is a system enslaved to the whims and personal biases of police, prosecutor, judge and jury. While cultivating certain voices of law enforcement may assist in efforts to achieve abolition, it should not be at the expense of exposing a case that embodies some of the most reprehensible actions on the part of the police, the district attorney and the judiciary. The powerful FOP, and their heavy-handed efforts to vilify Abu-Jamal and his supporters, should not be the barometer by which abolitionist leaders gauge their strategic priorities. Members of the abolitionist movement should be working together and not further censoring and ostracizing a death row inmate."

What makes the American abolitionists' petulant and manipulative behavior as expressed in the secret memo and their cynical threat to withdraw from the Congress particularly outrageous is that Abu-Jamal's arrest, trial and appeals process has been, as Boghosian notes, a textbook case of police and prosecutor corruption, malfeasance and abuse. From the beginning, even before his arrest, Abu-Jamal's case was poisoned by a police lust for vengeance. Although he had been shot through the lung and liver by a bullet fired from Officer Faulkner's service revolver, and was in danger of dying from internal bleeding that was filling his lungs with blood, Abu-Jamal was left lying in

a police wagon for almost half an hour before he was finally delivered to a hospital emergency room, where hospital staff and at least one police officer on the scene observed him being kicked and punched by the officers delivering him.

During the jury selection process at the beginning of his trial, the presiding judge, Albert Sabo, who as a county sheriff's deputy was an FOP member before he became a judge, was overheard by a second judge and his court stenographer saying to his own court clerk, as he exited the courtroom through the judge's robing room, "Yeah and I'm gonna help them fry that nigger!"

During the tortuous appeals process, both the state and federal courts have shamelessly bent their rules and violated precedents to deny Abu-Jamal the benefits of precedents that have been routinely accorded other appellants. Third Circuit Appeals Court Judge Thomas Ambro filed a stinging dissent to a decision by his two colleagues, who effectively created new law from the bench in rejecting Abu-Jamal's well-founded *Batson* claim of racial bias by the prosecution during jury selection at his trial. [See: *Batson v. Kentucky*, 476 U.S. 79 (1986)].

Scarcely concealing his outrage, Judge Ambro wrote, "Our Court has previously reached the merits of *Batson* claims on habeas review in cases where the petitioner did not make a timely objection during jury selection – signaling that our Circuit does not have a federal contemporaneous objection rule – and I see no reason why we should not afford Abu-Jamal the courtesy of our precedents." He added, "Why we pick this case to depart from that reasoning I do not know." [See: *Abu-Jamal v.*

Horn, 520 F.3d 272 (3d Cir. 2008), *vacated and remanded*, 130 S.Ct. 1134 (2010)].

Abu-Jamal himself, interviewed by phone from his cell at the super-max death row facility SCI-Greene in western Pennsylvania, blasted the attempt to silence him at the World Congress, and to ostracize him from the American abolitionist movement. "They are really making deals with the devil," he said of claims that the U.S. abolitionist movement was trying to gain the support of the FOP. "My instinct, being from Philadelphia, is that money was passed, though I have no evidence to prove it." He added, "This secret action is a threat to the entire abolitionist movement. They are saying that because the opposition [to abolition] is so strong, we should not fight. If you have that attitude, why have an abolitionist movement at all?"

Abu-Jamal, whose death sentence was lifted by a federal judge in 2001, only to have the U.S. Supreme Court remand that decision back to the Third Circuit where it could be reimposed, and who continues, in no small part thanks to pressure from the Pennsylvania FOP, to be held in solitary confinement on death row where he maintains his innocence, called the signers of the memo "co-conspirators" and said they were "naive" to believe they can win over the FOP by abandoning him to his fate.

"If the slavery abolitionists had taken this approach back in 1860, and said okay let's free the slaves, except those uppity ones with prices on their heads like Harriet Tubman and Frederick Douglass, we'd still have slavery today," he observed. Abu-Jamal said that the abolitionist movement appeared to have lost its way, and that it

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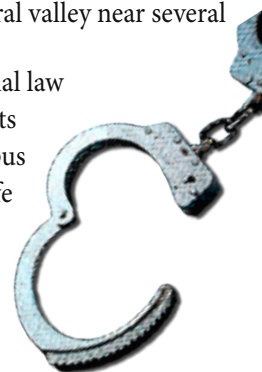
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needed to be broadened to more closely reflect the population of the nation's death rows, where nearly everyone is poor and where 53% of the prisoners condemned to death are non-white. ■

This article first appeared on www.thiscantbehappening.net, and is reprinted with permission with minor edits.

Addendum from PLN

PLN contacted the organizations whose representatives signed the confidential memo concerning Mumia Abu

Jamal. At the time this issue went to press only two had responded, the National Association of Criminal Defense Lawyers and Death Penalty Focus.

NACDL Director of Public Affairs and Communications Jack King commented, "No one is throwing Mumia under the bus, but neither should Mumia be driving the bus." He also said Thomas "Speedy" Rice had not informed NACDL board members about the memo, as it was "not considered important enough."

Elizabeth Zitrin, who represents Death Penalty Focus on the steering committee of the World Coalition Against the Death Penalty, responded and said, "There was never any suggestion that Mumia Abu Jamal should be treated any

differently than any other death row prisoner." However, the only death-sentenced prisoner mentioned in the memo was Mumia. Zitrin also acknowledged that DPF's board was not informed of the memo at the time.

PLN condemns efforts to silence, single out or marginalize Mumia Abu Jamal, who is a longstanding PLN columnist, or any other death row prisoner. No one should be sacrificed on the altar of expediency in an attempt to appease law enforcement organizations that oppose the death penalty. Nor should individual members of anti-death penalty groups unilaterally determine what is best for the abolitionist movement, either within the United States or internationally. ■

CMS Nurse Denied Summary Judgment for Failure to Treat Prisoner for Heat Illness; \$400,000 Settlement Following Sixth Circuit Ruling

by David M. Reutter

In February 2009, the Sixth Circuit Court of Appeals affirmed the denial of summary judgment to a Correctional Medical Services (CMS) nurse in a lawsuit that accused her of failing to properly treat a Michigan prisoner for heat sickness, which left him a quadriplegic.

On July 7, 2002, a scorching day that reached nearly ninety degrees, Carson City Correctional Facility prisoner Luis Dominguez attended a one-and-a-half hour outdoors weight-training session. When he had finished working out, he felt dizzy and unable to catch his breath. After about twenty minutes he was able to walk to his housing unit.

Upon arrival at the unit, Dominguez informed guard Crystal Galvan-Casas that he was not feeling well. She told him to take a shower, but when he returned a short time later looking "wobbly," she called CMS nurse Julie Fletcher to advise that she thought Dominguez may be suffering from heat exhaustion.

In response to Galvan-Casas' call at 3:30 p.m., Fletcher said she would not see Dominguez until 7:00 p.m. and ordered him to "drink fluids, lie down, and rest" in the non-air-conditioned housing unit until then. When Galvan-Casas made rounds at 4:00 p.m., Dominguez was vomiting and sweating profusely. Fletcher relented and said she would see him right away.

When Dominguez arrived at the medical unit, Fletcher took his vital signs

but not a core temperature reading. He vomited a clear substance during the examination. After consulting a physician's assistant at a local hospital, Fletcher ordered Dominguez to return to his cell, drink water, avoid sports and weight lifting, and take aspirin. She then filled out a Suspected Heat Related Illness Report Form. While Dominguez returned to his cell, an unoccupied air-conditioned cell remained empty in the medical unit.

During her rounds at 6:30 p.m., Galvan-Casas found Dominguez unconscious on the floor and was unable to wake him. Fletcher was contacted, and she said to give him water. A second call ten minutes later informed Fletcher that Dominguez had revived but vomited when he drank the water. She said to bring him to medical, where he reported he was dizzy and his entire side felt "prickly."

After consultation with a doctor by phone it was determined that Dominguez was suffering from dehydration, requiring his placement in an air-conditioned area with ice applied to his armpits and groin. Fletcher then left Dominguez with a guard while she passed out medication to other prisoners. At 7:25 p.m. Dominguez's speech became slurred, and he slumped in his wheelchair and began shaking uncontrollably. Shortly thereafter he became "completely non-responsive."

Emergency medical services took him to a hospital. Dominguez survived, but in a "locked-in state" as a quadriplegic with

limited communication but complete consciousness." He was given a medical parole in 2002 and discharged in 2004.

Dominguez filed suit in federal court against Fletcher, CMS and a number of other defendants, arguing that they were deliberately indifferent to his serious medical needs. He raised claims under the Eighth Amendment plus state law gross negligence claims. Fletcher filed a motion for summary judgment based on qualified immunity and immunity from tort liability under Michigan law; her motion was denied by the district court, and she took an interlocutory appeal.

The Sixth Circuit held that Dominguez's right to medical care was clearly established and Fletcher was not entitled to qualified immunity. The appellate court found that Fletcher knew the serious risks associated with heat-related illnesses and dehydration, but "ignored and/or acted with deliberate indifference when faced with those risks." Further, she was not entitled to immunity for gross negligence under Michigan law. As such, the district court's order denying Fletcher's motion for summary judgment was affirmed. See: *Dominguez v. Correctional Medical Services*, 555 F.3d 543 (6th Cir. 2009).

Following remand, the case settled in July 2009. According to an ex parte order entered by the district court, the total amount of the settlement was \$400,000, of which \$177,516.25 was allocated to attorney's fees and costs. Another \$50,000 was

deducted for payment to the Michigan Department of Community Health to resolve a Medicaid lien against Dominguez, and \$2,500 was paid to an attorney for establishing a special needs trust. After

the deductions, \$169,983.75 was placed in the trust for Dominguez. See: *Dominguez v. Correctional Medical Services*, U.S.D.C. (E.D. Mich.), Case No. 2:05-cv-72015-GCS-VMM. ■

Wisconsin County Pays \$750,000 to Settle Jail Sex Abuse Suit

A woman who was sexually assaulted at a jail in Monroe County, Wisconsin has received \$750,000 as part of a settlement in a federal civil rights case.

While awaiting trial on charges of felony battery of a police officer, Sherry Calhoun was repeatedly forced to perform oral sex on Lt. David Schaldach, a night shift supervisor at the Monroe County Jail (MCJ). Calhoun was especially vulnerable in comparison to other prisoners because she suffered from bipolar disorder and had been recommended for placement on suicide watch after losing custody of her children.

Schaldach threatened to hurt Calhoun if she revealed their sexual activity, and former Monroe County Sheriff Charles Amundson and former Undersheriff John Cram allegedly covered-up Schaldach's misconduct.

Schaldach, who was allowed to retire from the jail, later pleaded no contest to misconduct in public office and was sentenced to one-and-a-half years in prison in July 2008.

Calhoun's subsequent federal lawsuit was not the first involving Schaldach. In February 2007, Monroe County settled a suit filed on behalf of former MCJ prisoner Brenda Momborquette for \$6.1 million. [See: *PLN*, Feb. 2008, p.40; June 2007, p.14].

Momborquette had told a jail nurse about Schaldach's sexual abuse of Calhoun. When Schaldach became aware that Momborquette had reported him, he did not put her on suicide watch pursuant to a doctor's orders, apparently hoping that she would commit suicide. Momborquette tried to hang herself but was resuscitated by other guards. She suffered permanent brain damage as a result of the suicide attempt.

Calhoun settled her suit against Monroe County for \$750,000 in October 2009; she was represented by Michael Devanie of Devanie, Belzer & Schroeder, a La-Crosse, Wisconsin law firm. See: *Calhoun v. Schaldach*, U.S.D.C. (W.D. Wis.), Case No. 3:08-cv-00194-bbc. ■

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Arkansas Federal Jury Awards \$261,000 to Male Prisoner Raped by Male Guard

On July 16, 2009, a federal jury awarded \$261,000 to a former Arkansas prisoner who was sodomized and forced to perform oral sex on a guard.

While incarcerated at the Varner Supermax Unit, Jason D. Palton was terrorized by Arkansas Dept. of Correction guard Antonio Remley. On four occasions in 2005, Remley forced Palton to perform oral sex on him. He also sodomized Palton.

During three of the encounters Remley was careful to clean up any evidence of what had occurred, often forcing Palton to brush his teeth. Remley was distracted during the last encounter, though, and Palton was able to save some of Remley's semen in a potato chip bag that he passed to other prisoners for safekeeping. The semen was later turned over to authorities and identified as Remley's.

Remley confessed after investigators told him that Palton had saved a sample of his semen. He resigned, was criminally charged, pleaded guilty to three counts of third-degree sexual assault in 2007, and was sentenced to five years in prison. He is now out on parole.

Represented by Little Rock attorney Patrick James, Palton sued Remley, Assistant Warden Thomas Hurst and several other Varner Supermax staff alleging deliberate indifference. For example, according to Palton, Hurst saw Remley assaulting him but did nothing in response.

The jury returned a verdict in favor of Palton on his claims against Hurst and Remley but found no wrongdoing by the other defendants. The jurors awarded Palton \$10,000 in compensatory damages, \$250,000 in punitive damages against Remley and \$1,000 in punitive damages against Hurst. Remley did not appear at the trial or defend himself against Palton's claims.

James said that he and his client wished there were "more compensatory damages," but were "gratified that the jury found that [Palton] was raped while in prison, and that prison management was deliberately indifferent and allowed it to occur."

Dina Tyler, a spokesperson for Varner Supermax, said "We felt all along that Remley had done things wrong,

but that the agency as a whole did not." Commenting on the jury's verdict against Hurst, Tyler stated "We don't feel that the assistant warden did anything with the intention to allow this to take place."

Palton said he felt vindicated by the jury award. No amount of money, however, can compensate for the sexual abuse he

suffered while in the custody of Arkansas prison officials. According to court documents, the judgment against Hurst was satisfied in November 2009. See: *Palton v. Jackson*, U.S.D.C. (E.D. Ark.), Case No. 5:06-cv-00198-SWW. ■

Additional source: www.nwanews.com

Marsy's Law Enjoined in California

by Michael Brodheim

On February 4, 2010, in a class-action suit brought under 42 U.S.C. § 1983 by eight plaintiffs seeking to represent a class of California state prisoners serving life sentences with possibility of parole, U.S. District Court Judge Lawrence K. Karlton issued two significant orders.

The first order granted the plaintiffs' motion for a preliminary injunction barring enforcement of certain provisions of Proposition 9, a November 2008 ballot initiative also known as "Marsy's Law." [See: *PLN*, May 2009, p.12].

The court's second order denied the state's motion to dismiss the plaintiffs' claim that Proposition 89 – a November 1988 initiative that gave the governor the power to affirm, nullify or reverse any Board of Parole Hearings decision granting or denying parole to a prisoner convicted of murder – violated the constitutional prohibition against ex post facto laws with respect to prisoners who had committed offenses prior to the enactment of that initiative.

With respect to the Prop. 89 claim, the district court rejected the state's argument that *Johnson v. Gomez*, 92 F.3d 964 (9th Cir. 1996), foreclosed the plaintiffs' ex post facto challenge. Judge Karlton noted that *Johnson* was decided prior to *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362 (2000) [*PLN*, June 2000, p.5], in which the U.S. Supreme Court recognized (arguably for the first time) a distinction between facial and as-applied ex post facto challenges.

In *Johnson*, Judge Karlton noted, the Ninth Circuit had considered and rejected only a facial challenge to Prop. 89. In this case, by contrast, the plaintiffs presented an as-applied challenge, arguing that over the past two decades the governor's power of review had been used in a decidedly one-sided manner to reverse Board grants

of parole, but never to reverse a Board determination that a prisoner was unsuitable for parole.

With respect to the Prop. 9 claim, Judge Karlton found that in altering the deferral process when a prisoner is denied parole, Marsy's Law effectuated more changes than the U.S. Supreme Court had considered in *Garner* and an earlier case, *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995) [*PLN*, July 1995, p.1], in which ex post facto challenges had been rejected.

Where *Garner* and *Morales* had merely considered extensions of the maximum possible deferral period, Marsy's Law not only increased the maximum period of deferral (from five to 15 years), but also increased the minimum deferral (from one to three years) and reduced, in various ways, the Board's ability to defer parole for a period less than the maximum. Judge Karlton found the plaintiffs were likely to succeed in showing that these changes created a significant risk of unconstitutional increased punishment. See: *Gilman v. Schwarzenegger*, U.S.D.C. (E.D. Cal.), Case No. 2:05-cv-00830-LKK-GGH.

For now, the preliminary injunction applies only to the named plaintiffs in this case; however, on June 3, 2010, the Ninth Circuit affirmed the district court's grant of class certification. See: *Gilman v. Schwarzenegger*, 2010 WL 2232648. The state has appealed the district court's order granting a preliminary injunction to enjoin certain provisions of Prop 9. This case remains pending. ■

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One in Six HIV-Infected Americans Spent Time in Prison or Jail in 2006

by Michael Brodheim

The authors of a study published in November 2009, which was partially funded by the Emory Center for AIDS Research, reported that the number of HIV/AIDS cases involving releasees from prisons and jails in the U.S. decreased by nearly 30% between 1997 and 2006.

More specifically, the authors found that approximately one in five (20%) of all HIV-positive Americans was released from jail or prison in 1997, while that rate had dropped to one in seven (14%) by 2006. Although the proportional share of HIV/AIDS cases involving prisoners has declined, the total number of HIV-positive prisoners has remained more or less constant at 150,000 nationwide.

Some of the study's other findings are worth repeating. The prevalence of HIV/AIDS among prisoners was reported to be 1.7% in 2006, while the prevalence of AIDS (defined as the latter phase of infection) was 0.5%. Jail and prison populations, the authors reported, have similar demographics related to HIV risk.

According to the Centers for Disease Control, an estimated 1.1 million people in the U.S. were HIV positive in 2006. The study's authors estimated that there were 9.1 million releases from prisons and jails that year. With a seroprevalence of 1.7%, that translates to approximately 155,000 HIV-infected releasees.

The study's authors estimated that a total of 10.6 million Americans (including both releasees and those who remained incarcerated) spent some time in a jail or prison in 2006. With a seroprevalence of 1.7% that means, astonishingly, that approximately one out of every six Americans with HIV was incarcerated at some point that year. Even more surprising is that between 22% and 28% (or roughly one-fourth) of black men with HIV passed through a U.S. correctional facility in 2006.

The authors speculate that the decline in the proportional share of HIV/AIDS among those who are incarcerated is attributable to, among other reasons, decreasing HIV seroprevalence among those admitted to jails and prisons, pro-

longed survival and aging of the U.S. population with HIV/AIDS beyond crime-prone years (generally considered to be between the ages of 15 and 24), and success with release planning programs for HIV-positive prisoners.

The study stresses that because virtually all prisoners and detainees eventually return to the community, effective treatment and interventions for prisoners with HIV should remain a public health priority. ■

Note: For more information on the prevalence of HIV among U.S. prisoners, see the related article in this issue of *PLN* regarding a U.S. Dept. of Justice report on that topic.

Source: *Spaulding AC, Seals RM, Page MJ, Brzozowski AK, Rhodes W, et al. (2009), "HIV/AIDS Among Inmates of and Releasees from U.S. Correctional Facilities, 2006: Declining Share of Epidemic but Persistent Public Health Opportunity." PLoS One 4(11): e7558*

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Houston Police Department Conducted Blood Draw Training on Prisoners

by Greg Dober

In 2009, to expedite DWI arrests, the Houston Police Department sent seven officers to Lone Star College to be trained as certified phlebotomists. A phlebotomist is a qualified medical technician who draws a person's blood. During the course of the officers' clinical training, they practiced on prisoners in the psychiatric ward at the Texas Dept. of Criminal Justice's Jester IV unit in Richmond, Texas. That practice drew criticism for using prisoners as test subjects during the police officers' training.

Since 2008, Texas law enforcement officials have been at odds with the medical community over the issue of obtaining consent for drawing blood from suspects during DWI arrests using judge-issued warrants. In October 2008, police officers in Burnet County obtained a warrant to have a DWI suspect's blood drawn at Seton Highlands Hospital. The hospital refused to cooperate, despite the warrant, because the suspect would not give medical consent. Greg Hartman, Senior Vice President of the Seton Family of Hospitals, noted "There is a conflict in state law. There are other situations where it is questionable whether a licensed hospital can draw blood from a person without an order from a qualified practitioner to draw blood or consent is obtained directly from the suspect without coercion."

Also in 2008, the Llano Memorial Hospital refused to draw blood from a DWI suspect, despite a warrant, because the suspect, Eric Bradley Gegogine, did not give medical consent. Gegogine refused to allow the nurse at the hospital to draw his blood after being brought in by arresting officers. The nurse and hospital, in turn, refused to forcibly restrain him and withdraw his blood. In January 2009, Gegogine was arraigned on contempt of court charges for refusing to abide by the warrant and allow a blood sample to be taken.

While the warrant system was having its problems, Texas lawmakers enacted SB 328, which "Requires a peace officer to require the taking of a specimen of the person's breath or blood under certain circumstances if the officer arrests the person for an offense under Chapter 49 (Intoxication and Alcoholic Beverage Offenses), Penal Code, involving the op-

eration of a motor vehicle or a watercraft and the person refuses the officer's request to submit to the taking of a specimen voluntarily...." Among other provisions, the bill gives law enforcement the ability to forcibly draw blood from DWI suspects without a warrant.

To provide some comfort to hospitals and health care providers, the bill states "that if the blood specimen was taken according to recognized medical procedures, the person who takes the blood specimen under this chapter, the facility that employs the person who takes the blood specimen, or the hospital where the blood specimen is taken is immune from civil liability for damages arising from the taking of the blood specimen at the request or order of the peace officer or pursuant to a search warrant as provided by this chapter, and is not subject to discipline by any licensing or accrediting agency or body."

The bill's language encourages the health care provider or facility to break with their professional medical ethics. If they do violate medical ethics, the state gives them immunity. However, many medical practitioners and facilities do not see the professional code of ethics as waiveable or negotiable. It is interesting that the State of Texas has asked an entire profession to violate its own longstanding ethical rules and regulations. Ironically, the American Medical Association is only two years younger than the State of Texas. SB 328 was signed into law and became effective on September 1, 2009

Due to the tension between Texas law and medical ethics, law enforcement found it was easier to simply conduct blood draws themselves, and Houston's Police Department encouraged its officers to become trained in drawing blood from suspects. The first seven officers began training by first using artificial limbs and then sticking needles into each other's arms. To fulfill the required clinical blood draws for the course curriculum at Lone Star College, they trained at the psychiatric ward in the Jester IV unit. The officers received permission from the University of Texas Medical Branch (UTMB), which administers health care in the Texas prison system, to draw blood from prisoners at Jester IV.

In a statement, UTMB noted that the "Correctional Managed Care program has an agreement with Lone Star College involving its Law Enforcement Phlebotomy Program. The participating Houston police officers at the units were there as part of the Lone Star College course they were taking. Having blood drawn is part of the standard intake process at TDCJ and offenders were given the option of having a police officer or staff phlebotomists perform the procedure. All of the offenders involved chose to allow the police officers to do the procedure." In addition, Houston Police Department Executive Assistant Chief Tim Oettmeier said the training was conducted within a "validated, certified training program."

Despite the defenses offered by police officials and UTMB, the practice of training law enforcement in medical procedures by using prisoners as test subjects is very problematic. The officers were privy to inmates' private medical information and were not trained or certified in the Health Insurance Portability and Privacy Act (HIPAA). HIPAA, a federal law, imposes strict requirements on medical personnel regarding patients' privacy and the confidentiality of their medical information.

The Lone Star College enrollment application for the phlebotomy program requires students to attest that they "have participated in training regarding the privacy and security provisions of HIPAA." Upon inquiry, an official from Lone Star College stated in an e-mail that "Our phlebotomy students are not required to take the HIPAA training Our program does not require the officers to take HIPAA training."

In essence, without proper training, officers do not understand what is privileged and private information. Many times law enforcement officers are given exemptions under HIPAA during the course of their law enforcement duties. However, in this case the officers were not in their field of duty but were being trained as health care workers to draw blood from suspects. Lone Star College should have required officers in the phlebotomy program to undergo HIPAA training; otherwise, without compliance with HIPAA, the officers could have shared prisoners'

private medical information with prison staff – information that might be used maliciously.

Also, according to Houston civil rights attorney Randall Kallinen, “What you have there is sort of a group of people [prisoners] who can be very easily coerced into doing things that aren’t good for them. They want to please their captors.” UTMB should have ensured that proper informed consent was obtained from prisoners at Jester IV. UTMB noted that the prisoners chose the officers-in-training over medical technicians to do blood draws; however, informed consent in the medical context means obtaining a patient’s voluntary, autonomous authorization to proceed with a proposed procedure or treatment.

Further, the mental capacity of the patient must be considered when obtaining informed consent. In a psychiatric ward, such as at Jester IV, diminished capacity is a concern. That did not stop UTMB from allowing the officer trainees the opportunity to practice on prisoners, though. As Kallinen noted, informed consent must not be coerced. “This type of behavior on psychiatric inmates is very, very unethical,” he said. It seems unlikely that prisoners at

Jester IV would make the decision to choose an officer to draw their blood because they wanted to help train law enforcement. If the prisoners gave consent because they felt they would be punished for saying “no” or rewarded for saying “yes,” then they were coerced into giving consent.

The phlebotomy training program was discontinued by Houston Mayor Annise Parker in April 2010, and she issued the following statement: “While I applaud the out-of-the-box thinking that led to this idea, I believe it went too far. I cannot support taking our officers off the street either to draw blood or for deployment in this matter. Of course, drunk driving is a serious problem that we must work together to eradicate, but there are already mechanisms in place to determine whether a motorist is driving under the influence. Additionally, if we choose, there is the option of contracting with civilian professionals to draw the blood.” By canceling the program, the city reportedly lost \$4,000 in expenses paid to train the officers.

Despite the provisions of SB 328 and assurances by law enforcement officials, medical practitioners must maintain an ethical code of conduct when providing or overseeing medical procedures.

Unfortunately, there will still be some hospitals or practitioners willing to forcibly restrain DWI suspects to withdraw blood without their consent. Additionally, the use of prisoners for medical training is complicated by many ethical issues. Therefore, institutions like UTMB and Lone Star College should review, update and enforce their ethical practices when providing medical services to people who are incarcerated. ■

Sources: *KPRC (Houston), KXAN (Austin)*



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Second Circuit Ruling in Post-9/11 Immigration Detention Case

by Matt Clarke

On December 18, 2009, the Second Circuit Court of Appeals issued an opinion in a federal class-action suit brought by illegal immigrants arrested in sweeps following the 9/11 attacks and incarcerated at the Metropolitan Detention Center (MDC) in New York City. The Court of Appeals affirmed the district court's dismissal of length-of-detention claims, but vacated its denial of motions to dismiss the plaintiffs' conditions-of-confinement claims.

This civil rights action was filed in U.S. District Court pursuant to 42 U.S.C. § 1983 by immigration detainees who claimed the government had mistreated them and increased their length of detention prior to being deported because it believed they were Arab or Muslim. The plaintiffs admitted they were in the U.S. illegally and subject to deportation.

The defendants included high-ranking members of the Bush administration – the former Attorney General, FBI Director and INS Commissioner, as well as MDC officials and guards. The administration officials and four high-ranking MDC defendants filed motions to dismiss some of the plaintiffs' claims on grounds that included qualified immunity and failure to state a claim. The district court denied the motions as to the conditions-of-confinement claims, but granted the motions on the length-of-detention claims. Both sides appealed.

The Second Circuit first denied the plaintiffs' motion to dismiss the appeals due to a settlement between the defendants and five named plaintiffs, holding that the settlement, which came after oral argument, did not moot the appeals.

The appellate court noted that recent U.S. Supreme Court decisions required a "heightened pleading standard in those contexts where factual amplification is needed to render a claim plausible." However, the district court's decision denying the motions to dismiss the conditions-of-confinement claims predated the new standard, and had used an earlier standard of review – that a claim should not be dismissed unless it appears beyond doubt that no set of facts can be proven which would entitle the plaintiff to relief.

Therefore, the Second Circuit held the district court's decision to deny the motions to dismiss the conditions-of-

confinement claims should be vacated and the case returned to the lower court for a new evaluation based on the current standard of review.

The Court of Appeals noted that although the removal period for persons illegally in the U.S. is defined as 90 days in federal statutes, the Supreme Court had accorded a presumption of reasonableness to six months' detention. Periods of detention in excess of six months are only unreasonable if there is no significant likelihood of deportation in the reasonably foreseeable future. However, only two of the plaintiffs were held over six months, and neither was held over seven months. Both had settled their claims and the remaining plaintiffs did not plead that there was no significant likelihood of deportation in the reasonably foreseeable future.

Further, the plaintiffs could point to no authority clearly establishing a due process right to prompt deportation or an equal protection right to be free of selective enforcement of immigration laws. The administration was not required to reveal its "real reasons" for deeming nationals of a specific foreign country to be a security threat.

All of the plaintiffs were in the U.S. illegally and thus were legally being detained. Therefore, the district court did not err in dismissing the length-of-detention claims on the basis of either qualified immunity or failure to state a claim. The district court's judgment was affirmed in part and vacated in part, and the case remanded for further proceedings. See: *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009). ■

Massachusetts Supreme Judicial Court: Sheriff May Not Charge Jail Fees

by Matt Clarke

On January 5, 2010, the Supreme Judicial Court of Massachusetts held that the Sheriff of Bristol County could not charge fees for certain jail services.

In 2002, prisoners at the Bristol County House of Correction and Jail in Dartmouth, Massachusetts filed a complaint in state Superior Court challenging various fees they were being charged, and requesting declaratory and injunctive relief.

The fees included a \$5 per day "cost-of-care" fee, \$5 per medical appointment, \$5 for an eyeglasses prescription, \$3 per pharmaceutical prescription, \$5 per haircut or beard trim and \$12.50 for GED testing. If a prisoner was indigent the requested service would still be provided, but a charge would be entered in his or her jail account and the fees deducted from any future monies deposited in the account for up to two years, even if the prisoner was released and later reincarcerated.

The only exceptions to the fees were that indigent prisoners were allowed one free haircut a month and prisoners were not charged for medical services related to admission health screening, emergencies, prenatal care, lab work, diagnostics, and

contagious and chronic disease care.

The Superior Court determined that the plaintiffs were entitled to summary judgment on the grounds that the Bristol County Sheriff had no authority to impose the fees. [See: *PLN*, Jan. 2005, p.13]. The sheriff appealed and the Supreme Judicial Court, on its own initiative, transferred the case from the appellate court.

The Supreme Judicial Court rejected the sheriff's claim that he held a constitutional office entitling him to do anything necessary to carry out the functions of his office. The Court found that the sheriff's duties were regulated by the legislature and rejected his claim that he had the right at common law to impose the fees, because he failed to cite any authority demonstrating that such a common law right existed.

The Supreme Judicial Court held that the Commissioner of Corrections had various statutory obligations with respect to county correctional facilities, including the establishment of certain fees. The commissioner had established a fee of \$1.50 per haircut for prisoners in state facilities, but had not set such a fee for county prisoners. Nonetheless, this could be seen as authorizing the sheriff to charge

no more than \$1.50 per haircut.

However, the sheriff had no authority to establish fees for cost of care, medical services or GED testing. The legislature had expressly authorized what fees could be charged by local sheriffs, and had not included such fees in the statutes. This implicitly restricted the fees that sheriffs could charge to those authorized by the legislature. Further, charging a GED test fee contravened M.G.L. c. 127 § 92A, the clear intent of which was to provide prisoners with free access to GED testing.

The Court found that only the Commissioner of Corrections had the authority to establish medical fees for county prisoners, though he had not done so. Therefore, the Superior Court's order granting summary judgment to the plaintiffs was affirmed. The prisoners were represented by Massachusetts Correctional Legal Services attorney James R. Pigeon. See: *Souza v. Sheriff of Bristol County*, 918 N.E.2d 823 (Mass. 2010).

This victory may be short-lived, as the Massachusetts House of Representatives passed a budget amendment in April 2010 authorizing county sheriffs to charge prisoners a "daily custodial fee" of up to \$5, plus fees for various other services. The state Senate passed a similar amendment in May that did not specify the amount of the daily fee that sheriffs could charge. [See this issue's cover story, p.10].

Critics sharply objected to the fees, noting that imposing debts on prisoners was counter-productive and could hurt re-entry efforts. Even some sheriffs opposed the fee plan, with Hampshire County Sheriff Robert Garvey calling it "very shallow thinking" and a "terrible, terrible idea."

Rebekah Diller, a deputy director at the Brennan Center for Justice, said, "When you burden someone with debt

coming out of prison, it's yet another barrier to successful re-entry, and yet another factor that can contribute to recidivism. Very often you create a debt that won't be paid but stays with the person and has consequences."

In late June 2010, the Massachusetts House-Senate Ways and Means Conference Committee decided not to adopt either the House or Senate versions of the jail fee amendment. Instead, a commission was formed to study the issue of imposing fees on prisoners in county jails – which, in legislative-speak, means it's likely only a matter of time before the commission releases a report in favor of such fees, which will then be approved.

The commission will examine "the types and amount of fees to be charged, including a daily room and board fee and medical co-pays; revenue that could be generated from the fees; the cost of administering the fees; the impact on the affected population; use of the collected fees by the respective sheriff's office; method and sources of collecting the fees; impact on the prisoner work programs; waiver of the fees for indigents; exemptions from the fees for certain medical services; and forgiveness of the balance [of the fees] due for good behavior."

The commission is required to issue its report by March 1, 2011. 📄

Additional sources: *Valley Advocate*, <http://realcostofprisons.org>

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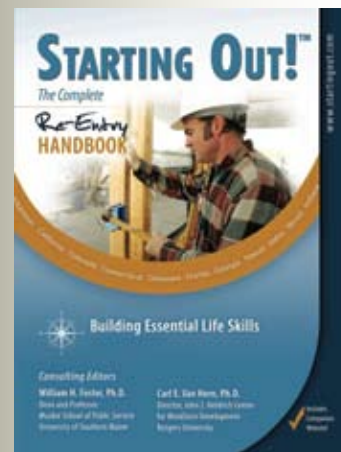
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Former New York Corrections Commissioner Receives Four-Year Prison Sentence

by Matt Clarke

On February 18, 2010, a New York federal judge sentenced Bernard “Bernie” Kerik, 54, to four years in federal prison after Kerik pleaded guilty to five counts of making false statements to federal agents, two counts of tax fraud and one count of making a false statement on a loan application.

The centerpiece of the case against Kerik was a charge that he accepted \$255,000 in renovations on his house in the upscale Bronx neighborhood of Riverdale from New Jersey-based Interstate Industrial Corporation, a company suspected of having ties to organized crime. The renovations included marble bathrooms and a Jacuzzi, and company officials allegedly hoped Kerik would help them get a city license. Kerik was asked about the then-surfacing bribery allegations while being vetted for the position of Secretary of Homeland Security, but lied to federal agents.

In regard to the tax fraud charges, he acknowledged hiding profits from his autobiography, “The Lost Son: A Life in Pursuit of Justice,” from the IRS. The title of the book reflects the murder of Kerik’s mother, a prostitute.

Kerik began his career as an officer in the New York Police Department. He rose to the rank of detective and eventually became the driver and bodyguard for former New York mayor Rudy Giuliani. Giuliani gave Kerik a senior post in the city’s Corrections Department, and he eventually became New York’s Commissioner of Corrections. Kerik later served as the city’s Police Commissioner from 1998 until 2002.

Kerik’s handling of the 9/11 attacks in New York City garnered him national attention. In 2003, the Bush administration sent him to Iraq to train that country’s police force. The following year, President Bush nominated him to be Secretary of

Homeland Security; however, the nomination fell apart and Kerik withdrew his name after allegations surfaced that he had employed a nanny who was in the U.S. illegally.

In 2006, Kerik pleaded guilty to bribery charges in connection with tens of thousands of dollars worth of gifts he had accepted while Commissioner of Corrections. [See: *PLN*, March 2007, p.30; May 2006, p.6]. He paid \$221,000 in fines in that case and avoided serving time.

Kerik entered into a plea bargain in his most recent false statement and tax fraud case, and prosecutors agreed to recommend a sentence between 27 and 33 months. U.S. District Court Judge Stephen C. Robinson ignored the recommendation and sentenced Kerik to 48 months in federal prison.

“I think it’s fair to say that with great power comes great responsibility and great consequences,” said Judge Robinson. “I think the damage caused by Mr. Kerik is

in some ways immeasurable.” Robinson also condemned Kerik for using the aftermath of the 9/11 attacks for “personal gain and aggrandizement.”

After being sentenced, Kerik made the following statement: “I’d like to apologize to the American people for the mistakes I’ve made and for which I have just accepted responsibility. As history is written, I can only hope that I will be judged for the 30 years of service I have given to this country and the city of New York.”

Many other prisoners would share Kerik’s sentiment. We would all like history to remember the good things we have done, at least along with the bad. Alas, that is not how it works in America, where forgiveness and second chances are given lip service while people are remembered for their most ignoble acts—even long after they have paid their debt to society. 📖

Sources: *www.cnn.com*, *New York Times*, *New York Daily News*

Sixth Circuit: No Eleventh Amendment Immunity When ADA Claim Includes Fourteenth Amendment Violations

by Matt Clarke

On January 5, 2010, the Sixth Circuit Court of Appeals upheld a Michigan district court’s denial of Eleventh Amendment immunity for a claim involving both a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, et seq., and the Equal Protection Clause of the Fourteenth Amendment.

Ned Mingus, a Michigan state prisoner with macular degeneration and other medical problems, filed a federal civil rights suit, pursuant to 42 U.S.C. § 1983, against registered nurse Sherilyn Butler, the Health Unit Manager at the G. Robert Cotton Correctional Facility, alleging violations of the Eighth and Fourteenth Amendments.

Specifically, Mingus complained about Butler’s failure to assign him a single-man cell when some able-bodied prisoners and prisoners with lesser health-

related issues were granted single cells. Mingus said he feared for his safety and his ability to protect his property from other predatory prisoners. Butler had denied Mingus’ requests, stating that he failed to meet the criteria for assignment to a single-man cell.

Butler filed a motion for summary judgment on the basis of qualified immunity and immunity under the Eleventh Amendment. The district court dismissed Mingus’ individual-capacity ADA claim and official-capacity § 1983 claim. However, the court denied summary judgment on grounds of qualified immunity under § 1983 and Eleventh Amendment immunity under the ADA, and denied summary judgment on Mingus’ Fourteenth Amendment equal protection claim. Butler appealed.

The Sixth Circuit held that Mingus failed to show he was subject to deliberate

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indifference to his serious medical needs. "Mingus did not allege that he was denied medical treatment but, rather, that Butler failed to protect him from the risks resulting from his deteriorating eyesight and other physical ailments." Therefore, Butler was entitled to qualified immunity on the Eighth Amendment claim.

The Sixth Circuit noted that Butler had conceded, for purposes of the appeal, that the facts showed a violation of Title II of the ADA. The Court of Appeals found that Mingus had "alleged misconduct that

independently violated both Title II of the ADA and the Fourteenth Amendment." Further, Mingus challenged the rational basis for denying him a single-man cell, "a traditional equal protection claim and not an 'equal protection-type claim of discrimination.'"

The Supreme Court had determined in *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877 (2006), that Congress abrogated state sovereign immunity for a claim that raises independent ADA and Fourteenth Amendment violations for

the same conduct. Therefore, the district court's denial of Eleventh Amendment immunity to Butler was upheld, but on different grounds.

The judgment of the district court was affirmed in part and reversed in part, and the case remanded for further proceedings. Mingus represented himself pro se on appeal after the appellate court denied his motion to appoint counsel, stating he had "more than adequately represented himself." See: *Mingus v. Butler*, 591 F.3d 474 (6th Cir. 2010). ■

Georgia Officials Receive Prison Sentences in Charge-Fixing Scheme

Two former DeKalb County, Georgia officials have been sentenced to federal prison for their involvement in a criminal charge-fixing scheme.

In 2008, an unidentified defendant arrested on a drug offense was told by DeKalb County pretrial officer Keith C. Hughes and probation officer Natalie Nicole Dunn that he could get the charges dropped in exchange for \$25,000.

The defendant informed the FBI, which arranged a sting operation. At a meeting in Hughes' office in December 2008, Hughes said Dunn would lie to the DeKalb County District Attorney about the defendant's cooperation in other drug investigations in order to have the charges dismissed. Two installment payments of \$5,000 were made.

Dunn and Hughes were indicted, pleaded guilty to bribery charges, and were both sentenced on November 24, 2009. Hughes received 35 months in federal prison, three years supervised release, a \$2,500 fine and 200 hours of community service, while Dunn

was sentenced to 26 months in prison, three years probation and 250 hours of community service. See: *United States v. Dunn*, U.S.D.C. (N.D. Ga.), Case No. 1:09-cr-00277-WSD and *United States v. Hughes*, U.S.D.C. (N.D. Ga.), Case No. 1:09-cr-00316-WSD.

"Using one's position for personal gain negates any sense of fairness and jus-

tice," said Special Agent in Charge Greg Jones, with the FBI's Atlanta office. ■

Source: *Atlanta Journal-Constitution*

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News in Brief:

Australia: In May 2010, guards at the Mobilong prison in South Australia discovered a fake gun made of matchsticks. Prison staff searched an unnamed prisoner and found the faux weapon after they noticed him behaving suspiciously. Authorities described the matchstick gun as highly realistic; it was apparently made in the prison's hobby crafts program. The prisoner was transferred to the high-security Yatala prison in Adelaide, banned from any type of craft activities, and charged with a felony under the Correctional Services Act.

California: On April 20, 2010, Constantine Peter Kallas, assistant chief counsel at the U.S. Immigration and Customs Enforcement office in Los Angeles, was convicted on federal charges of bribery, fraud, conspiracy, identity theft and obstruction of justice. The jury found that Kallas had been taking bribes from immigrants in exchange for helping them resolve legal issues and avoid deportation. His wife also pleaded guilty. The couples' illicit activities, which spanned a 10-year period, netted over \$1 million.

Connecticut: On May 6, 2010, a jury cleared former judicial marshal Manfred Vives, 41, of a sex assault charge but convicted him of disorderly conduct for swapping sweets for sexual misconduct involving a prisoner. Vives was charged with giving baked goods to a 19-year-old woman in a holding cell in exchange for watching her flash her breasts and kiss another female prisoner in 2007. Prosecutors argued that he also touched the 19-year-old's breast, but the jury apparently didn't believe that claim. Vives was fired from his judicial marshal position after he was charged.

District of Columbia: Thomas Ford, 35, formerly a guard at the Correctional Treatment Facility, was sentenced on May 27, 2010 to a year and a day in prison on a charge of bribery of a public official. Ford admitted that he accepted cash payments in exchange for agreeing to smuggle cell phones, an iPod and a charger to a prisoner cooperating with an FBI investigation into corrupt guards. The facility is operated by Corrections Corp. of America under contract with the D.C. Department of Corrections.

Florida: Jacksonville jail guard Russell Rhoden was returning prisoner Blake Lamar Cooper to his cell after a court appearance on May 26, 2010. According to news reports, Cooper, who is HIV positive, bit Rhoden on the hand as soon as

his handcuffs were removed. Cooper has been charged with criminal transmission of AIDS and battery on an officer; he remains incarcerated pending trial.

Florida: Katrina Wade was arrested for drug trafficking in May 2010 and held at the Charlotte County Jail. Other prisoners informed guards that Wade was continuing to deal drugs by selling nickel bags of heroin that she had smuggled into the facility in her vagina. She reportedly traded the drugs for commissary items, including deodorant and a radio. Wade admitted she had heroin concealed in her vagina after being questioned by investigators, who said they would use an ultrasound device to examine her. She has been charged with two additional felonies and a misdemeanor for smuggling drugs into the jail and selling them.

Florida: Amy Marie Hager, 33, was arrested on June 6, 2010 after deputies with the Manatee County Sheriff's Office responded to a domestic violence complaint. When trying to place Hager into a transport van to take her to jail, she jerked away and told the officers she had defecated in her pants. She then "turned and grabbed fecal matter from her shorts and threw it," soiling one deputy. Hager reportedly said, "Damn, I only hit one of you," according to an incident report. She was charged with domestic aggravated battery, battery on a law enforcement officer, assault on a law enforcement officer and resisting arrest with violence.

Georgia: BOP employee Michelle Dunmeyer, 46, pleaded guilty in federal court on May 14, 2010 to stealing government funds that she used to buy electronics and gasoline. Dunmeyer was a contract specialist at USP Atlanta; her duties included buying items for the prison and its employees. She was given a government credit card to make the purchases, plus access to a gasoline card for government vehicles that she drove to perform her duties. Dunmeyer used the cards to purchase more than \$15,000 worth of electronics and \$6,000 in gas for herself. She faces up to 10 years in prison and \$250,000 in restitution when she is sentenced on July 13.

Indiana: On May 21, 2010, Bradley McMahan, 48, a guard at the Wabash Valley Correctional Facility, was arrested and suspended for trafficking contraband. McMahan allegedly smuggled two cell phones and a can of tobacco into the facility for prisoner Fred Bishop, who was

housed in the prison's segregation unit.

Mexico: Suspected drug cartel hitmen abducted prison warden Luis Navarro as he reported for work on the morning of May 29, 2010. Parts of Navarro's body were later found in gift bags at four locations near police stations in Morelos state. At least two of the packages contained messages threatening police and other public officials. Drug violence is raging across Mexico and almost 23,000 people have been killed in fighting among the cartels and with Mexican security forces since President Felipe Calderon launched his army-led crackdown on drug gangs in 2006.

Michigan: On April 21, 2010, Tameca Brown, 37, a guard at an Ionia prison, pleaded guilty to disturbing the peace (a misdemeanor) and was ordered to pay a \$150 fine. She had originally been charged with felony assault for hitting prisoner Daniel Ervin, 18, who was handcuffed at the time. Brown said Ervin had lunged at her. The misdemeanor conviction will result in administrative discipline, but she will likely keep her job. Other Michigan prison guards rallied to support Brown and condemned the district attorney for filing charges against her.

Ohio: Summit County jail guard Jeffrey Dempsey was suspended for 10 days after assaulting a detainee on February 21, 2010. The incident was captured on surveillance video, which shows Dempsey striking prisoner Douglas Brown in the head, grabbing him by the neck and forcing him to the ground after he was uncooperative during fingerprinting. The assault occurred after Brown, who was being held for drunken disorderly conduct, gave Dempsey the finger.

Oklahoma: Here's some good advice: Do not turn your marijuana over to courthouse officers when going through a security checkpoint. Vaughn Ray Jones, Jr., 28, was arrested at the Oklahoma City courthouse after making that mistake. When he went to the courthouse on June 1, 2010, he placed his belongings on a tray at the checkpoint, including a bag of marijuana. He ran away when confronted by deputies but was arrested the next day when he returned to the courthouse. "You gotta wonder about somebody that's gonna bring marijuana in a courthouse, put it in a bowl – that's gotta be a mistake," said Cleveland County Deputy Steve Lucas.

Pennsylvania: Kevin Atkins, 45, a guard at SCI Camp Hill, was arrested in

April 2010 for attempting to sell marijuana to prisoners. State troopers learned of Atkins' plan from a confidential source. They arranged a sting where he purchased more than four ounces of marijuana from an undercover trooper and admitted he intended to sell it to prisoners. He is being held in lieu of \$200,000 bail.

Tennessee: On May 12, 2010, about 35 Vermont prisoners being held at the West Tennessee Detention Facility in Mason refused to return to their cells, according to a statement from Corrections Corp. of America, which operates the prison. The prisoners then began destroying personal and facility property. CCA guards used

chemical agents and subdued the prisoners within about 30 minutes. The cause of the riot was not reported; both CCA and Vermont officials are investigating.

Texas: On May 19, 2010, Rogelio Cannady was executed for murdering his cellmate in October 1993. Cannady, 37, didn't deny fatally beating 55-year-old

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News in Brief (cont.)

Leovigildo Bonal with a belt and padlock, but insisted the attack at the McConnell Unit in Beeville was self-defense as a result of Bonal's sexual advances. Cannady was already serving two life sentences for killing two teenagers. He had always maintained that he was innocent of the double murder but pleaded guilty to avoid the death penalty. "I got scared," he said from death row. "I was afraid I'd get the death penalty. Ironically, I did."

Texas: On May 24, 2010, Edgar Baltazar Garcia, 30, was one of two prisoners who received the death penalty from U.S. District Court Judge Marcia Crone for the 2007 homicide of fellow prisoner Gabriel Rhone, who was stabbed more than 50 times at the federal prison in Beaumont.

A jury had found Garcia and Mark Issac Snarr, 34, guilty of capital murder and recommended the death penalty. According to court records, Garcia and Snarr stabbed two guards while being escorted to their cells on Nov. 28, 2007, after slipping out of their hand restraints and pulling concealed shanks. They then grabbed a cell key, unlocked Rhone's cell and stabbed him repeatedly, including one wound that penetrated his heart. Guards used chemical agents to stop the attack, which was captured on a surveillance camera.

Washington: An arrestee being booked into the Chelan County Regional Justice Center reportedly "astonished" jail officials with the amount of contraband he had hidden in his rectum. The unidentified prisoner reportedly had a cigarette lighter, rolling papers, a bag of tobacco the size of a golf ball, a smaller bag of marijuana, a

1" pipe, eight tattoo needles and a bottle of tattoo ink concealed in his anus. A strip search didn't reveal any of the contraband items, but a guard later found a plastic bag and tape in a jail toilet, and the prisoner confessed after being questioned.

Washington: An unnamed prisoner at the Washington State Penitentiary is under investigation for butchering a deer. The minimum-security prisoner was working at the facility's pheasant farm on May 29, 2010 when he killed a deer that had become entangled in netting. About 20 deer roam freely in the area. The prisoner, who had been a butcher before his incarceration, slaughtered the animal with a box cutter. Investigators found about 15 pounds of venison hidden in garbage bags in the farm's break room. The prisoner has been removed from the work camp pending an investigation. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

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Law Dictionary, Random House Webster's, 525 pages. **\$19.95.** Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. **\$14.95.** A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046

Legal Research: How to Find and Understand the Law, by Stephen Elias and Susan Levinkind, 568 pages. **\$49.99.** Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 352 pages. **\$34.99.** How-to handbook for anyone who conducts a deposition or is going to be deposed. 1054

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Starting Out! The Complete Re-Entry Handbook, edited by William H. Foster, Ph.D. & Carl E. Horn, Ph.D., Starting Out Inc., 446 pages. **\$22.95.** Complete do-it-yourself re-entry manual and workbook for prisoners who want to develop their own re-entry plan to increase their chances of success after they are released. Includes a variety of resources, including a user code to the Starting Out website. 1074

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It, by Terry Kupers, Jossey-Bass, 245 pages. **Hardback only; prisoners please include any required authorization form. \$32.95.** Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003

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Crime and Punishment In America, by Elliott Currie, 230 pages. **\$16.95**. Effective rebuttal to right-wing proponents of prison building. Fact-based argument shows that crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention. 1019 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin Books, 368 pages. **\$16.00**. From Jack London, Malcolm X and Jack Henry Abbott to George Jackson and Edward Bunker, this anthology provides a selection of some of the best writing describing life behind bars in America, from those who have been there. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson, Lawrence Hill Books, 339 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

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Ten Men Dead: The Story of the 1981 Irish Hunger Strike, by David Beresford, Atlantic Monthly Press, 334 pages. **\$16.95**. Story of IRA prisoners at Belfast's infamous Long Kesh prison who went on a hunger strike in the 1980s in an effort to have the British government recognize them as political prisoners. Ten starved to death. 1006 ☐

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Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi, Seal Press, 295 pages. **\$15.95**. Best book available that covers issues related to imprisoned women, based on interviews with hundreds of women behind bars. 1066 ☐

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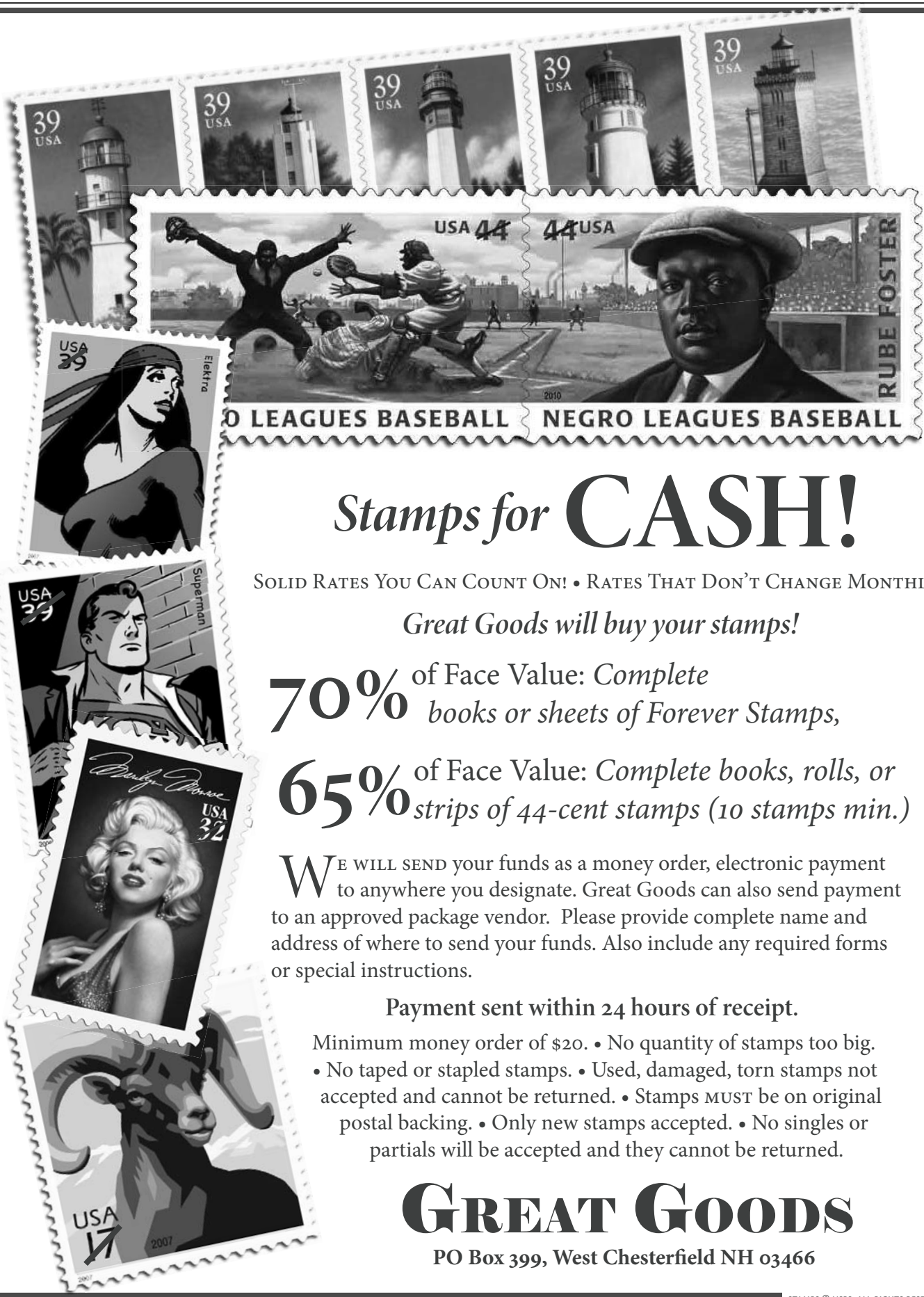
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PRISON

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August 2010

Everything Revolves Around Overcrowding: The State of California's Prisons

by Donald Specter, Director, Prison Law Office

I. Introduction

California has the nation's largest and the world's third-largest prison system.¹ In two separate class action lawsuits, filed a decade apart, California prisoners sued the governor and corrections officials for violating their rights under the Eighth Amendment's Cruel and Unusual Punishment Clause because they were being deprived of adequate health care. In the first case, *Coleman v. Wilson*, the federal court in 1995 held after a three-month trial "that thousands of inmates suffering from men-

tal illness are either undetected, untreated, or both."² In the second case, *Plata v. Davis*, the state of California in 2002 implicitly acknowledged that it had been deliberately indifferent to the medical care needs of prisoners and stipulated to an injunction designed to improve medical care throughout the state's thirty-three prisons.³ The common thread in both cases is that prisoners' basic health care needs were not being met, resulting in injury or death from neglect, suicide, or malpractice at an alarming rate.

Three years after stipulating to the injunction in *Plata*, the court put California's prison medical system into receivership because it remained "broken beyond repair" and the state had proved utterly incapable of fixing the system.⁴ At that time, the court noted that:

*[t]he harm already done in this case to California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action. ... Indeed, it is an uncontested fact that, on average, an inmate in one of California's prisons needlessly dies every six to seven days due to constitutional deficiencies in the CDCR's medical delivery system. This statistic, awful as it is, barely provides a window into the waste of human life occurring behind California's prison walls due to the gross failures of the medical delivery system. Plata, 2005 WL 2932253, at *1.*

Nearly five years after the *Plata* court placed California's prisons in partial receivership and after the *Coleman* court issued more than seventy additional orders to improve mental health care,⁵ California's prisoners remain at serious risk of injury or death because medical and mental health care remain abysmal. There is one primary reason why neither the state nor the receiver has been able to improve prison health care—overcrowding.

II. Overcrowding in California's Prisons

Severe overcrowding makes the safe operation of a prison system nearly impossible. "Everything revolves around overcrowding. The deficiencies in the classification plan, the deficiencies in the unavailability of staff because they are doing other tasks associated with overcrowding problems to do onsite medical appointments or offsite medical appointments, the wear and tear on the infrastructure."⁶

The level of overcrowding in California's prisons is unprecedented. California's prison system incarcerates approximately 155,500 men and women in thirty-three prisons that were designed to house roughly half that many.⁷ In recent times, some converted and triple-bunked gymnasiums have approached 300 percent of their capacity.⁸ There is near unanimity among correctional experts, California prison administrators, the correctional officers' union, the Governor of California, and various commissions that have studied the

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If you were arrested by the Chicago Police Department between March 15, 1999 and May 14, 2010, you could get a payment from a class action settlement.

A settlement has been proposed in a class action lawsuit about the detention and conditions of confinement policies of the Chicago Police Department ("CPD"). The settlement will pay people who were arrested by the CPD and were detained in a CPD interview room for more than 16 hours, or were detained in any CPD facility throughout the hours of 10:00 p.m. to 6:00 a.m. without a mattress, or were arrested by the CPD and did not receive a judicial probable cause hearing within 48 hours of their arrest. The settlement will provide up to \$16,500,000 to pay these claims and to pay the costs of class notice and settlement administration, attorneys' fees and costs to Class Counsel, and incentive awards to the Plaintiff Class Representatives.

The United States District Court for the Northern District of Illinois authorized this notice. The Court will have a hearing to decide whether to approve the settlement, so that the benefits may be paid.

Who's Included?

You may be a Class Member and could get a payment if you were arrested by the CPD between March 15, 1999 and May 14, 2010, and (1) were detained in a CPD interview room for more than 16 hours ("Class I"), or (2) were detained in any CPD facility throughout the hours of 10:00 p.m. and 6:00 a.m. without a mattress ("Class II"), or (3) did not receive a judicial probable cause hearing within 48 hours of your arrest ("Class III").

What's This About?

The lawsuit claims that Defendant, the City of Chicago, violated the Class Members' rights by engaging in the practices described above. Defendant denies it did anything wrong. The settlement is not an admission of wrongdoing or an indication that any law was violated. The Court did not decide which side was right, but both sides agreed to the settlement to ensure a resolution and to provide payments to the Class Members.

What Does the Settlement Provide?

Defendant has agreed to pay a total of up to \$16,500,000 to pay claims to Class Members, pay administrative costs of the settlement, pay incentive awards of up to \$25,000 to each of the Plaintiff Class Representatives, and pay Class Counsel's attorneys' fees and expenses of up to \$5,070,000. Each Class

Member who makes a valid claim will receive a share of this Settlement Fund.

You can make claims for each class you believe you are in as well as for each separate time you have been arrested. Class I members who submit valid claims are eligible for a payment for each detention of \$2,000; Class II members are eligible for a payment of \$90 for each detention; and Class III members are eligible for a payment of \$3,000 for each detention. The amount that each Class Member receives will be reduced proportionally if the amount left in the Settlement Fund is not enough to pay the full amount of all valid Class Member claims after payment of the costs and fees of Class Counsel, the Plaintiff Class Representative incentive awards, and administrative costs.

How Do You Ask For Payment?

A detailed Notice and Claim Form package contains everything you need. Just call 1-888-398-8212 toll free (or 312-224-7041 non-toll-free) or visit the settlement website, www.dunnsettlement.com, to get a Notice and Claim Form package. To qualify for a payment, you must send in a Claim Form. **Claim Forms are due by October 25, 2010.**

What Are Your Other Options?

If you don't want the settlement payments or don't want to be legally bound by the settlement, you must exclude yourself by **September 9, 2010** or you won't be able to sue, or continue to sue, the Defendant about the claims in this case. If you exclude yourself, you can't get any payment from this settlement. If you stay in the settlement, you may object to it by **August 10, 2010**. The detailed notice, available by calling or visiting the website below, explains how to exclude yourself or object.

The Court will hold a hearing in this case (*Dunn v. City of Chicago*, case no. 04-CV-6804) on **October 6, 2010**, at 10:00 a.m. to consider whether to approve the settlement and a request by the lawyers representing all Class Members (Michael Kanovitz and the firm of Loevy & Loevy, Chicago, IL) for attorneys' fees and costs. You may ask to appear at the hearing, but you don't have to. For more information, call 1-888-398-8212 toll-free (or 312-224-7041 non-toll-free), visit the settlement website www.DunnSettlement.com, e-mail info@dunnsettlement.com, or write to Dunn Settlement, c/o Rust Consulting, Inc., P.O. Box 2341, Faribault, MN 55021-9041.

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Overcrowding (cont.)

situation over the last two decades that this level of overcrowding causes serious and at times deadly harm to prisoners, prison staff, and the public.⁹

Current and former heads of corrections from other states have been shocked at the conditions.¹⁰ The former director of the next-largest state prison system, in Texas, said that “[i]n more than 35 years of prison work experience, I have never seen anything like it.”¹¹ This observation includes the time when all of Texas’s prisons were condemned by a federal court for overcrowding.¹²

Governor Arnold Schwarzenegger has recognized the dangers overcrowding poses to prisoners, prison staff, and the public. In October 2006, the Governor proclaimed a prison overcrowding state of emergency.¹³ In that proclamation, the Governor accurately described what the court would find two and a half years later—that overcrowding in California’s prison system “has caused substantial risk to the health and safety of the men and women who work inside these prisons and the inmates housed in them,” making prisons places of “extreme peril to the safety of persons.”¹⁴ He found that overcrowding creates “an increased, substantial risk of violence” and “an increased substantial risk for transmission of infectious illnesses,” and that “tight quarters create line-of-sight problems for correctional officers by blocking views, creating an increased, substantial security risk.”¹⁵ The Governor declared that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.”¹⁶

These risks are not theoretical. In one instance, a dormitory was so crowded that prison staff did not learn about a prisoner’s death for hours, much less provide emergency care.¹⁷

Last year, a riot broke out in a state prison near Los Angeles.¹⁸ Hundreds of prisoners were injured, some critically, and millions of dollars in damage was caused by a fire that destroyed several buildings.¹⁹ After touring the scene, Governor Schwarzenegger was clear about the reason for the disturbance. The riot, he explained, was “a terrible symptom of a much larger problem, a much larger illness. The reality is that California’s entire prison system is in a state of crisis. It is collapsing under its own weight.”²⁰

III. Litigation Leading to Limits on California’s Prison Population

A. Genesis of the Proceedings

The court’s constitutional authority to protect prisoners from cruel and unusual punishment under the Eighth Amendment by capping the prison population and thereby overriding state sentencing and parole laws is well established.²¹ That authority was restricted in 1996, when the Republican-controlled Congress passed the Prison Litigation Reform Act (PLRA) which President Clinton signed into law.²² As one might expect, the so-called reform provisions were designed not to enhance constitutional protections, but to prevent prisoner litigation against state prison systems through restrictions on the ability of prisoners to initiate litigation,²³ substantive limits on the injuries subject to compensation,²⁴ and a low cap on attorney fees.²⁵

In one sense the “reform” intended by the PLRA has been achieved. Despite the long trend of increasing prison populations throughout the United States, involuntary population caps on correctional facilities have been rare. Indeed, since the PLRA was enacted there have been only a couple of reported decisions, one of which resulted in a consent judgment.²⁶

The PLRA permits a court to cap the population of a prison or jail to alleviate constitutional violations caused by overcrowding.²⁷ Before a prisoner release order—defined as “any order ... that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison”²⁸—can be issued, the district court must find by clear and convincing evidence that overcrowding is the “primary cause” of the constitutional violation and that no other relief would be sufficient.²⁹ Before imposing a cap, the three-judge panel also must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”³⁰

Although it was meant to protect state and local governments from judicial interference, the PLRA gave the courts explicit authority, albeit in very limited situations, to interfere with the states’ criminal justice systems. By expressly directing the court to consider public safety concerns when doing so, it embedded the

Overcrowding (cont.)

federal courts in highly sensitive issues that traditionally have been left largely to the discretion of the states.³¹

The Supreme Court has made it clear that crowding itself is not a constitutional violation; instead, prisoners have to prove that crowding contributes to the deprivation of a basic human right, such as shelter or personal safety.³² The prototypical overcrowding case involves old dilapidated prisons or jails, with prisoners sleeping on the floor and/or living in filthy and violent conditions.³³ In California, however, many of the prisons are relatively new, and the corrections department has largely managed to provide each prisoner with a bed by triple-bunking prisoners in gymnasiums and dayrooms and sending thousands to private, out-of-state prisons.

On the other hand, basic medical and mental health care for prisoners have been lacking for decades, and have become less available as the prison population has swelled. Shortly after Governor Arnold Schwarzenegger proclaimed the State of Emergency, the plaintiffs in *Plata* and

Coleman filed simultaneous motions before their respective single district court judges, seeking the creation of a special three-judge court to determine whether to cap California's prison population.³⁴ The theory behind the motions was unique and untested. In contrast to the usual case where the connection between crowding and violence, for example, is more intuitive, in these motions the prisoners claimed that overcrowding was responsible for the state's decade-long inability to provide constitutionally adequate medical and mental health care to prisoners. In *Coleman* and *Plata*, the prisoners maintained that the demand for health care outstripped the ability of the prison system to provide adequate staff and facilities, and that the sheer number of prisoners crammed into the state's thirty-three prisons made doing so impossible.³⁵

Both Judge Henderson in *Plata* and Judge Karlton in *Coleman* were extremely reluctant to initiate proceedings that could result in a cap on California's prison population. Both judges continued the hearings for six months to obtain more information and to give the state another opportunity to solve the overcrowding crisis on its own.³⁶

Six months later, the state had done nothing except to pass a \$7.7 billion bond measure to finance another massive wave of prison construction that, three years later, has not resulted in the addition of a single prison cell.³⁷ As the court later stated, "Although California's existing prison system serves neither the public nor the inmates well, the state has for years been unable or unwilling to implement the reforms necessary to reverse its continuing deterioration."³⁸ The court found itself as the only practical mechanism to achieve the necessary reform: "[W]hen federal court intervention becomes the only means by which to enforce rights guaranteed by the Constitution, federal courts are obligated to act. 'Without this, all the reservations of particular rights would amount to nothing.'"³⁹

Left with no choice, and based on the reports of the receiver in *Plata* and the Special Master in *Coleman* and a lengthy review of the history of both cases, both courts ordered the creation of a three-judge court.⁴⁰ The Chief Judge of the Ninth Circuit consolidated the cases and assigned Judges Thelton Henderson, Lawrence Karlton, and Stephen Reinhardt to preside over the proceedings.⁴¹

B. The Three-Judge Court's Decision

After hearing testimony from nearly fifty witnesses in fourteen days and sifting through thousands of documents,⁴² the court found in a 184-page opinion overwhelming evidence that overcrowding was the primary cause of the state's failure to provide constitutionally acceptable health care to California prisoners.⁴³ It quoted particularly from the expert report of former acting Secretary of the California Department of Corrections and Rehabilitation (CDCR) Jeanne Woodford: "[O]vercrowding in the CDCR is extreme, its effects are pervasive and it is preventing the Department from providing adequate mental and medical health care to prisoners."⁴⁴ "In short," the court concluded, "California's prisons are bursting at the seams and are impossible to manage."⁴⁵

Specifically, the court found that besides adversely affecting prison administration, crowding created numerous barriers to adequate health care:

*Crowding also renders the state incapable of maintaining an adequate staff and an adequate medical records system. In addition, crowding causes prisons to rely on lockdowns, which further restrict inmates' access to care, and it forces prisons to house inmates in non-traditional settings, such as triple-bunks in gyms and dayrooms not designed for housing, that contribute to the lack of care and the spread of infectious disease and that increase the incidence and severity of mental illness among prisoners. Coleman, 2009 WL 2430820, at *32.*

All of these problems "ultimately contribute to unacceptably high numbers of both preventable or possibly preventable deaths, including suicides, and extreme departures from the standard of care."⁴⁶

The PLRA required the court to balance such extraordinary and dire circumstances with the potential consequences to public safety from an order capping the prison population.⁴⁷ The three judges were acutely aware of these concerns and expressed extreme reluctance at the prospect of interfering so directly in the operation of the prison system and making policy choices affecting public safety that usually belong to the state.⁴⁸ They virtually begged the parties, and the state in particular, to resolve the crisis through legislation or settlement, without



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success.⁴⁹ Finally, concluding that “California’s prisoners, present and future, (and the state’s population as a whole) can wait no longer,”⁵⁰ the court set a population cap of 137.5 percent of design capacity and ordered the state to develop a plan to make the required reduction of 40,000 prisoners over two years.⁵¹ The state and other parties have appealed that decision to the United States Supreme Court.⁵² [Ed. Note: The Supreme Court granted cert and will hear the appeal; see *PLN*, July 2010, p.14].

Were the Court forced to choose between reducing the prison population and increasing crime, the decision would have been even more difficult. However, that false dilemma is not present for one simple, yet counterintuitive reason—crime does not increase when fewer offenders are punished by incarceration. In fact, most agree that a prison population reduction, when targeted at low-risk offenders and accompanied by evidence-based programs in the community, is safer than the status quo.⁵³

The belief that a reduction in the prison population leads to more crime is not supported by data or the experience in many jurisdictions that have used early release to reduce their correctional

populations. A 2007 study by the National Council of Crime and Delinquency reviewed thirteen reports on the early release of prisoners in the United States and Canada.⁵⁴ In each case, the crime rates remained the same or declined during the early-release period, and the prisoners released early did not commit more crimes than their counterparts who served the full sentence.⁵⁵ In jurisdictions that provided community-based supportive services, recidivism rates declined.⁵⁶

Nor is there a change in the crime rate when correctional facilities cap their populations. From 1996 to 2006, twenty-one California counties released 1.7 million inmates early because of jail overcrowding.⁵⁷ During that same period, the number of reported serious crimes dropped by 18 percent.⁵⁸ A similar, although less dramatic, reduction in the crime rate occurred during the most recent three-year period.⁵⁹

One reason that there is no direct link between releasing prisoners and crime is that parolees are not responsible for as much crime as the public is led to believe. Although featured prominently in media stories about violent crime, parolees actually contribute very little to the crime rate.

A study by the U.S. Department of Justice concluded that parolees account for less than 5 percent of serious crimes.⁶⁰

The experience of Fresno County, California, is indicative of the sharp contrast between common myths about

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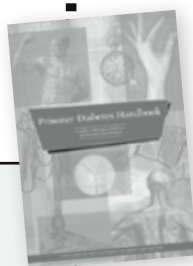
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Overcrowding (cont.)

parolees perpetuated by both the media and law enforcement and the actual data. The police chief of the City of Fresno, who at the time also was president of the California Police Chief's Association, testified that crime would increase if prisoners were released early. That prediction was based on his belief that the additional parolees would "dramatically" increase crime in his community.⁶¹ But the data showed—and the chief admitted—that despite a 28 percent increase in the number of parolees from 2003 to 2007, both property and violent crime dropped during that time.⁶² The drop in crime was so significant that it led the chief to boast on his website that Fresno was enjoying the lowest crime rate in forty-three years.⁶³

Another reason that incarcerating more offenders does not always translate into safe streets is that there is no evidence that sentence length affects recidivism.⁶⁴ The length of the sentence does not control whether a parolee will commit another crime and, if so, how many. That may be why virtually all states and the Federal Bureau of Prisons release prisoners "early"

through some form of sentence credit to provide incentives for good behavior and to control their prison populations.⁶⁵

This central point explains why the three-judge panel concluded that a reduction in the prison population, through increased credits or other means, would not lead to more crime:

*[A]ll else being equal the likelihood that a person who is released a few months before his original release date will reoffend is the same as if he were released on his original release date. Shortening the length of stay in prison thus affects only the timing and circumstances of the crime, if any, committed by a released inmate—i.e., whether it happens a few months earlier or a few months later. Coleman, 2009 WL 2430820, at *90 (citations omitted).*

The court is not alone in concluding that public safety and a smaller prison population are compatible. Ironically, at the same time the Governor was fighting to prevent the court's ultimate ruling, he was trying to persuade the state legislature to pass a series of laws that would effectively achieve nearly the same result.

The Governor proposed measures

that would reduce the prison population by 37,000 over the same two-year period.⁶⁶ His administration publicly trumpeted the reforms, proclaiming that:

[t]he best minds in California and the nation have already provided us with recommendations. Five years ago, the Deukmejian Commission outlined ways that we can target resources on higher risk offenders and reduce costs, without increasing crime rates. An expert panel convened by the Schwarzenegger administration has given us a road-map to reducing recidivism.⁶⁷

The proposed reforms—enhancing good time credits, parole reform, diversion of low-risk offenders, and reducing some property crimes to misdemeanors—were similar to those that the court found effective and safe.⁶⁸ The state legislature passed a watered-down version that ultimately is expected to reduce the prison population by approximately 11,000 prisoners.⁶⁹

IV. The State's Response to the Order Capping California's Prison Population

Despite the congruence between the Governor's policy and the court's findings, the battle between the state and the court continued. Having concluded that overcrowding presents an extreme danger to prisoners and that the prison population could be reduced safely, the court reluctantly but firmly ordered the Governor to submit a plan to reduce the prison population by about 40,000 prisoners within two years.⁷⁰ The Governor, however, defied the court's order. The plan he submitted called for a population reduction of only about 18,000 prisoners within two years.⁷¹

After the prisoners moved to hold the Governor in civil and criminal contempt, the court rejected the Governor's plan, implied that it would initiate contempt proceedings absent compliance with its orders, and directed the Governor to submit a plan consistent with its original order.⁷² The Governor blinked, perhaps motivated by the threat of contempt, and submitted a responsible plan that provides for the safe reduction of the prison population by the amount and within the time required by the court's order.⁷³

This plan, which the court subsequently approved,⁷⁴ relies on a mixture of measures that include sentencing reform, the transfer of prisoners to private out-of-state and federal immigration facilities,

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parole reform, community corrections, and enhanced conduct credits.⁷⁵ The largest single reduction (28 percent of the total) would be accomplished by abolishing state prison sentences for seven drug and property crimes.⁷⁶

The state's plan will not go into effect immediately because the court stayed its order pending the appeal to the U.S. Supreme Court. In the meantime, California's prisons remain extremely overcrowded, with recent reports of prisoners in at least one prison being confined to large cages called holding cells for days at a time without beds and toilets. In his first report of the new decade, the federal receiver for medical care noted that he remained unable to implement needed reforms because of the excessive prison population.⁷⁷

V. Conclusion

The crux of the problem confronting California's criminal justice system is that its sentencing and parole laws imprison more offenders than the state can house safely. Until the state recognizes that prison is a finite, scarce, and expensive resource and takes steps to use that resource efficiently and effectively to produce the maximum safety to the public, there is little hope that judicial intervention will end. As Governor Schwarzenegger candidly admitted earlier in his administration:

*I don't blame the courts for stepping in to try to solve the health care crisis that we have, the overcrowding crisis that we have, because the fact of the matter is, for decades the state of California hasn't really taken it seriously. It hasn't really done something about it.*⁷⁸ ■

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Notes

1 See: Thelton Henderson, *Confronting the Crisis of California Prisons*, 43 U.S.F. L. Rev. 1, 3 (2008). California topped Texas by 15,000 prisoners as of August 2008. See: Offender Information Services Branch, California Department of Corrections and Rehabilitation (hereinafter CDCR), Weekly Report of Population as of Midnight August 27,

2008 (2008), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP_1A/TPOP_1Ad080827.pdf; Tex. Dep't of Criminal Justice, Annual Review 2008, at 26 (2008), available at <http://www.tdcj.state.tx.us/mediasvc/annualreview2008.pdf>.

2 *Coleman v. Wilson*, 912 F.Supp. 1282, 1306 (E.D. Cal. 1995).

3 Stipulation for Injunctive Relief, *Plata v. Schwarzenegger*, No. C01-1351 TE H, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

4 *Plata*, 2005 WL 2932253, at *1.

5 *Coleman v. Schwarzenegger*, No. CI V S-90-0520 LKK JFM P, 2009 WL 2430820, at *12 (E.D. Cal. Aug. 4, 2009) (opinion and order).

6 *Id.* at *55 (quoting expert testimony of Doyle Wayne Scott) (internal quotation marks omitted).

7 Offender Information Services Branch, CDCR, Weekly Report of Population as of Midnight December 30, 2009 (2010), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP_1A/TPOP1Ad091230.pdf; *Coleman*, 2009 WL 2430820, at *1.

8 *Coleman*, 2009 WL 2430820, at *1.

9 See, e.g., *id.* at *38-*39, *44-*45.

10 See photos of overcrowded conditions on the CDCR website at Prison Overcrowding Photos, <http://www.cdcr.ca.gov/News/prisonovercrowding.html> (last visited Feb. 24, 2010).

11 *Coleman*, 2009 WL 2430820, at *42 (quoting expert report of Doyle Wayne Scott) (internal quotation marks omitted).

12 See: *Ruiz v. Estelle*, 503 F.Supp 1265, 1277-88 (S.D. Tex. 1980).

13 Proclamation by the Governor of the State of California, Prison Overcrowding State of Emergency Proclamation, Oct. 4, 2006, available at <http://www.gov.ca.gov/proclamation/4278/>.

14 *Id.*

15 *Id.*

16 *Id.*

17 Transcript of Proceedings at 382-83, *Coleman v. Schwarzenegger*, No. CI V S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (testimony of Jeanne Woodford).

18 See: Jackie Castillo, *250 Inmates Hurt, 55 Hospitalized After California Prison Riot*, CNN.com, Aug. 9, 2009, <http://www.cnn.com/2009/US/08/09/california.prison.riot/index.html>.

19 *Id.* Visual images of the riot and its aftermath can be found at *California's Overcrowded Prisons*, BBC News, Oct. 5, 2009, http://news.bbc.co.uk/2/hi/programmes/world_news_america/8291916.stm.

20 Governor Arnold Schwarzenegger, Governor Tours the California Institution for Men in Chino (Aug. 19, 2009) (transcript available at <http://gov.ca.gov/speech/13023>).

21 See, e.g., *Harris v. Philadelphia*, 47 F.3d 1342 (3d Cir. 1995); *Johnson v. Levine*, 588 F.2d 1378

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Overcrowding (cont.)

(4th Cir. 1978); *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *Vazquez v. Carver*, 729 F.Supp. 1063 (E.D. Pa. 1989).

22 Pub. L. No. 104-134 tit. VII, 110 Stat. 1321-66 to 1321-77 (codified as amended in scattered sections of 11, 18, 28 and 42 U.S.C.).

23 42 U.S.C. § 1997e(a), (c) (2006).

24 42 U.S.C. § 1997e(e) (2006).

25 42 U.S.C. § 1997e(d) (2006).

26 See: *Roberts v. Mahoning County*, 495 F.Supp.2d 719 (N.D. Ohio 2007).

27 18 U.S.C. § 3626(a)(3) (2006). The PLRA is applicable to prisoner federal civil rights cases brought in both state and federal courts. See, e.g., *Baker v. Rohnick*, 210 Ariz. 321, 325 (Ariz. Ct. App. 2005) (holding that “the broad yet plain language of [the PLRA] encompasses § 1983 prisoner lawsuits filed in both state and federal court”); *Martin v. Ohio Dep’t of Rehab. & Corr.*, 749 N.E.2d 787, 790 (Ohio Ct. App. 2001) (construing 42 U.S.C. § 1997e(a) to apply to federal civil rights cases “whether the claim is brought in federal court or state court”).

28 18 U.S.C. § 3626(g)(4) (2006).

29 18 U.S.C. § 3626(a)(3)(E) (2006).

30 18 U.S.C. § 3626(a)(1) (2006).

31 See, e.g., *Ewing v. California*, 538 U.S. 11, 24-25 (2003) (emphasizing courts’ traditional deference to states’ sentencing choices); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (characterizing the enforcement of criminal law as one of the primary functions of state governments).

32 *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

33 See, e.g., *Ruiz v. Estelle*, 503 F.Supp. 1265, 1277-82 (D.C. Tex. 1980).

34 *Coleman v. Schwarzenegger*, No. CI V-S-90-0520 LKK JFM P, 2009 WL 2430820, at *24 (E.D. Cal. Aug. 4, 2009) (opinion and order). Under the PLRA, only a three-judge court, composed of two district court judges and one appellate judge, has the authority to issue an order that has the purpose or effect of limiting the population of a correctional facility. 18 U.S.C. § 3626(a)(3)(B), (g)(4) (2006).

35 *Coleman*, 2009 WL 2430820, at *2.

36 *Id.* at *44.

37 Assemb. B. 900 ch. 7, 2007-2008 Reg. Sess. (Cal. 2007); *Coleman*, 2009 WL 2430820, at *65.

38 *Coleman*, 2009 WL 2430820, at *1.

39 *Id.* at *3 (quoting The Federalist No. 78 (Alexander Hamilton)).

40 *Id.* at *27.

41 *Id.*

42 *Id.*

43 *Id.* at *62.

44 *Id.* at *34.

45 *Id.* at *1.

46 *Id.* at *53.

47 18 U.S.C. § 3626(a)(1) (2006).

48 See: Transcript of Proceedings at 3145, *Coleman*, 2009 WL 2430820 (No. CI V-S-90-0520 LKK JFM P) (“I cannot possibly convey to you the depth of our reluctance to [order a remedy], but if you leave us no alternative, we will.” (statement of Reinhardt, J.)); *id.* at 3146 (“[W]e will do our duty. That’s what we are sworn to do, but we do it reluctantly and only when you have demonstrated that there is nothing else and no other way to proceed.” (statement of Karlton, J.)).

49 See: *id.* at 3142-43.

50 *Coleman*, 2009 WL 2430820, at *3.

51 *Id.* at *116.

52 The U.S. Supreme Court has jurisdiction over appeals from a three-judge district court. 28 U.S.C. § 1253 (2006). Although the first appeal was dismissed for want of jurisdiction, *Schwarzenegger v. Plata*, No. 09-416, 2010 WL 154851, at *1 (U.S. Jan. 19, 2010), the State and defendant-intervenors have filed a subsequent appeal from the three-judge court’s final order, which was issued on January 12, 2010. If the Court agrees to hear that appeal, the case will probably be decided by the end of June 2011. [Ed. note: The Supreme Court granted cert. and will hear the appeal].

53 See: Expert Panel on Adult Offender and Recidivism Reduction Programming, CDCR, Report to the California State Legislature: A Roadmap for Effective Offender Programming in California 77-79 (2007) (reviewing fifteen reports over the previous seventeen years), available at http://www.cdcr.ca.gov/News/2007_Press_Releases/docs/ExpertPanelRpt.pdf.

54 Carolina Guzman, Barry Krisberg, & Chris Tsukida, National Council on Crime and Delinquency, Accelerated Release: A Literature Review (2008), available at http://nccd-crc.issuelab.org/sd_clicks/download2/accelerated_release_a_literature_review_focus.

55 *Id.* at 2.

56 *Id.*

57 Expert Report of Barry Krisberg Ph.D. at 10, *Coleman v. Schwarzenegger*, No. CI V-S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (opinion and order).

58 *Id.*

59 *Id.*

60 Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, U.S. Department of Justice, Recidivism of Prisoners Released in 1994, at tbl.5 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

61 Transcript of Proceedings at 2348, *Coleman*, 2009 WL 2430820 (No. CI V-S-90-0520 LKK JFM P).

62 Plaintiffs’ Trial Exhibit No. 842, *Coleman*, 2009 WL 2430820 (No. CI V-S-90-0520 LKK JFM P); Transcript of Proceedings at 2349-51, *Coleman*, 2009 WL 2430820 (No. CI V-S-90-0520 LKK JFM

P).

63 *Id.* Currently, the police chief’s website states that violent crime is at its lowest point since 1973 and that in 2008, the property crime rate was the lowest in more than forty years. City of Fresno, Fresno Police Department, Chief Jerry Dyer, <http://www.fresno.gov/Government/DepartmentDirectory/Police/default.htm> (last visited on Feb. 25, 2010).

64 Expert Panel on Adult Offender and Recidivism Reduction Programming, *supra* note 57, at 92.

65 *Id.*

66 Matthew Cate, *Prisons: It’s Time to Reform and Reduce Population*, Cap. Wkly., Aug. 13, 2009, available at http://www.capitolweekly.net/article.php?_c=ybr1t2urmkdelf&xid=y6x62x72akddqo&done=.ybr1ub1utqweuz.

67 *Id.*

68 *Id.*; *Coleman*, 2009 WL 2430820, at *87-99.

69 Sen. B. xxx 18 ch. 28 2009-2010 Third Extra. Sess. (Cal. 2009); see: CDCR, California to Submit Population Management Plan that Prioritizes Public Safety and Relieves Overcrowding (2009), available at http://www.cdcr.ca.gov/News/2009_Press_Releases/Sept_18.html.

70 *Id.* at *116.

71 Defendants’ Population Reduction Plan, at ex. A tbl.1, *Coleman v. Schwarzenegger*, No. CI V S-90-0520 LKK JFM P, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010) (order to reduce prison population), available at http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/Defendants_Pop_Reduction_Plan_wExhibits.pdf.

72 Order Rejecting Defendants’ Population Reduction Plan and Directing the Submission of a Plan that Complies with the August 4, 2009, Opinion and Order, *Coleman*, 2010 WL 99000 (No. CI V S-90-0520 LKK JFM P).

73 Defendants’ Response to Three-Judge Court’s October 21, 2009 Order, *Coleman*, 2010 WL 99000 (No. CI V S-90-0520 LKK JFM P), available at http://www.cdcr.ca.gov/News/2009_Press_Releases/docs/Defendants_Pop_Reduction_Plan_wExhibits.pdf.

74 *Coleman*, 2010 WL 99000 at *1.

75 Defendants’ Response to Three-Judge Court’s October 21, 2009 Order, at ex. A, *Coleman*, 2010 WL 99000 (No. CI V S-90-0520 LKK JFM P).

76 *Id.* at ex. A tbl.1.

77 Clark Kelso, Achieving a Constitutional Level of Medical Care in California’s Prisons: Thirtieth Tri-Annual Report of the Federal Receiver’s Turnaround Plan of Action 6 (2010), available at http://www.cprinc.org/docs/court/T13_13th_Tri-Annual20100114.pdf.

78 Plaintiffs’ Trial Exhibit 1012A, *Coleman v. Schwarzenegger*, No. CI V S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009).

From the Editor

by Paul Wright

This month's cover story on *Plata v. Schwarzenegger* is an ample illustration of the political failures that have led to the current state of the criminal justice system around the country. Namely the lack of political will to ensure public safety and to respect the human and civil rights of poor people. As Don Specter's article illustrates, the current state of affairs in the California prison system has been decades in the making and only when there is an ongoing body count of dozens of needless deaths a year and a dozen medical class-action lawsuits have failed, did the federal judiciary step in to safeguard the constitutional rights of California prisoners.

Alas, the medical plight of prisoners is not confined to California but is a national problem that is largely ignored for the simple reason that politicians want to lock people up but don't want to spend money on their health care. With *Plata* going to the Supreme Court it promises to be the most significant prisoner rights case of the 21st century. We have been reporting on the case since its inception and will continue to do so.

I am pleased to report that the move to our Vermont office is complete and we have largely completed the transition from Seattle to Vermont. Please direct all correspondence to our Vermont office to ensure timely responses. Mail sent to our Seattle address is forwarded to us weekly.

A number of readers have ordered *The Citebook* which we have distributed for a number of years. The book has been on back order for several months now and I was recently informed by the publisher that the book is out of print and the author is working on a new edition. As soon as the new edition is available we will announce it in *PLN*. Everyone who ordered a copy of *The Citebook* from us who has not received a copy should have received a refund by now.

We are working away on publishing *The Habeas Corpus Citebook* by Brandon Sample, which will be a compendium of winning federal habeas cases focusing on ineffective assistance of counsel claims. As this issue of *PLN* goes to press the manuscript is largely done and we hope to have the book ready for shipping by October. As soon as it is available we will announce it in *PLN*. This is the second

book published by PLN Publishing and we look forward to printing 1-2 self-help reference books a year on topics that are of interest to prisoners.

Censorship of *PLN* and the books we distribute continues to be a problem. If you are a prisoner and a *PLN* subscriber and your subscription or books ordered from us are censored, please let us know and send us a copy of whatever documentation you are provided with so we can focus on resolving the issue. Most of the time *PLN* is not notified of censorship.

I would like to thank those readers who continue to send us their verdicts and settlements to report in *PLN*. Please continue sending them as you are able to since it is the most solicited aspect of our news reporting. All we need to report these cases are the last complaint filed in the case and the verdict, settlement or judgment in the case.

PLN receives between 500-1,000 pieces of mail each week. The best way to write PLN is to be brief and to the point. The longer the letter the more likely things are to be overlooked. If you are sending a change of address and send in a two-page letter, mention the address change in the first paragraph, not the last. We often get requests for legal assistance from our readers. In some cases we can provide referrals in civil cases, either through direct representation from

Adam Cook, our in-house staff attorney, or through other counsel. But as a general rule we can only do this in catastrophic injury cases where significant injuries have been incurred. If you are wondering what "significant" and "catastrophic" injuries are, then you probably don't have them. But most of the time we are unable to provide any assistance at all in civil matters. Moreso with criminal matters. We know of no one who provides pro bono criminal representation aside from the various innocence projects that provide representation to factually innocent prisoners. This is simply a reflection of this period of American history where 15 years of the Prison Litigation Reform Act have made litigation involving prisoners even more difficult to bring than ever before.

Enjoy this issue of *PLN* and if this is not your copy or you have received a sample copy of *PLN*, I hope you consider subscribing. We currently have around 7,000 subscribers. If we can boost that number to 10,000 it would reduce our per issue costs significantly. 📧

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Wheelchair-bound Texas Escapee Produces Pistol, Commandeers Transport Van

by Matt Clarke

On November 30, 2009, a maximum-security Texas state prisoner who was shackled to a wheelchair in the back of a transport van while being transferred between prisons pulled out a pistol, commandeered the van, handcuffed the guards together and escaped. He was recaptured eight days later.

Arcade Joseph Comeaux, Jr., 49, was in solitary confinement at the Estelle Unit in Huntsville, Texas, where he was serving three life sentences, when prison officials decided to move him to the Stiles Unit in Beaumont. During a contact visit a decade earlier, Comeaux, who was confined to a wheelchair, pinned his wife against a wall and stabbed her 17 times with a homemade shank. He also stabbed another prisoner's visitor who tried to intervene.

That got him two of the life sentences. They were consecutive to his other life sentence, which he received for aggravated sexual assault of a child. He also had prior convictions for rape of a child, aggravated rape of a child, burglary of a building and indecency with a child.

The 6-foot, 200-pound Comeaux had been using a wheelchair for a decade. Perhaps that is what lulled Texas Department of Criminal Justice (TDCJ) guards into complacency, even though prison officials had videos showing him walking around in his cell. As the transport van was about to leave the Estelle Unit early in the morning, Lt. Monte S. Henson was supervising guards Lance Waldo and Matthew A. Smith, who had been assigned to accompany Comeaux. Several hours into the trip, Comeaux produced a .380-caliber semi-automatic pistol and yelled to the guards in the front of the van, "I've got a gun. I'm serious."

Apparently needing to prove his seriousness, Comeaux fired one round into the dashboard. He then ordered Waldo to keep both hands on the wheel and Smith to keep his hands on the arm rests. Comeaux forced them to drive away from the highway, where he handcuffed the guards together in the rear of the van, took their pistols, a shotgun

and a uniform, and drove to Baytown, Texas. There he abandoned the van and walked away. The guards were discovered in Baytown, which borders Houston, Comeaux's hometown. The wheelchair and smuggled pistol were left in the vehicle.

A total of \$30,000 in reward money was quickly offered for Comeaux's capture, and local schools were placed on lockdown. State troopers, the Texas Rangers and a Department of Public Safety helicopter joined in the search.

Eight days later, a barefoot and be-draggled Comeaux was spotted sleeping in a parked school bus. Within hours he was taken into custody at a nearby business, still wearing a TDCJ guard uniform and carrying the guards' pistols and ammunition. Refusing to talk to investigators unless community activist Quanell X was present, Comeaux spun a tale of having been aided by a vast criminal conspiracy both inside and outside the prison, but his sorry state when he was caught belied that story.

He then told investigators that he worked for a prison gang, earning money by pushing drugs, until he could afford to buy the pistol from gang members. The pistol was supposedly brought into the prison by a guard, passed to another guard and then given to a third employee who delivered it to Comeaux three weeks before the escape. Comeaux also claimed to have witnessed a prisoner being beaten to death by guards. According to the TDCJ's Inspector General, none of those claims checked out. Comeaux was allowed to lead investigators to the place where he had stashed the shotgun and shells, just 1,000 feet from the Houston neighborhood where he was recaptured.

Comeaux's short-lived escape resulted in disciplinary action against at least nine prison staff members. Waldo and Smith, both 19-year TDCJ veterans, were allowed to retire in lieu of punishment. Lt. Henson, who had worked for the TDCJ for five years, was recommended for dismissal for improperly supervising the placement of shackles on Comeaux before the transport. Michael Price, a six-year TDCJ veteran who was a guard at Estelle when

Comeaux escaped, was suspended without pay for recklessly endangering others by not adequately searching Comeaux when he was removed from his solitary confinement cell. And TDCJ employee Cynthia M. Allen, who had worked at Estelle for 10 months, was charged with "establishing an improper relationship with an offender" after it was discovered she had placed phone calls to Comeaux's ex-wife at his behest.

The TDCJ also recommended that Major Thomas Hutt and guard David Delaney be fired; Delaney was accused of delivering notes and contraband to prisoners, including Comeaux. Further, two senior officials at the Estelle Unit, warden Alfonso Castillo and assistant warden Thomas Hunt, elected to resign effective the end of January 2010 rather than face disciplinary action for failing to ensure that policies were followed related to security searches and restraints.

"Our primary mission is to protect the public," said TDCJ spokesperson Michelle Lyons. "And when we fail in that mission, we do take it very seriously, and we take the steps to ensure that type of incident doesn't occur again."

State Senator John Whitmire, chairman of the Senate Criminal Justice Committee, called for an independent review of TDCJ policies and procedures to prevent contraband smuggling. He also recommended the creation of an independent agency to screen prison employees and visitors.

"I want the problem fixed. I want accountability from the top to the bottom within TDCJ," Whitmire stated. "And I think it is unfortunate that you need an episode like the Comeaux matter to have the administrators take it as seriously as I have for over a year." Senator Whitmire has advocated for stronger security measures in Texas prisons after he was threatened by a death row prisoner who called him on a contraband cell phone in October 2008. [See: *PLN*, March 2009, p.29].

Sources: *www.examiner.com*, *www.cnn.com*, *Houston Chronicle*, *www.cbs11tv.com*, *FOX 26 News*

U.S. Supreme Court: Counsel Must Advise Immigrant Defendants of Deportation Risks

An immigrant charged with a criminal offense must be advised of the deportation consequences associated with pleading guilty, the U.S. Supreme Court held on March 31, 2010.

Jose Padilla was charged with drug trafficking after he was caught in Kentucky driving a tractor-trailer loaded with marijuana. Padilla, a lawful permanent U.S. resident for 40 years, pleaded guilty after he was allegedly told by his attorney that he “did not have to worry about immigration status since he had been in the country so long.”

Padilla’s attorney was wrong. Padilla had a lot to worry about, since his guilty plea to felony drug charges exposed him to automatic deportation. He tried to withdraw his plea but the Kentucky Supreme Court denied relief, holding the Sixth Amendment right to effective assistance of counsel did not extend to misadvice concerning collateral consequences of a conviction, such as deportation. See: *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky 2008). The U.S.

Supreme Court granted certiorari.

Looking at the long history and seriousness of deportation, and equating it with the arcane punishment of banishment, the Supreme Court held that advice regarding deportation falls within “the ambit of the Sixth Amendment right to counsel,” regardless of whether deportation is properly characterized as a direct or collateral consequence of conviction. As such, the misadvice given by Padilla’s lawyer was subject to the familiar two-part analysis for ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Under the first *Strickland* prong, the Supreme Court, taking Padilla’s allegations as true, found deficient performance by his attorney because “[t]he consequences of Padilla’s plea could be easily determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”

Further, the Court wrote, “prevailing

professional norms” in the form of American Bar Association (ABA) standards had dictated for some time that “counsel must advise her client regarding the risk of deportation.” And while ABA standards are “only guides” and not “inexorable commands,” they remain “valuable measures of prevailing professional norms of effective representation,” the Supreme Court stressed.

Accordingly, in order to “ensure that no criminal defendant – whether a citizen or not – is left to the ‘mercies of incompetent counsel,’” the Court held that “counsel must inform her client whether his plea carries a risk of deportation.”

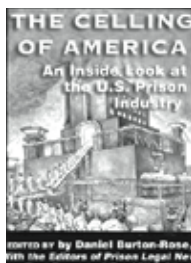
The Supreme Court did not resolve whether Padilla was prejudiced by his guilty plea, however, because the lower court did not address the issue of prejudice. The judgment of the Kentucky Supreme Court was accordingly vacated and the case remanded for further proceedings. See: *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). ■

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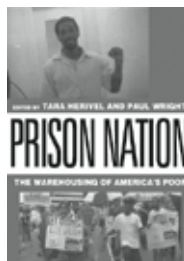
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Controversy Over Texas Attorneys Charging Questionable Fees in Wrongful Conviction Cases

by Matt Clarke

On September 17, 2009, Steven Charles Phillips, a former Texas prisoner who spent 24 years in prison on a rape charge before being exonerated in 2008, filed suit in Dallas County district court against his former attorney, Kevin Glasheen, and his attorney's law firm, Glasheen, Valles, Inderman & DeHoyos LLP.

Phillips alleged that after he filed for over \$4 million in compensation from the state for his wrongful incarceration, Glasheen sent him a bill for almost \$1 million even though he had not provided meaningful legal services and did not even help Phillips fill out the compensation form.

According to Phillips' lawsuit, he contacted Glasheen shortly after his release from prison, when he was living in difficult circumstances in Springfield, Missouri. The next day, Glasheen's firm flew a representative to Springfield to speak with him. The representative gave Phillips a \$3,400 loan and persuaded him to sign a contract for legal services with a contingency fee arrangement. At the time, Phillips was entitled to recover statutory compensation of \$50,000 per year of wrongful incarceration without having to file suit. Glasheen failed to tell Phillips about that provision of state law.

Phillips learned about the statutory compensation and filed a one-page form requesting more than \$4 million without the assistance of an attorney or anyone else. He then received a bill from Glasheen's law firm for \$1 million.

Phillips was attending the University of Texas at Arlington and taking a class from criminal justice professor John Stickels. He asked Stickels for help in firing Glasheen. Stickels suggested that he call Patti Gearhart Turner, dean of students at the Texas Wesleyan School of Law. She referred Phillips to her husband, attorney Randall E. Turner, who filed suit against Glasheen on Phillips' behalf.

In response, Glasheen counter-sued Stickels and the Turners in district court, claiming tortious interference with the contract between his firm and Phillips. Randall Turner countered that he hadn't interfered with the contract.

"I didn't induce [Phillips] to do anything," said Turner. "His mind was made up." He also stated that Glasheen's suit was "all about greed," adding, "[t]his man is desperate to get his hands on a million dollars and will do anything to get it."

Glasheen argued he had earned the \$1 million fee because he spent November 2008 through May 2009 lobbying the state legislature on behalf of Phillips and eleven other exonerees he represented, and that his efforts led to the passage of HB 1736, which increased the statutory compensation from \$50,000 to \$80,000 per year for people who had been wrongly convicted, plus lifetime annual annuity payments of \$80,000 and other benefits. [See: *PLN*, Dec. 2009, p.26].

State lawmakers backed up Glasheen's lobbying claim. HB 1736's author, state Representative Rafael Anchia, said Glasheen's role in getting the legislation passed was pivotal. According to Rep. Anchia, Glasheen organized exonerees' testimony before legislative committees and participated in strategy meetings about the bill.

"He worked tirelessly with the leadership in the House and Senate to make sure we developed a bill that we could live with and that provided just compensation for exonerees," Anchia stated.

However, the contract between Glasheen and Phillips did not mention payment for political lobbying. Further, according to Texas legal ethics expert Charles Herring, § 305.022 of the Texas Government Code prohibits compensation for employment that is totally or partially contingent on getting legislation passed.

"He wasn't hired to be a lobbyist. He was hired to do legal work," said Randall Turner. "I think it's pretty audacious for a lawyer to go down to Austin to lobby for a bill that will make him a lot of money and then try to claim the lobbying work was legal work."

Not surprisingly, Glasheen disagreed. "It is true we didn't move [Phillips'] individual case," he acknowledged. "But the strategy resulted in a higher payout. The bulk of legal work was part of the lobbying effort. I disagree that that work

should not be compensated."

Judge Bradley S. Underwood of the 364th District Court in Lubbock granted Glasheen a temporary injunction against Stickels and the Turners, preventing them from contacting any of his other wrongly convicted clients. Phillips' suit against Glasheen remains pending with a trial date of October 18, 2010. See: *Phillips v. Glasheen*, 95th District Court, Dallas County (TX), Case No. DC-09-12513.

Glasheen also filed suit in Travis County to stop the state comptroller from releasing \$1 million of Phillips' compensation payment, which Glasheen claims he is owed in fees. The comptroller had calculated Phillips' payment at \$1.2 million plus reduced annuity payments, since he was not cleared of six other felony offenses despite being declared innocent of the rape charge.

Another Texas attorney, Jeffrey Blackburn, has been drawn into the fee dispute involving Phillips and Glasheen. Blackburn, who serves as chief counsel for the Innocence Project of Texas (IPT), an organization he helped found, has received many accolades for his longstanding advocacy for the wrongly convicted.

For example, he was instrumental in the release of dozens of innocent defendants in an infamous case in Tulia, Texas in 1999, in which almost 15% of that town's black population was prosecuted on spurious drug charges. Most of the Tulia defendants' convictions were later reversed, resulting in an eventual \$6 million settlement. [See: *PLN*, March 2003, p.24].

In his lawsuit against Glasheen, Phillips alleges that Blackburn misused his position with IPT to hand-pick cases with the greatest potential for compensation, then referred those cases to Glasheen in exchange for "kickbacks." Glasheen admitted he had an agreement to split fees 60/40 with Blackburn. Of the \$1 million that Glasheen charged for representing Phillips, Blackburn reportedly was to receive \$412,936 as a "referring attorney."

Patrick L. Waller, another Texas exoneree who served 16 years for aggravated robbery and aggravated kidnapping before being proven innocent in 2008, had hired Glasheen to help with his wrongful conviction.

tion lawsuit. After the Texas legislature raised the compensation rate to \$80,000 per year of wrongful incarceration plus annual annuity payments, Waller dropped the idea of filing suit and accepted almost \$1.3 million in compensation from the state. He paid \$650,000 in fees to Glasheen with \$130,000 of that amount earmarked for Blackburn, which he found troubling.

"Jeff Blackburn didn't have nothing to do with my case. That's what bugged me," said Waller. "It's pretty low."

Although fee sharing among attorneys is not illegal when agreed to by the client, Austin-based Texans for Public Justice (TPJ), a nonprofit watchdog group, said there was an appearance of impropriety in the arrangement between Blackburn and Glasheen.

"The Texas Innocence Project will suffer a huge loss of innocence if its top attorney worked by day as a pro bono attorney for the falsely accused while secretly angling by night for a cut of those exonerees' monetary settlements," said Andrew Wheat, TPJ's research director.

Waller filed suit against Glasheen and Blackburn in December 2009, arguing the \$650,000 in fees charged by Glasheen was excessive. Waller noted that Glasheen would get at least \$8 million in fees from 12 wrongly convicted former prisoners he represented based on their compensation payments, which was more than any individual exoneree would receive. "I mean, come on, man," said Waller. "He ended up with more money than any of us."

"We were committed to take these

[cases] all the way through to trial and appeal if need be," Glasheen countered. "That we found a better solution than litigation isn't something we ought to be criticized for doing."

But even some of his supporters disagreed. "When I hear about folks potentially abusing and taking the money of the exonerees, it really breaks my heart," said state Representative Rafael Anchia. "They should be helping the exonerees on a pro bono basis. The exonerees have suffered enough."

Glasheen has since admitted that Blackburn was not entitled to fees in Phillips' case, saying an error in the accounting section of his law firm caused Blackburn to be incorrectly listed on the bill. "That's a very convenient thing to say after you've been sued," noted Randall Turner, Phillips' attorney.

Those who defend Glasheen and Blackburn cite their years of tireless work to bring justice to the wrongly convicted, and believe the lawsuits must be based on a misunderstanding. However, others say the conflict has been brewing for years.

Former Innocence Project of Texas president Michelle Moore said she left IPT over her concerns about Blackburn profiting from exonerees while sitting on the organization's board. Moore is a Dallas County public defender.

"It was bad enough to see private attorneys do it, taking 30 to 40 percent" in legal fees from exonerees, she observed. "But to see people who are supposed to be helping ... I have no problem with someone who does attorney's work receiving a fee. But when it's a one-page document

the guy could fill out himself"

Glasheen described Phillips' lawsuit as being a power struggle involving other lawyers who want to represent exonerees – presumably for lucrative fees such as those that he charges. "When there is a lot of cheese on the table, rats will come out and try to steal a piece of the cheese," he remarked.

Patti Gearhart Turner, the wife of Phillips' attorney representing him in the suit against Glasheen, resigned from IPT's board and formed a separate innocence project at the Texas Wesleyan School of Law in Fort Worth.

Phillips' criminal justice professor, John Stickels, also left the IPT, due to what he described as "philosophical differences." He founded the Innocence Network at the University of Texas at Arlington, where his students review potential innocence cases. On March 3, 2010, two Texas prisoners convicted of murder, Chris Scott and Claude Simmons, were exonerated based on work by Stickels' students. "I haven't made a dime off of exonerees," he said. "I don't believe that's right."

But when millions of dollars are at stake, some lawyers, rightly or wrongly, are willing to profit from people who were wrongly convicted and spent years – sometimes decades – in prison. Then again, without getting paid, most attorneys would not represent exonerees in compensation cases in the first place. ■

Sources: *Dallas Morning News*, www.gritsforbreakfast.blogspot.com, www.law.com, www.cbs1tv.com, www.star-telegram.com, www.nbcdfw.com

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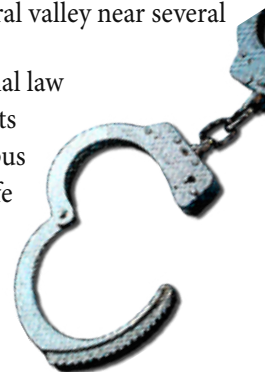
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\$4.3 Million Award in Preventable Death of Cook County Pretrial Detainee

by David M. Reutter

The Seventh Circuit Court of Appeals has affirmed a jury's \$4.3 million award to the estate of a pretrial detainee. The jurors found that guards at the jail in Cook County, Illinois were deliberately indifferent to the detainee's serious medical needs, resulting in his death.

Less than a week after his arrival at the notoriously overcrowded Cook County jail on April 24, 2004, Norman Smith, 32, died from pneumococcal meningitis. He was being held pending trial on a charge of possession of a controlled substance.

Routine medical intake by the jail's private healthcare provider, Cermak Health Services (Cermak), revealed only that Smith had elevated blood pressure, for which he received a week's supply of medication. However, Smith's cellmate and other detainees painted a very different picture.

The cellmate, Carlos Matias, said that Smith demonstrated symptoms of illness from the first day he arrived at the jail. He appeared to be dizzy, began vomiting and asked Matias to submit a medical request for him.

Over the next several days Smith's condition rapidly deteriorated. He was unable to hold down food or maintain conversations with other prisoners. Requests for medical assistance by both Smith and other detainees on his behalf were ignored and no action was taken, assuming the request forms were even collected by Cermak staff.

On April 30, 2004, Matias awoke to find Smith convulsing on the floor. It was an hour later before Smith was finally removed from the cell, which required help from other prisoners because there was insufficient staff on hand to carry him up the stairs on a gurney. He died later that day due to pneumococcal meningitis, a treatable condition.

Smith's mother, Marlita Thomas, sued Cook County, the Cook County Sheriff, and jail guards Jesus Facundo, Alex Sanchez and Terrence Toomey. The case went to trial in December 2007, and the jury awarded a total of \$4,450,000 in damages against the defendants. The U.S. District Court reduced the award to \$4.15

million on a motion for remittitur, plus \$598,825 in attorney's fees and \$22,839.80 in costs. [See: *PLN*, Dec. 2008, p.36].

On appeal, the defendants argued the verdict was not supported by evidence or law. The Seventh Circuit disagreed, stating, "The evidence suggests the officers were aware of Smith's health, either from the inmates' complaints, or from his visible symptoms." Moreover, "Smith was lying on the floor in front of the cell – which would have placed him in the direct path of officials when performing their rounds."

The evidence against Cook County showed a "practice of not retrieving medical requests on a daily basis." While the jury verdict against the county was affirmed by the Court of Appeals, the verdict against the Sheriff, based on a policy of understaffing, was reversed. There was sufficient staff at the jail, but the guards

failed to take "the steps necessary to investigate and ensure that Smith received medical attention."

Although the case was remanded to the district court to enter judgment in the Sheriff's favor, that in no way altered the monetary award because removal of the Sheriff from the list of defendants did "not affect the amount of damages to which the plaintiff is entitled," the appellate court wrote. "That amount remains the same because it is tied to the injury itself."

The jury's verdict was affirmed in all respects except as to the Sheriff's liability. The Seventh Circuit issued an amended decision on May 3, 2010, superseding its original opinion after the defendants' petition for rehearing and rehearing en banc was denied, but the outcome was the same. See: *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2010). ■

Incomplete DNA Databases Result in Tragic Consequences

by Justin Miller

A review by the *Associated Press* has found that state crime lab databanks are missing thousands of DNA samples. The missing samples and backlogs in processing those that have been collected raise questions concerning serious crimes that otherwise might have been prevented.

"If you got missing samples, some of those people are out there raping your wives and abducting and murdering your children," said J.E. Harding, a former Charlottesville, Virginia police captain. Harding discovered missing DNA samples in Virginia's database while searching for a serial rapist.

Over the past several decades legislatures in 47 states have enacted laws requiring convicted felons to provide DNA samples; in 21 states, people arrested for murder, sex crimes or other offenses are required to supply samples even though they have not been convicted. The FBI's National DNA Index System, which draws from state databanks, held about 7.4 million samples as of September 2009.

State officials lay the blame for failing to collect required DNA samples on confusing legislation and a lack of coordination among government agencies – plus the costs involved in collecting and processing the samples.

One high-profile case involving a serial killer has focused attention on missing DNA samples. In September 2009, Wisconsin resident Walter E. Ellis, 49, was linked to the murders of seven women – a killing spree that spanned a 21-year period.

Under Wisconsin law, a DNA sample should have been taken from Ellis while he served a 5-year prison term following a 1998 conviction for reckless endangerment. But when DNA was collected from the body of one of his victims in 2003, no matches were found – apparently because he had convinced another prisoner to submit a DNA sample for him. As a result Ellis was able to elude detection, and in 2007 he allegedly strangled and killed his seventh victim.

That didn't stop the police from making arrests, they just didn't arrest Ellis. Two

other men were charged in homicide cases subsequently attributed to Ellis—Curtis McCoy was prosecuted for a 1994 murder but acquitted at trial, while Chaunte Ott served more than 12 years of a life sentence for killing a 16-year-old girl. Ott was released in January 2009 after DNA tests determined that semen found at the crime scene was not his. It was later matched to Ellis.

Following the discovery of Ellis' missing DNA sample, Wisconsin officials conducted an audit that revealed the state was missing 12,000 samples from current and former prisoners. [See: *PLN*, May 2010, p.44].

The *Associated Press* review found that 27 states were either missing samples or unable to determine if they had been collected in every case they should have been. Illinois alone was missing DNA samples from 50,000 offenders [See: *PLN*, June 2010, p.19], while 8,400 were missing in Virginia and 2,000 in Colorado. Although the total number of missing samples nationwide is unknown, the National Institute of Justice estimated in 2003 that around 1 million remained uncollected.

Compounding the problem is a huge number of already-collected DNA samples waiting to be processed. At least

13 states are experiencing significant backlogs of samples that have not yet been added to their databanks; a 2007 estimate put the number of unprocessed samples at between 600,000 and 708,000 nationwide.

Delays in processing DNA samples have been linked to a number of crimes that may have been prevented. Robert N. Patton, Jr. of Columbus, Ohio committed 37 rapes over a period of 15 years. While serving time for burglary in 2001, Patton submitted his DNA to authorities. However, the sample was not entered into the DNA database until 2004; two days later, Patton raped another woman. He had committed 13 sexual assaults after his DNA sample was taken.

If Patton's DNA "had been processed in a timely fashion, he never would have gotten to me or gotten to any of the others," said one of his victims. Patton was convicted and sentenced to 68 years in prison.

Federal officials had a DNA sample for Delmer Smith III, a rape and home invasion suspect in Florida, but had not entered it into a DNA databank due to a backlog. Smith provided his DNA while serving a federal sentence for bank rob-

bery; by the time authorities found his sample and tested it, he had reportedly committed at least a dozen violent crimes, including murder and sexual assault.

According to a March 2009 audit by the Inspector General's Office of the U.S. Department of Justice, one in six state crime labs reported cases "where additional crimes may have been committed by an offender while that offender's DNA sample was part of the backlog in their state."

Walter Ellis is scheduled to go to trial on multiple first-degree murder charges in February 2011. Chaunte Ott, who served over a dozen years for a homicide attributed to Ellis, was awarded \$25,000 in compensation by Wisconsin's Claims Board in May 2010. He is also pursuing a federal lawsuit against police investigators, and has subpoenaed the Wisconsin Department of Corrections and state crime lab. See: *Ott v. City of Milwaukee*, U.S.D.C. (E.D. Wisc.), Case No. 2:09-cv-00870-RTR. ■

Sources: www.msnbc.com, *Associated Press*, www.truecrimereport.com, www.innocentproject.org, www.wisn.com, www.bradenton.com



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Texas Youth Commission Pays \$625,000 to Settle Abuse Suit

by Gary Hunter

To settle a federal lawsuit, the Texas Youth Commission (TYC) agreed to pay \$625,000 in damages to four youths who were grossly abused by the states' corrupt juvenile justice system.

The largest payout of \$345,000 went to plaintiff Joseph Galloway, who had filed suit alleging that the TYC failed to protect him from being sexually molested by a guard, raped by a cellmate and beaten on several occasions by other juveniles.

Three other youths, identified only as J.A., J.W. and A.B., split the remainder of the settlement for \$150,000, \$105,000 and \$25,000, respectively. The case was filed in the U.S. District Court for the Western District of Texas, and named thirty-eight individual defendants.

Joseph Galloway, 20, spent four years of living hell in the corrupt confines of the TYC. During that time he was sent to the Marlin, Giddings, Evins and Crockett units. Prior to his incarceration in TYC facilities, Galloway had been held in a state mental institution for disabilities stemming from bipolar disorder and Tourette's Syndrome, characterized by major mood swings and uncontrollable outbursts. Both conditions are clinically-recognized mental disorders and both required Galloway to take heavy doses of an extremely powerful medication called Clonidine.

Even though TYC officials knew that Clonidine caused drowsiness and dizziness, they persisted in charging Galloway with disciplinary infractions for trivial offenses such as falling asleep, playing with a banana, looking out the window, and shaking hands with another offender. On two occasions he received disciplinary charges for wearing an extra shirt because he was cold. Each of those infractions served to extend his time in TYC facilities.

Galloway's sentence was also extended when he was denied credit for several programs that he had actually completed. No less than four TYC administrators, Don Freeman, Geraldo Panuelas, Teri Wilson and Blu Nicholson, knew that Galloway had completed the program requirements for release but deliberately denied him program completion credit. Wilson went so far as to send a letter to

Galloway's parents insisting that their son would not be released even though she was aware he had completed the required programs.

As if bogus disciplinary charges and false imprisonment were not bad enough, Galloway alleged he was sexually assaulted by TYC guard Alexandra Warmke during the time he worked for her in the prison's kitchen. Warmke was accused of approaching Galloway and telling him "It's my turn to touch you," just before she performed oral sex on him.

While Galloway was being held at the Giddings State School, TYC guard James Henry deliberately placed him in a cell with a much older and larger juvenile offender who openly indicated his intention to rape him. Galloway tried to defend himself but was literally beaten into submission and brutally sodomized. To add insult to injury, the attacker also bullied him out of his meal that evening.

When Henry later escorted Galloway to the shower he noticed his bloody underwear and commented sarcastically, "What's wrong with your ass?" Henry never took Galloway to the infirmary for medical treatment. Even several weeks later, when Galloway complained to the nurses about blood in his stool, no serious inquiry was made by the medical department as to the cause of the bleeding. He was only given Metamucil for "constipation."

Medical records indicate that Galloway did receive treatment several times after being beaten by other prisoners. In one racially-charged incident at the Crockett State School, Galloway's jaw was broken and had to be wired shut. He was given pain medication that sometimes caused nausea.

Guards were given wire cutters and instructed to cut the wiring if it became necessary to prevent Galloway from choking on his vomit. However, when he became nauseous from the medication the guards refused to help; one told him to "hang his head upside down over the toilet and let the vomit drip out." Afraid of choking to death, Galloway literally ripped the wiring out of his face.

Another plaintiff in the TYC lawsuit,

A.B., started his nightmare in the Texas juvenile justice system at the age of 16. In one year he was sent to four different units – Marlin, Giddings, Gainsville and Mart. A.B. suffered from Obsessive Compulsive Disorder (OCD) that was characterized by unwanted thoughts and persistent repetitive behavior. His time in TYC facilities was extended when he received disciplinary charges for such things as not marching properly and calling his mother on the phone. A.B.'s OCD-driven behavior required him to call his mother at the same time every night.

A.B. was small in stature, and after being attacked by larger, stronger juveniles, he often received disciplinary infractions for refusing to leave protective custody. Rather than being cognizant of A.B.'s cries for help, TYC guards mocked him.

A third plaintiff in the lawsuit, J.W., suffered a broken jaw when he was assaulted by two other juvenile offenders. The injury did not occur immediately; rather, when TYC employee Shiree N. Wooden saw the youths fighting, instead of separating them she locked all three in a bathroom. The other juveniles then broke J.W.'s jaw.

The fourth plaintiff, J.A., was sexually abused twice by another youth who had a history of sexually assaultive behavior. TYC guard Jerome Williams was aware of the attacker's history but left J.A. in the cell with him anyway. J.A. was physically assaulted on at least one other occasion and given a disciplinary charge when he refused to leave safe-keeping. He eventually tried to commit suicide.

Like Galloway, the other plaintiffs in the suit had been diagnosed with some type of mental disability prior to being incarcerated, and all suffered violations of their constitutional rights. Further, as a prerequisite to being released, all of these young offenders were required to participate in what the TYC calls its "Resocialization" program. Part of the Resocialization program requires participants to "check and confront" misbehavior by other youths.

During this process, juvenile offenders engage in "huddle ups" to confront misbehaving peers. A.B. was beaten by

other juveniles on several occasions and labeled a snitch for participating in the “check and confront” process. As a result he refused to engage in the process – which meant he was unable to complete the Resocialization program required for his release.

The Resocialization program also requires youths to admit culpability for the crimes that brought them to prison and even for crimes they may never have committed. Although he was convicted of a sex offense, A.B. continued to maintain his innocence. His conviction was on appeal and any admission of guilt might have had adverse consequences in his criminal case. Yet when A.B. asked to talk to counsel about that dilemma, TYC officials consistently denied him privileged communication with his attorney.

Lawyers for Galloway and the other plaintiffs pointed out that the defendants’ actions constituted a deprivation of their clients’ constitutional right to contact with legal counsel, and violated their Fifth Amendment right to be free from self-incrimination. It was also demonstrated that prisoner-on-prisoner violence in TYC facilities was five times the national average and higher than even in Texas’ adult prison system.

Despite extensive evidence of misconduct, the TYC denied culpability and insisted the only reason it had agreed to the \$625,000 settlement with Galloway and the other plaintiffs was “to avoid the further expense and risk of litigation.” See: *Galloway v. Texas Youth Commission*, U.S.D.C. (W.D. Texas), Case No. 1:07-cv-00276-LY.

In reality, however, the agency was still reeling from a widespread corruption and sexual abuse scandal involving high ranking TYC administrators that

was exposed in 2007. [See: *PLN*, Feb. 2008, p.1].

Further, the U.S. Department of Justice (DOJ) had filed suit against the TYC in 2008 related to abuses at the agency’s Evins unit. The DOJ required the Evins unit to come into compliance on 26 different issues, including protecting juveniles from harm and improving staffing ratios. Investigators had found that in some cases, youths who didn’t pay protection were being assaulted by other juvenile offenders. [See: *PLN*, Oct. 2008, p.50].

When the TYC corruption and sexual abuse scandal became public, it was discovered that youths had been filing grievances against the various abuses they suffered at the hands of guards and other juveniles but TYC administrators turned a blind eye, often giving inappropriate responses or no responses at all.

Even after TYC officials agreed to speed up the process for investigating grievances and complaints, the state Auditor’s Office found that the investigative process for fiscal year 2008 took twice as long as it did in pre-scandal 2006.

“It was horrible before,” said state Representative Aaron Peña, whose district includes the Evins unit. “The administration was in protectionist mode and I assume it’s somewhat difficult to get rid of that culture.”

That turned out to be an understatement. Between 2008 and 2009, deficiencies

in the TYC were still so pronounced that the Office of the Independent Ombudsman and the Texas House of Representatives proposed abolishing the agency and creating a new one combined with the Texas Juvenile Probation Commission. Although the measure was narrowly defeated, it was indicative of how problems in the TYC remained unresolved. [See: *PLN*, March 2010, p.28; May 2009, p.24].

More recently the TYC continues to experience significant shortcomings, including the indictment and resignation of the agency’s newly-appointed Ombudsman in November 2009. [See: *PLN*, July 2010, p.18].

For its part, the Texas legislature is showing signs of retreating from its more lenient post-scandal policies requiring the release of nonviolent juvenile offenders. In 2009, legislators passed a measure that prohibits the release of youths with serious mental illnesses until the TYC can ensure they will receive treatment in community programs – which has the effect of keeping mentally ill juveniles in TYC facilities for longer periods of time. Under the law now in place, there is a good possibility that Joseph Galloway would still be imprisoned – and suffering – in TYC custody. ■

Sources: *Associated Press*, *KENS 5 CBS Evening News*, *The Texas Tribune*, *Dallas Morning News*, *Office of the Independent Ombudsman for the Texas Youth Commission – Quarterly Report through December 2008*

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Exorbitant Prisoner Phone Rates Pass New York Constitutional Scrutiny

by David M. Reutter

On November 23, 2009, the New York Court of Appeals – the state’s highest court – affirmed the dismissal of a lawsuit arguing that the contract between the New York State Department of Correctional Services (NYDOCS) and MCI Worldcom Communications for prison telephone services violated the state’s constitution.

The complaint alleged that the portion of the telephone charge allocated as a commission (i.e., kickback) paid to NYDOCS constituted an illegal tax or fee, amounted to a government taking without just compensation, and violated the petitioners’ equal protection, free speech and associational rights. NYDOCS used the phone commission payments to fund the Family Benefit Fund, which included prisoner health care services, bus transportation for family visitation programs, free prisoner postage, and expenses at prison visitor centers.

New York’s initial 1996 contract with MCI included a 60% per-call commission payment to the state. In 2001, a new contract lowered NYDOCS’ commission to 57.5%. A 2003 contract revision purported to provide relief to families from MCI’s “unfair” variable rate structure by enacting a flat rate fee of \$3.00 per phone call plus \$.16 per minute, but continued the 57.5% commission.

While the suit was on appeal, having been dismissed for being time-barred, then-Governor Eliot Spitzer enacted an executive policy requiring NYDOCS to discontinue collecting commissions on prisoner calls. A law that went into effect on April 1, 2007 made it illegal for NYDOCS to accept or receive revenue in excess of its reasonable operating costs for administering the prison phone system. [See: *PLN*, April 2007, p.20].

After the case was remanded by the appellate court, which found it was not time-barred, the trial court dismissed the complaint on the merits. [See: *PLN*, Oct. 2008, p.24]. The dismissal was then affirmed on appeal. See: *Walton v. New York State Department of Correctional Services*, 57 A.D.3d 1180, 869 N.Y.S.2d 661 (N.Y.A.D. 3 Dept. 2008).

On review in the Court of Appeals, the parties agreed that the actions of

the executive and legislative branches rendered the complaint’s injunctive relief claim academic, and that any decision in the case would affect the rights and liabilities of the parties only to the extent that the petitioners were entitled to refunds.

As to whether the commissions constituted a tax or fee, the Court concluded that MCI’s contractual obligations fell into the category of permissible government activity of entering into contracts with the private sector. The Court noted that it was an “industry standard” for telephone service providers to pay commissions when placing a payphone on public or private property. Additionally, in the prison context such commissions typically ranged from 20% to 63%.

The commission, the Court found, “lacks the hallmarks of a tax or fee because [NYDOCS] has not compelled petitioners to purchase services from MCI, nor are telephone services a government benefit.” Even if the commissions were considered

a tax, the “claim for refunds would be barred because [petitioners] failed to pay the rate under protest.”

Further, the “takings” claim failed because the use and acceptance of the prison phone system was voluntary. The complaint’s free speech and associational claims also failed, because the alternatives of visitation and mail were available to prisoners and their family members. Finally, the petitioners’ equal protection claim failed as it was “not alleged that recipients of station-to-station collect calls to non-inmates pay less than the rate they paid MCI.” Accordingly, the order of dismissal was affirmed. See: *Walton v. New York State Department of Correctional Services*, 13 N.Y.3d 475, 921 N.E.2d 145 (N.Y. 2009).

No lawsuits challenging exorbitant prison phone rates have been successful; when there are reductions in such rates, they usually occur as a result of action by the legislative or executive branch – as was the case in New York. ■

Obama’s 2011 Budget Calls for More Prisons, More Guards

by Brandon Sample

So much for “hope” and “change.” President Obama’s fiscal year (FY) 2011 budget for the U.S. Department of Justice (DOJ) is simply more of the same – more prisons, more guards, more cops. At least when it comes to the criminal justice system, Republicans and Democrats apparently have no trouble finding consensus.

According to a recent report from the Justice Policy Institute, the President’s proposed FY 2011 budget, which covers spending for federal government operations from October 1, 2010 to September 30, 2011, asks for a whopping \$29.2 billion for the DOJ – largely to fund programs and policies that will cause crime rates and prison populations to increase.

The DOJ’s budget request is on top of \$4 billion already provided to the department through the American Reinvestment and Recovery Act, better known as the federal “stimulus package,” and reflects a 5.4 percent increase over the DOJ’s 2010

budget appropriation.

Some \$500 million of Obama’s FY 2011 budget is dedicated to providing Edward Byrne Memorial Justice Assistance Grants to the states. Byrne grants can be used for a variety of different purposes, but past experience has demonstrated that most go to law enforcement efforts rather than prevention, drug treatment or community services. The \$500 million is in addition to \$2 billion already allocated for Byrne grants through the stimulus package. The net result from increased Byrne grant funding is more arrests and prosecutions, which means more prisoners – even though focusing on law enforcement instead of prevention and treatment does not necessarily improve public safety.

President Obama has also requested \$690 million for Community Oriented Policing Services (COPS) grants, which allow states and municipalities to hire and retain police officers. The requested \$690

million, which includes \$600 million for hiring and retention, is on top of \$1 billion already provided for such grants through the stimulus package.

Obama's Office of Management and Budget said that hiring more police officers "will help states and communities prevent the growth of crime as the nation's economy recovers." But as the Justice Policy Institute points out, "protecting public safety and supporting continued economic growth can be more cost-effectively accomplished by investing in positive community services and jobs that do not lead to more incarceration." As with the Byrne grants, increased COPS funding is likely to "increase the prison population, without a significant drop in crime."

Other regressive funding measures include a \$528 million increase for the U.S. Bureau of Prisons (BOP), U.S. Marshals Service, Office of the Federal Detention Trustee and U.S. Parole Commission, for a total of \$6.8 billion. The additional funding includes money to operate two new prisons (including a supermax facility in Thompson, Illinois to house terrorism detainees presently held in Guantanamo Bay, Cuba); to contract for 1,000 more private prison beds; and to hire 652 more BOP guards and fill 1,200 vacant job positions. The BOP already houses more than 200,000 prisoners and spends over \$800 million a year on contract beds, largely to house illegal immigrants convicted of federal crimes.

Unfortunately, as the Justice Policy Institute put it, "increased funding for more prison beds has been shown to be a self-fulfilling prophecy: If you build it, they will come." Further, funding for additional federal prison beds sets a bad example, especially at a time when cash-strapped states are trying to cut

corrections costs and reduce their prison populations.

Obama's budget also calls for a special line item allotment of \$20 million to help coerce states into compliance with the Adam Walsh Act, even though studies have found there is little relationship between keeping children safe and the sex offender registration requirements embodied in the Act. Thus far only three states are in compliance with the Adam Walsh Act, indicating that most don't consider it a priority. [See: *PLN*, July 2010, p.24].

As for justice-related programs that may actually work to prevent and decrease crime, thereby reducing crime rates, funding is being pared back or not increased. For example, Obama's FY 2011 budget allocates \$290 million for juvenile justice programs, down significantly from \$423 million in FY 2010. Also, reentry initiatives, including those under the Second Chance Act, are set to receive only \$100 million, while a paltry \$57 million has been designated for drug court programs.

To put that in perspective, the \$100 million for reentry services, to help released prisoners return to their communities without reoffending, constitutes just .34 percent of the DOJ's total \$29.2 billion FY 2011 budget request.

In all, President Obama, like his predecessors, is singing the same old song when it comes to criminal justice priorities. Nationwide an estimated \$60 billion is spent on corrections, primarily on the state level. ■

Sources: *Justice Policy Institute*, "The Obama Administration's 2011 Budget: More Policing, Prisons, and Punitive Policies" (February 2010); *Washington Post*; <http://solitarywatch.wordpress.com>; *USA Today*

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Aryan Warriors Prison Gang Prosecuted in Nevada

by Gary Hunter

Nevada prison officials recently had to come to grips with two stark realities. First, for decades their correctional facilities have been a haven for gang-related crime and brutality, and second, the state's own corrupt prison guards played a role in perpetuating those dangerous and violent conditions.

A federal investigation into gang violence in Nevada's prison system began in January 2004, but the actual drama did not begin to unfold until July 2007 when 14 members of the Aryan Warriors prison gang were indicted on a variety of charges, including drug distribution, extortion and murder.

The indictments named Ronald "Joey" Sellers (AKA "Fuzzy"), Daniel Joseph Egan (AKA "Dano"), James Milton Wallis (AKA "Gargoyle"), Guy Edward Almony and Ronnie Lee Jones (AKA "RJ") as high-ranking leaders in the gang. Sellers, the most infamous member, was accused of killing fellow prisoner Anthony Beltran in 2006 and stabbing one of his own gang members in 2007. Prosecutors charged Aryan Warriors members in prison as well as several who had been released.

The trial began on May 18, 2009, with heightened security and two unusual twists in court procedure. Fearful of retaliation against witnesses and jurors, the U.S. District Court issued a rare order allowing prosecutors to withhold the names of witnesses from defense attorneys until just before trial.

In the words of Judge Kent Dawson, "The court further finds that the [Aryan Warriors] are capable of locating the witnesses and carrying out such threats and assaults and that the witnesses cannot be adequately protected from physical harm if their identities are revealed well in advance of their anticipated testimony." Judge Dawson also cited security reasons for withholding the identities of the jurors.

The defendants remained shackled during court proceedings after an FBI intelligence report alleged that gang members were planning "unspecified major disruptions" during the trial. Members of the public attending the trial were not allowed to bring any electronic devices into the courtroom, including cell phones or laptop computers.

Defense attorneys argued that witnesses for the prosecution had incentives to lie in exchange for reduced sentences and special treatment. One witness who turned state's evidence, Michael Calabrese, had originally faced state and federal charges for armed robbery. The state charges were dropped completely.

"His sentence could be reduced down to nothing," observed defense attorney Osvaldo Fumo. "He went from facing life without [parole] to being back on the streets."

Hawaiian prisoner Michael Alvarez agreed to testify for the prosecution in exchange for hormone treatments. "All I wanted to do was get treatment for my gender disorder," he said. "No one knows what it's like to be a 'Type 5' transsexual."

Alvarez was originally serving a 30-year sentence for attempted murder and robbery; he was sent to a Nevada prison in exchange for cooperating in a prison investigation in Hawaii. While in Nevada he was a leader in a Hispanic gang called Sureños, a rival of the Aryan Warriors.

In November 2006, Alvarez testified before a federal grand jury that Nevada prison guards had helped distribute sheets of construction paper saturated with methamphetamine for both the Sureños and the Aryan Warriors.

"[I]t would come in on a daily basis [through the mail], and we'd always, you know, send things to the other units ... and use COs, correctional officers, to do it," Alvarez told the grand jury. He said the sheets sold for \$75 to \$100 each.

The most damning testimony came from Guy Almony, one of the original Aryan Warriors defendants. Shortly after being indicted with the other gang members in 2007, Almony was attacked and stabbed by Sellers. State officials agreed to drop charges against Almony in exchange for his testimony against the gang, though they may not have anticipated his knowledge concerning the extensive involvement of their own prison guards in the gang members' illicit activities.

According to a January 2008 FBI report, Almony implicated guards in almost every aspect of the gang's crimes. He specifically identified five prison staff members who assisted in bringing drugs into the North Las Vegas Detention

Center, and directed officials to a guard who smuggled drugs so he could feed his own heroin addiction. According to Almony the guard had a "heroin problem" and "would smuggle in anything for half the product." Almony's testimony was corroborated by another prison guard, according to a follow-up FBI report issued in February 2008.

Former Aryan Warriors leader Michael Kennedy testified that a guard would often bring compact disc cases filled with white powder and slide them under the cell doors of various prisoners. Kennedy reportedly had a dispute with the gang over money from a sports-betting operation, and was "blooded out" by other gang members who repeatedly stabbed him.

Guards were accused of opening doors for gang members so they could attack other prisoners, bringing in cell phones, and passing messages to Aryan Warriors members both inside and outside of prison. Testimony from one witness implicated guards in a prisoner's murder; the witness said guards had ignored a written message about a planned hit on the prisoner's life.

One guard was suspended after it was learned he received a tattoo from an incarcerated skinhead gang member. Another guard was accused of having sex with a prisoner, while several others were reprimanded. However, despite numerous verified accusations, no charges were filed against the guards identified by gang members. At the time of the Aryan Warriors trial, 8 of at least 16 guards implicated in helping the gang still worked for the state prison system.

In an earlier statement, Nevada Department of Corrections (DOC) Director Howard Skolnik defended the integrity of his employees. "Our staff does an incredible job with the resources it has," he said, noting that federal officials had "not taken any action against any of our staff, which leads me to believe they don't have any substantiation or there's going to be another wave" of indictments.

"There might be superseding indictments down the road," remarked FBI spokesman Dave Staretz. "This is not the end of the investigation."

Those indictments might not be easy

without cooperation from state prison officials, though. On April 28, 2009, the Nevada DOC moved to quash a subpoena from defense counsel in the gang members' prosecution, seeking "the personnel files of correctional officers investigated about their conduct involving the Aryan Warriors," claiming the subpoena was "overbroad and seeks confidential personnel information." The motion was granted by the court.

On July 6, 2009, five of the Aryan Warriors gang members were convicted of multiple charges that included racketeering, firearms violations and conspiracy. In December, Kenneth "Yum Yum" Krum was sentenced to 292 months in federal prison, Charles Gensemer received a 35-year prison term and Robert Allen Young was sentenced to 17½ years. James Wallis had been sentenced a month earlier to 25 years in federal prison, which included 120 months to be served consecutive to his state sentence, while Michael Wayne "Big Mike" Yost received a 168-month sentence on March 17, 2010.

Seven of the defendants pleaded guilty and received prison terms ranging from five to 16 years, and in earlier

proceedings Michael Kennedy pleaded guilty to RICO violations in a related case. Michael Calabrese accepted a plea bargain for felony gun possession and was sentenced to 15 years, while Ronnie Lee Jones was found not guilty. Aryan Warriors leader Ronald Sellers is scheduled to go to trial on January 10, 2011; federal prosecutors are considering the death penalty in his case.

Prison officials confirmed that six major "security threat groups" exist in the Nevada DOC. Of the state prison system's 12,800 prisoners, roughly 4,000, or one-third, have been identified as gang members.

"We've started providing training to our staff about the culture and the behavior of these groups," said DOC Director Skolnik. "And we're acknowledging that it's a problem, where in the past we tended to deny that these groups exist." Apparently, though, Nevada prison officials continue to deny the existence of corrupt guards who assist incarcerated gang members. ■

Sources: *Associated Press, FBI Press Release, Las Vegas Review Journal, Pittsburgh Post-Gazette, The Sun*

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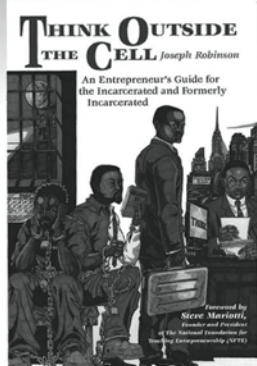
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\$500,000 Settlement in Maryland Prisoner's Death from Pepper Spraying

by David M. Reutter

A half-million dollar settlement was paid to the family of a Maryland prisoner who died when prison officials used excessive pepper spray while extracting him from his cell, and then failed to provide medical care.

After state prisoner Ifeanyi A. Iko was involved in a violent altercation with his cellmate on April 28, 2004 at Maryland's Western Correctional Institution, Iko was taken to an isolation cell. Concerned with his behavior and refusal to speak in English, Lt. James Shreve asked the prison's psychology staff to visit Iko.

His erratic behavior continued over the next two days, which led psychologist Janet Hendershot to recommend that Iko be transferred to Special Observation Housing. When he refused to "cuff up" to be escorted to that housing unit, the security chief and warden authorized an extraction team to use force.

The cell extraction was videotaped. It showed Iko lying passively on the cell floor, ignoring requests to cuff up. Lt. Shreve then "doused" Iko with pepper spray three times through the cell door slot for a total of "nine to fourteen seconds."

At no time "during the spraying did Iko respond violently or in a confrontational manner." As he lay prone on the floor, the seven-man extraction team "secured Iko's arms in metal handcuffs behind his back and his legs in shackles, and placed a spit mask over his head."

He was then taken to a nearby medical room, where a nurse said it did not appear he was suffering ill effects from the pepper spray. After about a minute, Iko collapsed and was placed in a wheelchair. Without being provided medical care or decontaminated, he was wheeled to an observation cell. Guards applied forceful pressure to hold him on the floor while flex cuffs were applied.

For the next hour and a half, Iko remained on his stomach without moving; guards refused to allow medical staff into the cell due to his alleged "dangerousness." When medical personnel were finally permitted to check on him, Iko was dead. A medical examiner ruled his death a homicide, finding he had "died of asphyxia ... caused by chemical irritation of the airways by pepper spray, facial mask

placement, compressional and positional mechanisms." [See: *PLN*, Aug. 2005, p.1].

Iko's estate filed suit in federal court, which on September 17, 2007 denied the defendant prison officials' motion for summary judgment in part and granted it in part. On appeal, the Fourth Circuit Court of Appeals said it lacked jurisdiction over whether the guards' application of pressure constituted excessive force, because the district court had denied summary judgment on that claim on the sole ground that issues of material fact remained.

However, the Fourth Circuit ruled on the defendants' qualified immunity defense, affirming the denial of summary judgment "to Lt. Shreve regarding the amount of pepper spray used against

Iko and to the officers regarding their deliberate indifference to Iko's medical needs." See: *Iko v. Shreve*, 535 F.3d 225 (4th Cir. 2008).

Following remand, the parties agreed to settle the case for \$500,000. The January 29, 2009 stipulation of settlement provided that \$200,000 would be allocated to attorney's fees and \$55,985.24 to expenses. The remaining \$244,014.76 was split among the estate's administrator and Iko's three children.

Iko's estate was represented by attorneys from the Washington, D.C. law firms of Roetzel & Andress LPA and Nossaman, O'Connor & Hannan LLP. See: *Iko v. Galley*, U.S.D.C. (D. MD), Case No. 8:04-cv-03731-DKC. ■

Prisoner's Homicide at Maryland Jail Not Prosecuted

by Gary Hunter

Ronnie White's death by strangulation will go unpunished. On June 2, 2009, almost a year after White died amid a flurry of controversy at the Prince George's County Correctional Center in Maryland, state's attorney Glenn F. Ivey announced there was not enough evidence to charge anyone with his death.

On June 27, 2008, White, 19, was arrested for killing county policeman Richard S. Findley. Two days later, at 10:30 a.m., White was found dead in his maximum security cell at the jail. The initial autopsy report determined that he had been strangled, and his death was ruled a homicide. [See: *PLN*, May 2009, p.14].

A rash of inconsistencies surrounded the subsequent investigation into White's death. Originally, jail guard Ramon Davis claimed to have found White lying in the cell unresponsive. A camera was brought to the scene to record the removal of White's body, but video footage showed White only after he was already on a stretcher outside the cell. Guards blamed the lapse on a camera malfunction.

Allegations of suicide were raised almost immediately by the guard's union. However, ranking officer Gregory O. Harris had stated that White did not have

access to anything that could have been used to hang himself; also, nothing was around his neck at the time his body was found, according to initial reports.

County Executive Jack B. Johnson immediately decried the incident as vigilante justice by jail guards. "If we tolerate these kinds of acts, the courts are superfluous," he said, angrily.

Two days later, jail guard Anthony McIntosh came forward and admitted that he, not Davis, had found White's body. McIntosh said White was hanging from a sheet and that he had pulled him down and removed the sheet without reporting the incident or calling for help. He claimed he had panicked.

Medical Examiner J. Laron Locke noted that the hyoid bone in White's neck had been broken, an injury not consistent with hanging. Five other medical examiners interviewed by the *Washington Post* concluded that a broken hyoid bone is more consistent with violent strangulation than hanging.

Autopsy reports reflect that White's body did not have any defensive injuries to indicate a struggle. Clothilda Harvey, attorney for the Prince George's Correctional Officers Association, said, "There is no safety issue at the jail with respect to

officers exacting revenge on inmates.”

“There was no opportunity, no motive, no murder,” added Davis’ attorney, George Harper. A year after White’s death, even County Executive Jack Johnson had changed his tune. “Since that time, the Maryland State Police have ruled that Ronnie White committed suicide. Not to mention the guards who have come forward and said initially what they found and what they did to cover that up,” said spokesman Jim Keary.

But not everyone was convinced. Angela White, Ronnie’s mother, has claimed the whole thing was “a cover-up” because authorities “don’t want to prosecute any law enforcement officials.”

Her words have the ring of truth. Other prisoners have died or been abused while serving time in Maryland prisons and jails. [See: *PLN*, Feb. 2007, p.1]. Problems and corruption are widespread; for example, in 2008 several guns went “missing” from the Prince George’s County Jail armory and several guards were suspended for smuggling cell phones to prisoners. [See: *PLN*, Jan. 2009, p.50]. And in March 2009, jail guard John Hanna was arrested on charges of burglary, rape, abduction and other crimes.

“We believe it is disingenuous and

very self-serving for county officials to suggest this was a suicide,” stated Bobby Henry, an attorney who represents White’s family. “There is no credible forensic evidence suggesting this was a suicide.”

Both Davis and McIntosh were placed on leave immediately after White’s death. McIntosh eventually resigned. Prosecutor Glenn Ivey said it was still possible that he will prosecute the guards on lesser charges of obstruction of justice and making false statements, but no charges had been filed as of November 2009.

Meanwhile, White’s father, Ronnie L. Harris, said he was disgusted with the lack of action – and justice. “They’ve had a year to try and find out who did this and they still haven’t. Ronnie died inside that jail. There were people in there. Still, a year later, they know who was in there, but they don’t know who killed Ronnie. What is that? What does that say?”

The U.S. Department of Justice is reportedly investigating White’s death. Davis indicated that he would invoke his Fifth Amendment right against self-incrimination if he was asked to answer questions.

White’s mother, Angela, filed suit against county and jail officials in Circuit Court on June 30, 2009, seeking \$153.6

million in damages. The lawsuit alleges that guards at the Prince George’s County Correctional Center attacked and strangled White in his cell, resulting in his death, and that county officials were grossly negligent for failing to use reasonable care, to provide adequate monitoring and staffing to provide for White’s safety, to supervise and train jail staff charged with White’s protection, to implement adequate procedures and safeguards for White’s protection, and to adequately respond after White was attacked and killed.

“People are not supposed to die under mysterious circumstances in correctional facilities in America. Civil rights are real rights,” stated Hassan Murphy, one of the attorneys representing White’s family. “The blatant disregard for Mr. White’s civil and human rights by so many people in the system, who were supposed to enforce the law, is inhumane and illegal – a travesty of justice.” See: *White v. Prince George’s County*, Circuit Court for Prince George’s County (MD), Case No. CAL09-19552. ■

Sources: *FBI-Baltimore press release*, www.washingtonexaminer.com, www.gazette.net, www.washingtonpost.com, *PRWeb press release*



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DOJ Investigation into New York Jail Finds Unconstitutional Conditions

by Justin Miller

The findings of an investigation by the U.S. Department of Justice (DOJ) into conditions at a New York jail describe violations of prisoners' constitutional rights – violations which, in the words of federal investigators, have resulted in “serious harm.”

The Civil Rights Division of the DOJ and the U.S. Attorneys Office conducted an investigation into the Westchester County Jail (WCJ) in Valhalla, New York pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997. CRIPA provides the DOJ with the authority to seek remedies when conditions at correctional facilities violate prisoners' rights.

The 42-page DOJ report, released in November 2009, contained findings related to on-site inspections at WCJ as well as a review of internal documents and videos. The report, issued by Assistant Attorney General Thomas E. Perez, concluded that “certain conditions at WCJ violate the constitutional rights of inmates.” It detailed four areas of concern: inadequate protection from harm, medical care deficiencies, mental health care issues and the treatment of juvenile offenders.

The DOJ investigation cited a “pattern” of failures which indicated “that WCJ is not adequately providing for the safety and well being” of prisoners held at the facility. Numerous examples were cited regarding the use of excessive force by WCJ staff. Many of those incidents involved the Emergency Response Team (ERT), which was made up of jail officers and supervisors in full riot gear who responded to incidents involving violence and non-compliance by prisoners.

The investigation found that ERT members often employed chemical agents such as OC pepper spray at point-blank range on restrained prisoners. They also used crowd control-sized OC canisters on individual prisoners when personal-sized canisters would have been sufficient, frequently used physical force to attack or subdue prisoners who were not presenting any immediate threat, and employed painful restraint techniques when unnecessary.

Another commonly-mentioned prob-

lem was inaccurate reporting at WCJ, which the federal investigation called “routinely ... incomplete, vague, or conclusory,” and often “exaggerated.”

In one example, a jail report indicated that the ERT “attempted to take control” of a prisoner, escorted her to a search area and administered OC spray when she “became very combative.”

The DOJ review found that an ERT officer drove the prisoner’s “head to a wall while other officers took her to the ground ... escorted her with a bent wrist tactic, which appeared to cause her substantial and unnecessary pain,” and “sprayed [her] at point-blank range in the face with OC spray from a [crowd control size] canister while she was lying prone and cuffed on the floor.”

Discrepancies between written reports by jail staff and video footage reviewed during the DOJ investigation raised serious concerns about documentation related to incidents in which no video was available.

The review of one video showed a prisoner who was described in a use of force report as attempting to resist; the prisoner was fully complying with an ERT officer’s order to kneel when the officer threw him into a wall, injuring his head.

The federal investigators said they were “troubled to see this use of excessive force used against a compliant inmate who did not appear to pose a threat to officers or himself,” finding that the ERT’s actions were neither “justifiable nor necessary.”

Also noted was the lack of review and investigation of use of force incidents. When reviews were conducted, they were often done by supervising members of the ERT itself, who would sign off on their own actions. Allowing the ERT foxes to guard the WCJ hen house afforded jail staff “unfettered use of force” against prisoners.

A review of another video revealed a restrained prisoner in a prone, face-down position being sprayed in the face by a chemical agent. Referring to that incident, the DOJ report stated, “Even a casual review ... should have prompted some level of investigative inquiry because the video showed that unsafe and highly injurious tactics were used.” However, no indication

of an internal review was found.

Additional examples cited in the DOJ investigation included cases where prisoners were escorted naked, dragged across floors by their handcuffs, slammed against elevator walls and subjected to other tactics deemed “unsafe and unprofessional.” Further, several areas were noted in which the medical care at WCJ did not meet constitutionally required standards. In particular, inadequate dental care and control of infectious diseases such as staph infections were highlighted.

Prisoners awaiting dental care were routinely left without treatment for over a month and not provided pain medication. In one case, a prisoner who had submitted a request indicating “serious pain” had not been treated in four months.

Although the facility had reported no outbreaks of MRSA, a drug-resistant and potentially life-threatening form of staph infection, during the months leading up to the DOJ investigation numerous examples were referenced in which likely cases of MRSA were not identified because cultures had not been performed. Just four months after the investigation, a confirmed outbreak of MRSA occurred at the jail.

Mental health care issues at WCJ noted in the DOJ report included the use of force, intimidation and mechanical restraints to involuntarily administer medication to mentally ill prisoners. The report found that ERTs were employed 33 times in 2007 for such purposes, often using chemical agents or “hog-ties” to subdue prisoners.

As for juveniles, the DOJ stated that “WCJ’s treatment ... raises serious constitutional concerns....” Specifically mentioned were lengthy disciplinary sentences in Special Housing Units, inadequate mental health care, failure to adequately separate juveniles from adult prisoners, and failure to obtain parental consent for medical services and mental health treatment.

The DOJ report detailed a number of remedial measures that WCJ should take to remedy the constitutional violations uncovered by the investigation. Among those recommendations were developing more comprehensive policies

regarding use of force, including prohibitions on uses of force where there is no immediate threat to safety and the use of crowd control-sized chemical agents. Also mentioned was establishing better oversight of use of force through improved reporting and reviewing by independent staff. Better training, increased use of video recording and revisions of the disciplinary process and grievance procedure were stressed, plus the inclusion of a definition of excessive or unnecessary force in the jail's Standard Operating Procedures.

The DOJ's recommendations for medical and mental health care included improved screening and treatment, timely evaluations for mental illness, and the prevention of ERTs from being employed in the forced medication of prisoners unless there is an immediate risk.

While Assistant Attorney General Perez wrote that he believed the county had been cooperative and was capable and willing to resolve the issues presented in the report, he acknowledged that if no resolution could be reached the Attorney General may file suit pursuant to CRIPA to enforce the DOJ's recommendations and correct the constitutional violations of prisoners' rights.

"The conditions at the Westchester County Jail are woefully inadequate. Every member of our society deserves to have his or her civil rights respected, and Westchester County has failed to adhere to this ideal," Perez stated.

That finding came too late for mentally ill prisoner Zoran Teodorovic, who was beaten and kicked by guards at WCJ

in October 2000, lapsed into a coma and later died due to his injuries. Jail guard Paul M. Cote pleaded guilty to state charges related to that incident and received a three-month sentence. [See: *PLN*, Oct. 2002, p.20]. He was later prosecuted on federal charges and convicted; his conviction was dismissed by the district

court but reinstated by the Second Circuit Court of Appeals. Cote was sentenced to six years in prison on June 1, 2009. [See: *PLN*, Oct. 2009, p.44].

Sources: *DOJ CRIPA Investigation of the Westchester County Jail, New York Times*

California Official Resigns from State Post, Hired by Federal Receiver

Kathleen Webb, the California official who, as deputy director of the state's Department of General Services, oversaw the questionable purchase of \$1.2 million worth of vehicles that remained unused for months, and who resigned in October 2009, just two days after her actions were scrutinized in the press, did not remain unemployed for long.

About a month following her resignation, Webb, who earned \$106,800 a year in her state post, was hired to work in the office of policy, planning and evaluation for the California Prison Health Care Receivership at a slightly reduced salary of \$98,760.

As detailed in previous *PLN* articles, the Receivership was established by Judge Thelton Henderson of the U.S. District Court for the Northern District of California to oversee the state's prison medical system which, the court had determined, was violating prisoners' Eighth Amendment right to be free from cruel and unusual punishment [see this issue's cover story].

Webb became enmeshed in controversy when the *Sacramento Bee* reported on October 28, 2009 that she had overseen the purchase of 50 new Toyota Priuses that sat parked on the roof of a state garage near the capitol, unused for months. The report came at a time when state lawmakers were attempting to deal with a multi-billion dollar budget deficit by slashing spending and furloughing state workers.

Despite the controversial vehicle purchase, Webb was never accused of any fraud, corruption or unethical personal gain. The federal Receiver, J. Clark Kelso, welcomed her "formidable executive leadership skills and abilities," yet also noted, no doubt seeking to avoid additional scrutiny, that Webb was "not on the [Receivership's] executive management team."

Some of the Priuses were later placed into service for state employees, after being converted to plug-in electric vehicles at an additional cost of \$600,000.

Source: *Sacramento Bee*



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Washington DOC Pays \$3,275,000 to Family of Deputy Killed by Former Prisoner

In September 2009, the Washington Department of Corrections (DOC) agreed to settle a wrongful death suit filed by the family of a King County deputy who was murdered by a recently-released prisoner.

On December 2, 2006, while responding to a 911 call, Deputy Steve Cox of the King County Sheriff's Office, a former prosecutor, was shot and killed by Raymond O. Porter, a recent releasee from the DOC. After shooting Cox, Porter was shot by other deputies and then took his own life by shooting himself in the head.

Porter, an alleged gang member, had been sentenced in February 2003 to two years in prison and two years post-release supervision on a drug offense. While serving his sentence, he walked away from the Madison Work Release Program in June 2004.

Porter was subsequently apprehended, charged with escape, and ordered to serve an additional 33 months consecutive to the remainder of his first sentence. After being returned to prison, though, the DOC apparently failed to properly calculate his new sentence. As a result he was released early in August 2006.

The community corrections officer assigned to monitor Porter did not catch the error. Nor was that the officer's only mistake. According to the lawsuit filed by Cox's family, Porter repeatedly tested positive for illegal drug use, and even self-reported drug and alcohol use, but was not re-incarcerated and only received minor sanctions.

Just days after Cox was murdered, Washington Governor Chris Gregoire, who had previously worked in a state probation and parole office, announced an investigation into that incident and two others in which Seattle-area law enforcement officers were killed by former prisoners on post-release supervision. [See: *PLN*, Nov. 2007, p.20].

In all three cases the prisoners had been sentenced under the Drug Offender Sentencing Alternative (DOSA), which includes shorter prison terms combined with substance abuse treatment and community supervision.

In March 2007, the DOC released a 90-page report following the investigation ordered by Governor Gregoire. The report found that due to Washington's complex

sentencing system, prisoners often had sentences that were incorrectly computed. Also, the DOC had insufficient drug treatment program beds; thus, all three former prisoners who killed officers after their release did not get the treatment they were supposed to receive under their DOSA sentences. Further, community supervision officers were overworked and thus failed to properly monitor offenders—such as not conducting curfew checks, keeping current on paperwork, or giving required drug tests.

The DOC instituted new measures for monitoring released prisoners on community supervision following Cox's death, including a new range of sanctions to determine what penalties will be imposed when an offender fails to comply with conditions of post-release supervision.

Had Porter not been released from prison early, and had his community supervision been revoked, Deputy Cox would not have been murdered, his family claimed. Thus, according to their suit, the DOC was grossly negligent in releasing Porter early and failing to properly monitor him on post-release supervision.

Almost three years after Cox's death, on September 10, 2009, the DOC agreed to settle the lawsuit for \$3,275,000. Cox's family was represented by John Connelly of the Connelly Law Offices in Tacoma. See: *Cox v. Washington State Department of Corrections*, Superior Court for King County (WA), Case No. 08-2-18427-7. ■

Additional sources: *DOC press release*, www.seattlepi.com

U.S. State Prison Population Declines for First Time in a Decade

by Justin Miller

Recent advance data from the Bureau of Justice Statistics (BJS) indicates that not only has the rate of people entering the U.S. prison system declined in the past year, but the state prison population actually dropped in 2009 following a decade of growth.

In 2009 the number of people sent to state prisons nationwide decreased by 2,941, or .2 percent, compared with the previous year. In all, 24 states experienced a reduction in their prison populations last year.

In Michigan, which saw the largest drop, the prison population declined by 3,260 – a reduction of 6.7 percent. The California prison system decreased by 2,395 prisoners, while New York dropped by 1,660 and Texas by 1,257. The most dramatic reduction in terms of percentage was Rhode Island, with a decline of 371 prisoners, representing 9.2 percent of that state's prison population.

"The change has been dramatic," said Rhode Island Department of Corrections director A.T. Wall. "The staff is less harried ... there's a sense that we're in charge, a general feeling that things are calmer, more orderly."

These drops in state prison populations were mostly – but not completely

– offset by increases in 26 other states, including Pennsylvania (up 2,214 prisoners), Florida (up 1,527) and Louisiana (up 1,399).

As of mid-year 2009, BJS data also reflected a decline in the number of black prisoners nationwide, dropping to 841,000 from 846,000 in 2008. However, the incarceration rate for black males is still more than six times that of white males, and black females are three times as likely to be sent to prison as their white counterparts.

"While the declining number of African Americans in prison is encouraging," said Marc Mauer, executive director of the Sentencing Project, a research group devoted to lowering incarceration rates, "the scale of racial disparity in imprisonment is still dramatic."

Overall, the rate of incarceration in the United States fell from 509 prisoners per 100,000 population in 2008 to 504 in 2009. One contributing factor was a drop in crime; according to FBI statistics, last year crime was down in every category. Another factor has to do with finances.

In the midst of the nation's economic crisis, many feel the decline is a result of budget-strapped states seeking ways to

reduce the high costs of their corrections systems, which in some cases has translated to the politically-unpopular option of releasing more prisoners.

With budget shortfalls in nearly every state, many have taken a fresh look at their sentencing, parole and drug offense policies. Rhode Island recently ended mandatory minimum sentences for drug crimes, while Massachusetts and Ohio are also looking at reforms, and Michigan has developed a comprehensive re-entry initiative.

"More and more policymakers are realizing that new technologies and strategies are more effective and less expensive than warehousing somebody in a \$30,000-a-year taxpayer-funded prison cell," remarked Adam Gelb, a director at the Pew Center on the States, which tracks incarceration trends.

Although such moves have been applauded by some, they also have their critics. Will Marling, executive director of the National Organization for Victim Assistance, worries that the changes in criminal justice policy are for the wrong reasons. "The issue for us is that it seems to be an issue of financial expediency rather than a justice issue," he said.

Of course, it was decades of unchecked growth in the nation's prison population that led to the need for such financial expediency, after states realized they simply could not afford to maintain their draconian sentencing and imprisonment policies. Also, mass incarceration carries its own societal cost.

"The [prison] costs that accumulate down the years, they have an impact, too, on funding for education, for health programs, for tax rates," said Rhode Island DOC director Wall. "And while that can't be captured with the same impact or force that a horrible crime [can], the fact is, that has an impact, too."

This lesson has yet to be learned by the federal Bureau of Prisons, however,

which in 2009 saw an increase of 6,838 prisoners, resulting in a .2% net increase in the combined state and federal prison systems last year. Overall, the combined federal and state prison population in

the U.S. has been increasing since at least 1980. ■

Sources: *The Washington Post*, *Christian Science Monitor*, *Bureau of Justice Statistics*

New Jersey's Riverfront Prison Demolished

by Justin Miller

The Riverfront State Prison in Camden, New Jersey is no more.

Despite protests from prison employees and the union that represents them, which objected to the loss of jobs, the prison – which had drawn considerable criticism over the years as a colossal waste of the city's riverfront potential – was finally torn down. [See: *PLN*, April 2009, p.1].

On hand for an event marking the beginning of the demolition was a group of New Jersey officials that included then-governor Jon Corzine, who used a hammer to ceremoniously knock out the first brick. Corzine, who had made a campaign promise to raze the facility, called the prison's destruction "emblematic of what can happen in this great city in the years ahead."

The Riverfront facility was built 24 years ago at a cost of \$31 million, and was situated on 17 acres of the city's prime riverfront real estate. It will now make way for new developments that Camden officials hope will improve the city's tarnished image.

Having been dubbed an "eyesore," Riverfront State Prison, with its gray walls, razor-wire-topped-fences and looming guard towers, sat directly across the Delaware River from an upscale area of Philadelphia. The view of the New Jersey prison from bars and new condominiums on the Philadelphia side of the river was an all-too-constant reminder of the crime-plagued reputation of Camden – a city commonly known as one of the nation's most dangerous.

Community groups had lobbied against the facility's construction before it was even built, but cash-strapped city officials agreed to host the prison in exchange for state funding and the jobs that came with it. However, in the years since, both community members and politicians alike have been highly critical of the Riverfront facility.

"It should have never been here in the first place," lamented one of the speakers on hand for the demolition ceremony.

What will replace the prison is still unknown, but an ambitious neighborhood project has been proposed that calls for nearly \$2 billion in investments over 20 years. The project would replace the torn-down prison and surrounding area with a park-lined riverfront and several thousand new homes – a fitting end for an unwanted prison facility. ■

Sources: www.courierpostonline.com, www.myfoxphilly.com



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“Back to School” is a Guide to Success Following Release from Prison

by Gary Hunter

Even the most diligent planning does not ensure success. However, it is a proven fact that education significantly enhances one's chances to succeed. *Back to School: A Guide to Continuing Your Education After Prison* (the Guide) offers numerous helpful insights for entry or reentry into educational programs.

For many prisoners, education has never been their strong suit. Many dropped out before completing high school or are working to get their GED. Even those who did graduate probably have not been inside a classroom for many years.

The Guide notes that prisoners are not alone in that regard. For example, a 2000 study determined that more than 18% of adults in the U.S. never finished high school or earned a GED. Yet education is crucial to success. “According to the U.S. Department of Labor, a high school graduate earns about \$9,000 more per year on average than a person without a diploma,” the Guide states.

In 2006, the unemployment rate for people with a high school diploma was 4.3% and their median weekly earnings were \$595. By contrast, graduates with a two-year college degree had only a 3% unemployment rate and an average weekly income of \$721. A four-year degree yielded 2.3% unemployment and \$962 in average weekly income.

The Guide is packed with tips on how to reenter the educational arena no matter what level you had previously attained. In one section, ex-prisoner Dwight Stephenson describes a program called the College Initiative as a prisoner-friendly course that helped him get started on his college career after 14 years in prison.

From GED to Ph.D., the Guide walks you, step-by-step, through many of the major obstacles of enrollment in educational programs. It also provides examples of practical success-oriented steps such as obtaining and organizing relevant documents. Resumes, references and proper identification can make all the difference between success and failure, and the Guide takes the reader through the fine points of each of those areas.

The Guide also includes web addresses for a variety of educational resources. For those who are technologically challenged,

it provides step-by-step instructions on how to access websites and use email, and shows users how to identify academic institutions not accredited by the U.S. Department of Education.


No matter what your level of preparedness, the Guide can help you get started. One section contains instructions on how to select your direction of study by making a list of jobs you might like to have. Another section walks you through the complicated process of applying for financial aid from federal agencies.

Success can often hinge on relatively minor details such as having a quiet place to study or simply budgeting your time. The Guide suggests ways to work around even the busiest schedule.

One of the Guide's most appealing features is its suggestions for those who are still incarcerated. The very first appendix directs prisoners to the *Prisoners' Guerrilla Handbook to Correspondence*

Programs in the United States and Canada by Jon Marc Taylor. The 3rd edition of the *Guerrilla Handbook*, published by *Prison Legal News*, provides information about college and other educational courses that are available via correspondence study. The *Guerrilla Handbook* can be ordered on pp.53-54. [Also see: *PLN*, March 2009, p.38].

Back to School: A Guide to Continuing Your Education After Prison is a lifeline of hope for those willing to further their education in order to improve their chances of success once they are released.

The Guide is produced by the John Jay College of Criminal Justice through funding by the U.S. Department of Education. Note that it is only available in electronic form; thus, prisoners must arrange to have it printed out and mailed in. The Guide is available on *PLN's* website, or at: www.jjay.cuny.edu/Back_to_School_Final_5.28.08.pdf. 

ICE Policies and U.S. Deportation Laws Violate Human Rights

by Gary Hunter

A 64-page report issued last year by Human Rights Watch (HRW), a non-profit watchdog organization, indicates that changes in U.S. deportation laws implemented by Congress in 1996 are mostly targeting immigrants who commit nonviolent crimes.

Statistical data accumulated from 1997 through mid-2007 show that approximately 897,000 immigrants, both legal and illegal, were deported from the U.S. due to criminal offenses. Of those, only 28 percent had been convicted of violent crimes while 72 percent committed nonviolent crimes.

Specifically, 34 percent of the deportees were charged with nonviolent immigration offenses, 24 percent for nonviolent drug offenses, 8 percent for nonviolent theft and 6 percent for nonviolent general offenses.

Of those deported, almost 180,000 were legal residents in the U.S. and were returned to their home countries after serving their prison sentences. The non-

citizens legally present at the time of their deportation left behind an estimated 436,852 family members. The HRW report uses the word “tragic” to describe “lawful permanent residents ... forced to confront life without [their] fathers, mothers, children, husbands, or wives” following deportation.

More punitive immigration laws, enacted by Congress in 1996 and implemented in 1997, expanded the list of offenses for which non-citizens could be removed from the U.S. That same legislation also tied the hands of judges who previously had some discretion in deciding which immigrant offenders would be allowed to stay.

Thirty-year immigration judge James P. Vandello was sympathetic to the pre-1996, more lenient immigration laws. Comparing those laws to current ones, Judge Vandello said, “I have [in the past] been able to unite or re-unite families. On the other hand, in many [current] cases I have had to deal with the frustration of not being able to grant

relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit.”

By contrast, openly xenophobic Republican congressman Steve King embodies the excessively punitive nature of current deportation laws. The HRW study quotes King’s “ill-informed” ideas, presented before Congress, as an example of what he called a “... slow-rolling, slow-motion terrorist attack on the United States costing us billions of dollars and, in fact, thousands of lives” King backed up his rhetoric with statements suggesting that non-citizens are responsible for 12 murders, 13 negligent deaths and 8 child molestations a day.

The HRW report also calls attention to television personality Bill O’Reilly, who used his program on Fox News Network to inform viewers that illegal immigrants have placed the U.S. on the “tipping point” of “anarchy.”

ICE officials have made their own significant contributions to misinformation about non-citizens facing deportation. The HRW study required 2½ years of wrangling with ICE to obtain the data presented in the report. The first request for information, made under the Freedom of Information Act (FOIA), was sent to ICE on March 15, 2006.

ICE officials initially refused to

produce any information, stating it would significantly disrupt the agency’s operations. When they finally released the requested data in August 2008, it was learned that ICE’s records were woefully incomplete in almost every category. Even after taking more than two years to respond, over 26 percent of the records released by ICE for the HRW study “contain[ed] no crime data.”

ICE has combined secrecy with deception by releasing press updates suggesting that the majority of deportations involve violent criminals, when the truth is precisely the opposite.

Current immigration legislation combined with unethical ICE practices places the deportation policies of the U.S. crosswise with international human rights laws. For example, *PLN* previously reported ICE’s practice of illegally drugging deportees when sending them back to their home country. [See: *PLN*, Jan. 2009, p.10].

More recently, ICE officials misrepresented the number of deaths in detention facilities in two separate reports. [See: *PLN*, Nov. 2009, p.26; Sept. 2008, p.30]. Now, according to Human Rights Watch, ICE’s reluctance to release information concerning the agency’s deportation practices “suggests at best a lack of commitment to transparency and ... at worst it suggests deliberate stonewalling.”

HRW acknowledges that non-citizens have an obligation to adhere to the laws of this country. However, the organization suggests that U.S. laws governing immigration should comply with the articles of the United Nations, which call for deportation decisions to be based “... on the potential danger to the community [and] necessarily requires an examination of the circumstances of the refugee as well as the particulars of the specific offence.”

In the words of Judge Harry Pregerson, “I pray that soon the good men and women in our Congress will ameliorate the plight of [immigrant] families ... and give us humane laws that will not cause the disintegration of such families.”

Unfortunately, Judge Pregerson’s heartfelt prayer was the dissenting opinion in *Memije v. Gonzales*, 481 F.3d 1163 (9th Cir. 2007), voiced in opposition to the “harsh conclusion” of the majority ruling, which held that the appellate courts lack jurisdiction to review certain deportation decisions. *Memije* involved the deportation of two undocumented immigrants, a husband and wife, who faced separation from their four children, ages 6 to 17, who were U.S. citizens. ■

Source: “*Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Non-violent Offenses*” (*Human Rights Watch*, April 2009)

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U.S. Department of Justice Releases 2008 Capital Punishment Statistics

by Matt Clarke

In December 2009, the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice released statistical data on capital punishment in the United States for 2008. The report was later revised to include preliminary statistics on capital punishment in 2009.

Of the 37 executions carried out in 2008, most were in Texas (18), followed by Virginia (4) and Georgia and South Carolina (3 each). One execution was by electrocution and the others by lethal injection. All of the executed prisoners were male; 20 were white and 17 were black.

Texas also led the capital punishment statistics for 2009 with 24 executions, followed by Alabama (6), Ohio (5) and Georgia, Oklahoma and Virginia (3 each). There were a total of 52 executions in 2009 – an increase of 40% over the previous year.

The average amount of time that condemned prisoners had spent on death row as of December 31, 2008 was more than 12 years. Thirty-seven states and the federal government had statutes authorizing capital punishment at year-end 2008. Thirty-six states and the federal government authorized execution by lethal injection, nine states allowed electrocution, four states permitted lethal gas to be used, three states allowed hanging and three states authorized firing squads.

Due to a state Supreme Court ruling that held electrocution violated the state constitution, Nebraska had no authorized method of execution in 2008. The Nebraska legislature has since adopted lethal injection as a means of capital punishment, and the state's new execution chamber was unveiled in July 2010.

There were 111 new death sentences imposed in 2008, the smallest number since at least 1993. Excluding executions, 82 prisoners were removed from death row that same year – which included overturned convictions or sentences, commutations, and deaths from other causes.

From 1977 through 2008, 7,658 people were sentenced to death. Of those, 15% have been executed and 5% died of causes other than execution. At the end of 2008 there were 3,207 prisoners under sentence of death nationwide. California had the most death row prisoners (669), followed by Florida (390), Texas (354) and Pennsylvania (223).

New York was the only state that authorized capital punishment yet had no prisoners on death row; a 2004 state court ruling had imposed an effective moratorium on executions, which is still in effect.

At year-end 2008, 98.2% of death-sentenced prisoners were male, 56.1% were white, 41.7% were black, and 13.2% were of Hispanic origin. The median education level of death row prisoners was 12th grade; 40.8% graduated from high school or had a GED and 9.2% had some college, but 13.5% never got past the 8th grade. Of all death row prisoners, 34.5% had no prior felony convictions.

The BJS statistics provide some insight into the characteristics of prisoners who face the ultimate punishment in our

revenge-oriented, eye-for-an-eye system of criminal justice. Despite an increase in executions in 2009, the trend in the United States appears to be toward rethinking the death penalty, with two states recently repealing their capital punishment statutes (New Mexico in 2009 and New Jersey in 2007), and fewer death sentences being imposed in the states that authorize executions. Let us hope that trend continues.

The BJS statistical tables are available online on *PLN*'s website or at: www.ojp.usdoj.gov/bjs. ■

Sources: *Capital Punishment 2008 – Statistical Tables*, Bureau of Justice Statistics, NCJ 228662 (December 2009); *Journal Star*; www.deathpenaltyinfo.org

Problems Persist at Privately-Operated Rhode Island Jail

by Justin Miller

On June 30, 2009, a former employee at the Donald W. Wyatt Detention Facility, a privately-operated jail near Providence, Rhode Island, pleaded guilty to lying to federal officials about sexual misconduct involving an immigration detainee, marking yet another embarrassing problem in a string of scandals to hit the facility.

Glenn Rivera-Barnes, formerly a medical technician at the 746-bed Wyatt jail, admitted he had lied to federal investigators, telling them that the male detainee had sexually assaulted him when in fact he had initiated the unwanted sexual encounter. Rivera-Barnes' involvement in the incident was confirmed by DNA evidence.

Rivera-Barnes had been fired in January 2009; he was previously employed by Cornell Companies, which operated the Wyatt facility until 2007. It is now run by the Central Falls Detention Facility Corporation. Rivera-Barnes was sentenced on December 21, 2009 to two years' probation plus 480 hours of community service and participation in a mental health program. See: *United States v. Rivera-Barnes*, U.S.D.C. (D. RI), Case No. 1:09-cr-00106-S-LDA.

On February 11, 2010, Wyatt's warden, Wayne T. Salisbury, Jr., and Chief

Financial Officer, Tammy L. Novo, were fired following an eight-week audit of the facility's operations. They had been suspended in December 2009. The 55-page audit report found, among other deficiencies, that the jail's staff was operating with little oversight and accountability.

The audit further found that Novo had been ordered to report directly to Warden Salisbury instead of the Board of Directors, without the Board's knowledge, and that she had intentionally delayed responses to a financial report that could have demonstrated the facility was not able to make its debt payments.

Two days before Salisbury and Novo were terminated, Wyatt's public relations spokesman, Bill Fischer, and his company, True North Communications, resigned. "This situation has certainly created an unhealthy work environment and I have decided to end it on my terms," Fischer stated.

Previously, in April 2009, the Board of Directors had fired Wyatt's executive director, Anthony Ventetuolo, Jr., and his management firm, Avcorr Management LLC. Also, on April 27, 2009, the Chairman of the Central Falls Detention Facility Corporation, Daniel Cooney, was terminated after he equated the Wyatt jail to the U.S. military prison at Guantanamo

Bay, Cuba. [See: *PLN*, July 2009, p.50].

"Comparing the facility to one of our nation's most controversial detention centers clearly demonstrates he does not share my goal to restore public confidence in the operations of the Wyatt Detention Facility," said Central Falls Mayor Charles Moreau.

The firings were a setback for the jail, which was already under considerable scrutiny related to the abuse and death of a prisoner. The widow of Hiu Lui Ng, a 34-year-old Chinese computer engineer held at the facility on an immigration violation, is pursuing a federal lawsuit that alleges Wyatt officials abused her husband, accused him of faking an illness and denied him medical care.

Ng's attorneys filed a habeas petition to get him adequate medical treatment but he died on August 8, 2008, just five days after being seen by a doctor. He had advanced, undiagnosed liver cancer and a fractured spine.

The lawsuit accuses Wyatt guards of denying Ng the use of a wheelchair, forcibly moving him while he was in excruciating pain to meet with Immigration and Customs Enforcement (ICE) officials, throwing him on the floor and dragging

him by his arms and legs, and claiming he was only pretending to be sick. Ng was detained at Wyatt because he had overstayed his visa.

"Hiu Lui Ng was tortured, brutalized, and deprived of the dignity every human being deserves by officials at the Wyatt Detention Center," his family said.

On June 14, 2010, the district court denied a motion by ICE to dismiss the lawsuit for lack of jurisdiction. Ng's family is represented by Rhode Island ACLU cooperating attorney Jack McConnell, with the law firm of Motley Rice LLC. See: *Qu v. Central Falls Detention Facility Corp.*, U.S.D.C. (D. RI), Case No. 1:09-cv-00053-S-DLM.

While the federal suit over Ng's death remains pending, immigration officials have already acknowledged he was mistreated, based on an ICE investigation that found Ng was denied medical care, subjected to excessive force and denied access to counsel. Wyatt's contract to hold ICE prisoners was terminated in December 2008 and the remaining 153 immigration detainees at the facility were removed. The loss of the ICE contract reportedly cost the jail \$100,000 a week in lost revenue, and threatened its ability

to finance its debt.

"This administration takes any allegation of inadequate medical care or ill treatment seriously and will not accept or tolerate any willful misconduct," said ICE spokesman Brian P. Hale. Unfortunately, ICE has failed to acknowledge its own responsibility for keeping Ng and other immigration detainees safe.

After Salisbury and Novo were fired in February 2010, the Chairman of Wyatt's Board of Directors issued a statement that said the Board would "continue to purge any previous culture of wrongdoing at Wyatt that has been carried over in any shape or manner from the past ... and has resulted in the difficult financial situation that exists today."

Preventing the facility's guards from sexually abusing prisoners, denying them medical care and wheelchairs, dragging them by their arms and legs, and accusing them of faking a fatal illness might help, too. The U.S. Marshals Service continues to house federal detainees at the Wyatt facility. ■

Sources: *Nashua Telegraph*, *New York Times*, *Associated Press*, *Providence Journal*, www.rifuture.org, www.riachu.org

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Maricopa County Throws Sheriff Arpaio Under Improperly Purchased Bus

by Matt Clarke

On October 30, 2009, the Maricopa County Internal Audit Department released a report critical of Sheriff Joe Arpaio's purchase of a \$456,221.57 bus specially equipped to transport prisoners. Among other criticisms, the report noted that the Maricopa County Sheriff's Office (MCSO) failed to obtain the approval of the Board of Supervisors prior to the bus purchase, failed to obtain board approval for a contract to purchase an item in excess of \$250,000, failed to get board approval for a sole source purchase exceeding \$50,000, and failed to obtain Office of Management and Budget approval for an exemption to the county's capital purchasing freeze in effect at the time.

Sheriff Arpaio also failed to deposit Jail Enhancement Fund (JEF) monies with the County Treasurer, as required by Arizona state statutes and JEF guidelines, and failed to follow procurement policies required by state law, county policies and JEF guidelines. Essentially, the Audit Department report accused Arpaio of failing to seek the best price for the bus by using competitive bidding, failing to have adequate controls in place to protect public funds from misuse, and violating county purchasing policies.

JEF funds are a revenue stream from fines, penalties and forfeitures. Instead of depositing JEF income with the County Treasurer, Arpaio set up a separate account with Bank of America. It was that account he used to purchase the custom bus from Motor Coach Industries, Inc. (MCI) on October 8, 2008. MCI delivered the bus in May 2009, but the Board of Supervisors refused to authorize tags and title for the vehicle, so it has sat unused since that time.

Arpaio's imperious response to the Audit Department's report was that he had decided he was the only one authorized to spend JEF funds, and therefore they were not subject to the capital purchasing freeze or prior board approval requirements. He said the bus purchase "was not made maliciously or as an attempt to usurp the policies of the Board of Supervisors," and claimed the Board's criticism and refusal to authorize title and tags were "bureau-

cratic policies and power plays."

While Arpaio knows a thing or two about bureaucratic policies and power plays himself, the Maricopa County Board of Supervisors wasn't willing to back down. On March 29, 2010, the Board authorized the county to sue MCI unless the company took the bus back and refunded the purchase price.

MCI apparently wasn't willing to do so, prompting Maricopa County to file suit in federal court on March 30, claiming

that "MCI's sale and MCSO's purchase of the bus violated State law, County procurement policies and JEF guidelines." The Sheriff's Office was not named in the lawsuit, but has moved to intervene. See: *Maricopa County v. MCI*, U.S.D.C. (D. Ariz.), Case No. 2:10-cv-00713-ROS. ■

Sources: *Maricopa County Internal Audit Department Report on MCSO Bus Procurement Contract*, Arizona Republic, Phoenix New Times, Associated Press

North Carolina Innocence Commission Verifies Wrongful Conviction

by Matt Clarke

After examining hundreds of cases, the North Carolina Innocence Inquiry Commission has verified its first claim of innocence – which resulted in both controversy and stinging criticism from prosecutors.

In 2006, North Carolina became the first state to establish a government agency with the sole mandate of verifying prisoners' claims of innocence. That unprecedented action was taken following a string of high-profile wrongful convictions, including those of Darryl Hunt and Allen Gell.

Hunt had served 18 years for rape and murder; he later received \$1.95 million in settlements from North Carolina and the City of Winston-Salem. [See: *PLN*, Oct. 2008, p.47]. Gell, who was sentenced to death, served 8 years prior to his release and received a \$3.9 million settlement from the state plus \$93,750 from the town of Aulander. [See: *PLN*, Nov. 2005, p.8]. Both Hunt and Gell were exonerated in 2004.

"As a state that exacts the ultimate punishment, we should continue to ensure that we have the ultimate fairness in the review of our cases," then-Governor Mike Easley said when the Innocence Inquiry Commission was formed. [See: *PLN*, March 2007, p.24].

Fortified with a \$360,000 annual budget, the Commission examined hundreds of claims but had never verified a prisoner's innocence until September 2009, when it presented the case of Gregory F. Taylor to an eight-member panel that included

a judge, a prosecutor, a defense attorney and a victims' advocate. The function of the panel was to determine if the case should be referred to a three-judge panel with the power to free prisoners who were wrongly convicted. The Commission voted unanimously to have the judges consider Taylor's case.

All of the cases previously reviewed by the Commission had been rejected for reasons such as the prisoner having pleaded guilty, a lack of evidence to support the innocence claim, or even new evidence of guilt. In Taylor's case, the evidence against him was the testimony of a jailhouse snitch and a blood stain in his car. His attorneys said that evidence had been discredited since his conviction. Operating in favor of Taylor was the fact that he had continuously proclaimed his innocence over 16 years of incarceration, and that another prisoner, Craig Taylor (not related to Greg) had confessed to the crime. Craig Taylor also provided details about the 1991 rape and murder of which Greg Taylor had been convicted.

Craig Taylor's confession sparked controversy and criticism because he had a history of confessing to murders, some of which he clearly could not have committed. His penchant for confessing to crimes was not known to the Commission when it voted to send Greg Taylor's case to the three-judge panel.

Further, Craig Taylor continued to confess to dozens of murders after the

Commission hearing, including telling journalists that he murdered prostitutes and rival drug dealers and dumped their bodies in Chesapeake Bay, and contacting the television show *Unsolved Mysteries* to confess to 65 unspecified murders he committed as a master criminal known as "Ninja." According to Greg Taylor's prosecutor, C. Colon Willoughby, Jr., those contrived confessions undermined his claim of innocence.

Kendra Montgomery-Blinn, executive director of the Innocence Inquiry Commission, said they went to great lengths to verify Craig Taylor's credibility. He was a known acquaintance of the victim, a prostitute, and his confession stated he became jealous after seeing her in a car with another man and beat her to death with a bat, stabbed her with a small knife and partially disrobed her.

His simultaneous claim that he had shot to death four women in New York, Miami and Raleigh did not deter the Commission's investigator. Nonetheless, Montgomery-Blinn said she wished she had known about the other confessions before the Commission presented Greg Taylor's case to the judicial panel. The Commission also considered additional evidence, includ-

ing the credibility of the jailhouse snitch and the fact that the blood stain found in Taylor's car turned out not to be blood.

Ultimately, whether or not the Commission had properly weighed Craig Taylor's confession as part of Greg Taylor's claim of innocence was moot, because the three-judge panel had the final say. And that say, announced on February 17, 2010, was that there was "clear and convincing evidence" that Greg Taylor had been wrongly convicted.

When Taylor, 47, was released from prison the same day of the judicial panel's decision, state officials gave him a \$45 check as "gate money." Hopefully he will seek and receive more adequate compensation for the 16 years he served behind bars for a crime he didn't commit.

"North Carolina's commission is an important model for the adjudication of innocence claims," stated Barry Scheck,

director of the Innocence Project. "In the American court system, there are normally procedural bars that get in the way of litigating whether someone is innocent or not." That is especially true in cases like Taylor's that do not include DNA evidence.

Several other states are considering forming innocence commissions. On July 2, 2010, the Florida Supreme Court issued an administrative order creating a commission "to conduct a comprehensive study of the causes of wrongful conviction and of measures to prevent such convictions." Florida's commission, however, will only review wrongful convictions that already have been proven, not new claims of innocence. ■

Sources: *Associated Press*, *New York Times*, www.newsobserver.com, *CNN*, www.deathpenaltyinfo.org

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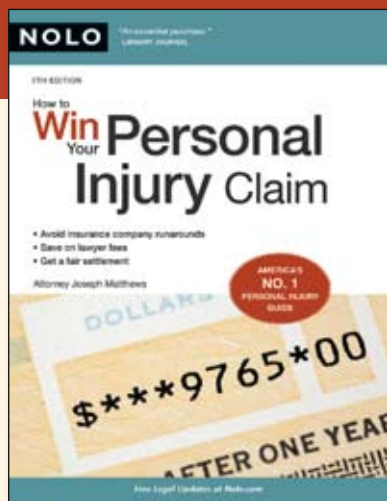
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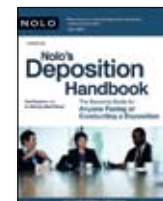
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Wisconsin: Taycheedah Lawsuit Set for Trial

by Michael Brodheim

On November 24, 2009, a U.S. District Court judge in Wisconsin substantially denied prison officials' motion for partial summary judgment and set for trial a class-action suit that alleges medical and mental health care provided to female prisoners at Taycheedah Correctional Institution (TCI) violates the Eighth Amendment, Title II of the Americans with Disabilities Act, and § 504 of the Rehabilitation Act. [See: *PLN*, Jan. 2007, p.20]. The district court granted the defendants' summary judgment motion only to the extent that it sought dismissal of claims related to dental care.

After hearing testimony from expert witnesses the court catalogued a "mountain of evidence," which, it found, demonstrated that "there are 'systemic and gross deficiencies' in staffing, facilities and procedures at TCI." The evidence easily established that there were genuine issues of material fact sufficiently in dispute to preclude summary judgment. In the court's words, "it [is] curious that the defendants would even bother moving for summary judgment when their own expert describes the system as one designed to let people 'fall through the cracks.'"

Among the deficiencies noted by the court, "TCI's nursing system places patients at risk of harm by its failure to properly triage and respond to prisoner health concerns"; patients with acute conditions were not seen by an appropriate medical provider in a timely manner; "[n]urses at TCI fail to conduct nursing assessments according to nursing protocols" and thereby put patients at risk of harm; patients endure long delays without necessary care; TCI's medication system fails to reliably provide antibiotics to patients; TCI has neither an onsite infirmary nor the ability to provide infirmary-level health care; and patients do not receive timely follow-up care after discharge from offsite hospitals.

Further, the district court held that the absence of an on-site medical director contributed to "the lack of 'direction and accountability' in the system"; in regard to mental health care, "TCI has too few psychologists and social workers to provide adequate mental health services"; prisoners with mobility-related disabilities were not allowed to eat in the dining hall with other prisoners, but were forced to eat alone in

their cells; "treacherous" sidewalk paths caused wheelchair-bound prisoners to miss out on important activities, such as religious services and educational classes, or to be late for time-sensitive medical care such as insulin injections for diabetics; and TCI generally failed to accommodate prisoners

with hearing and vision-related disabilities.

This case remains pending, with the parties participating in settlement discussions. A five-week trial has been scheduled to start on September 27, 2010. See: *Flynn v. Doyle*, 672 F.Supp.2d 858 (E.D. Wis. 2009). ■

California Prison Health Care System Plagued by Understaffing, Overtime

by Michael Brodheim

The rampant use of overtime to fill gaps in medical staffing in California's prison system has resulted in windfalls for some of the state's prison health care workers, fatigue for others, and lapses of judgment that endanger the health of prisoners entrusted to their care, according to a December 2009 investigative report by the *Sacramento Bee*.

The *Bee*'s investigation found that many prison health care employees average 12 hours a day, while others routinely log 16- to 18-hour shifts for months at a time. The impact of such extreme work schedules has both financial and clinical consequences.

A report from the independent, non-profit Institute of Medicine – the health arm of the National Academy of Sciences – found that prolonged wakefulness has the same effect on skills and judgment as being drunk. According to Charlene Harrington, a professor at the University of California San Francisco School of Nursing and co-author of the Institute of Medicine study, "Above eight hours a day, the errors [in medical judgment] start going up exponentially."

Such errors include misdiagnoses, communication breakdowns and medication blunders, which contributed to nearly 300 "extreme departures from the community standard" of medical care in California prisons in 2007.

"Last year we had a couple of nurses who collapsed due to exhaustion," admitted Orelene Sargenti, a licensed vocational nurse at the Deuel Vocational Institution. Asked what happens when health care workers are found sleeping on the job, a prison nursing director said, "We would wake them up."

The *Bee*'s investigation found that

prison health care staffing problems were the result of a state budget that routinely underestimated the need for doctors, nurses and other health care workers. "The people who are writing the budgets aren't acknowledging the reality," stated J. Clark Kelso, the federal Receiver appointed to oversee health care in California state prisons (see this issue's cover story).

Another contributing cause for the excessive hours worked by prison medical staff is California's mandatory furlough program for state employees, which results in overtime to cover vacant – but necessary – positions. [See: *PLN*, June 2010, p.36]. Plus in some cases there has been outright fraud and corruption, such as the indictment of six doctors at Salinas Valley State Prison in November 2008 for falsifying time sheets. [See: *PLN*, Feb. 2009, p.29].

What is less clear from the *Bee*'s investigation is whether the negative effects of prison health care staffing problems outweigh the improvements made by the Receiver over the past several years – including greater access to medical care, better qualified physicians, upgraded clinics and new equipment.

One common measure of a prison health care system's efficacy is the death rate. According to Dr. Dwight D. Winslow, the Receiver's acting chief executive for medical services, improvements by the Receiver's office have led to a dramatic drop in prisoner deaths, which reached historic highs in 2006. Notwithstanding that rosy assessment, the current death rate in California prisons – 205 deaths per year for every 100,000 prisoners – is still 9 percent higher than the average rate from 1996 to 2001, before intervention by the federal courts.

The *Bee's* investigation found that prison nursing assistants logged the most overtime, averaging 1½ extra work weeks per month. About 95 percent of prison nurses worked overtime in 2008 – a higher proportion than the employees of any other state agency. Fifty-two nurses earned more than \$187,535 in base pay plus overtime – that is, more than the salary of Cali-

fornia's Secretary of Corrections.

One registered nurse, Marie Punla, earned \$300,000 (including benefits) by logging 93 hours a week at Corcoran State Prison – the equivalent of six 16-hour shifts a week. Even more astounding, Vanessa Avila, a medical assistant employed as a temp worker at the Deuel Vocational Institution, reportedly worked a time-clock-defying 26.5 hours a day, on average,

according to her state pay records.

California's prison system paid approximately \$60 million in overtime to health care employees in 2008, plus another \$111 million in overtime pay for guards to provide security for those workers during in-prison and off-site medical appointments. ■

Source: *Sacramento Bee*

\$140,000 Settlement in Washington Jail Detainee's Suicide

Pierce County, Washington has paid \$120,000 to settle a federal lawsuit that claimed its policies were deliberately indifferent to the risk of suicide by pretrial detainees at the Pierce County Detention and Corrections Center (PCDCC). The City of Lakewood paid an additional \$20,000 to settle the case.

The suit was filed by Ralph Close, father of James Close, who had been arrested for bank robbery. After Ralph provided authorities with details concerning his son's role in the robbery, they conducted a home search and obtained a confession from James.

In making the June 16, 2006 arrest, detectives noted that James suffered from mental problems, had a history of suicide attempts and exhibited signs of depression. Under other remarks it was noted in capital letters that James "has attempted suicide in the past. May be bipolar. Became very angry after confessing." At the top of the form in large bold print the report stated, "Suicide watch."

Despite that information, James was not referred for mental health care or

placed on suicide watch after the booking process at PCDCC. Instead he was taken to a two-man cell, where his cellmate was not present at the time. Several hours later the cellmate was escorted back to the cell, and Close was found hanging from a bed sheet without a pulse.

The lawsuit against Pierce County alleged deficient nurse staffing, failure to perform mental health screening and evaluations, and lack of training that resulted in Close's preventable suicide. The case settled for a total of \$140,000 from the county and city defendants, and was dismissed by joint motion of the parties on February 25, 2010. Pierce County Sheriff Paul Pastor issued a letter

of apology for Close's death. The plaintiffs were represented by the Seattle law firm of McDonald, Hogue and Bayless. See: *Close v. Pierce County*, U.S.D.C. (W.D. Wash.), Case No. 3:09-cv-05023 -RBL. ■

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California: Audit Finds CDCR Overpaid Employees Who Supervise Prisoner-Workers

by Michael Brodheim

A follow-up investigation by the California State Auditor has found that the Department of Corrections and Rehabilitation (CDCR) overpaid certain employees who supervise prisoner-workers.

In California, non-custodial staff who supervise prisoner-workers qualify for a monthly pay differential which ranges from \$190 (for an office technician or a cook specialist I) to \$325 (for a chaplain) and \$400 (for a supervising registered nurse), but only if the employee meets specific requirements set forth in the collective bargaining agreement between the state and the employee's bargaining unit.

The requirements applicable to all bargaining units are that the employee have regular, direct responsibility for supervising the work of at least two prisoners, who collectively work at least 173 hours a month; the employee must provide on-the-job training to the prisoners he or she supervises and evaluate their work performance; and the prisoners being supervised must perform work that otherwise would be performed by civil service employees.

An October 2008 investigation by the State Auditor had previously found that CDCR overpaid nine office technicians at R.J. Donovan Correctional Facility a total of \$16,530 for supervising prisoners over a three-year period. Suspecting that the problem was not limited to one facility but rather symptomatic of a general failure of internal controls, the auditor launched another, broader inquiry.

In its second investigation, reported in a November 17, 2009 letter to Governor Schwarzenegger and legislative leaders, the State Auditor reviewed a random sample of monthly differential payments made to 153 CDCR employees at six facilities over a 12-month period, from March 2008 through February 2009.

Payments were deemed to be potentially improper if documentation indicated either that the employee had not in fact supervised two prisoners, or that the prisoners had not collectively worked at least 173 hours. The payments were not classified as actually improper, however, unless the employee failed to meet those requirements for either two or more con-

secutive months or for more than four of the 12 months in the review period.

The auditor found that 23 of the 153 reviewed employees received improper differential payments totaling \$34,512. Extrapolating from that data, the State Auditor estimated that overall the CDCR had overpaid prisoner-supervising employees between \$237,711 and \$588,376 in improper differentials during the 12-month period that was examined.

The auditor concluded that the improper payments were attributable, in all likelihood, to the lack of internal controls necessary to ensure that employees who supervise prisoner-workers satisfy all of the requirements for receiving pay differentials. It recommended that the CDCR initiate collection efforts to recover the improper overpayments. The report is on *PLN's* website. See: *California State Auditor Report, I2009-0702*. ■

Prosecutorial Misconduct Case Pending Before Supreme Court Settles for \$12 Million

by Brandon Sample

On January 4, 2010, the U.S. Supreme Court side-stepped resolving an important case that would have likely exposed prosecutors to greater liability when they engage in prosecutorial misconduct.

The case, *Pottawamie County v. McGhee and Harrington*, S.Ct. No. 08-1065, was filed by Curtis W. McGhee, Jr. and Terry J. Harrington after both were wrongly convicted and spent 25 years in prison for a murder they did not commit.

In July 1977, Jerry Schweer, a retired police captain, was working security at a local car dealership in Council Bluffs in Southwest Iowa. He was killed with a shotgun, and his body was found ten days later near some railroad tracks.

Schweer's murder was a special case for Council Bluffs police and county prosecutors – he was one of their own. Detectives Daniel C. Larsen and Lyle W. Brown worked the case along with prosecutors David Richter and Joseph Hrvol.

Early leads pointed to Charles Gates, a white male who matched the description of a suspect seen in the area at the time of the shooting, walking his dogs and carrying a shotgun. Nevertheless, police abandoned Gates as a suspect, opting instead to blame the murder on McGhee and Harrington, two African-American youths.

To maintain the homicide charge against McGhee and Harrington, police

and prosecutors relied on a fabricated account of the murder as told by Kevin Hughes, a 16-year-old witness who had been arrested for car theft. Hughes, it would later be learned, falsely implicated McGhee and Harrington after police and prosecutors threatened to charge him with Schweer's murder instead. Prosecutors then knowingly used Hughes' false testimony at trial.

Over the years while McGhee and Harrington languished in prison, prosecutors covered up their misconduct with more lies. For example, during a 1987 post-conviction proceeding, prosecutors lied about the existence of other potential suspects in the case even though another suspect existed – Gates, who had failed a polygraph test during the Schweer murder investigation.

Eventually, Gates' identity became known. Harrington's conviction was reversed by the Iowa Supreme Court in February 2003, and he was granted a new trial. See: *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). One justice wrote that he was "outraged" by the suppression of evidence in Harrington's case. Despite this development, a new prosecutor and police investigator, Matthew Wilber and David Dawson, resorted to their predecessors' tactics to secure another conviction.

Wilber and Dawson pressured Hughes to recant his statement that he had been forced to lie. Hughes ultimately refused to play along, Harrington received a reprieve from the governor, and the charges against

him were finally dropped in October 2003 – but not before Wilber had duped McGhee into accepting a no-contest plea to the murder charge that resulted in his release with time served.

McGhee and Harrington sued all of the prosecutors and investigators involved in their wrongful convictions, claiming misconduct. Their lawsuit made it all the way to the U.S. Supreme Court, which granted certiorari in the case on April 20, 2009 to resolve the question of whether the prosecutors were entitled to absolute immunity.

Specifically, the question before the Court was “whether a prosecutor may be subjected to civil trial and potential damages for a wrongful conviction and

incarceration where the prosecutor allegedly (1) violated a criminal defendant’s ‘substantive due process’ rights by procuring false testimony during the criminal investigation, and then (2) introduced that same testimony against the criminal defendant at trial.”

However, after oral argument was presented the parties restarted settlement negotiations, and the prosecutors agreed to settle the case for \$12 million – \$7 million going to Harrington and \$5 million to McGhee. The Supreme Court dismissed the writ of certiorari following the settlement without entering a decision. The underlying appellate ruling was *McGhee v. Pottawattamie County*, 547 F.3d 922 (8th Cir. 2008).

The case is not completely over, though. McGhee and Harrington’s claims against the City of Council Bluffs and the Council Bluffs police department are still pending but have not yet been set for trial.

McGhee is represented by Stephen Davis of Canel, Davis & King, a Chicago law firm, and Harrington is represented by J. Douglas McCalla of the Spence Law Firm of Jackson, Wyoming. See: *McGhee v. Pottawattamie County*, U.S.D.C. (S.D. Iowa), Case No. 4:05-cv-00255-RP-TJSC. ☞

Additional sources: www.nlj.com, www.talkleft.com, *Spence Law Firm press release*, *Washington Post*

New Picture on Violence in Federal Prisons

by Brandon Sample

As the federal prison population continues to rise – to over 206,500 prisoners as of mid-year 2009 – violence in the U.S. Bureau of Prisons (BOP) is both up and down, according to recent data obtained from BOP officials.

Last summer *PLN* reported increasing levels of violence in the BOP, focusing largely on U.S. Penitentiaries (USPs), high-security facilities that house some of the BOP’s most dangerous prisoners. [See: *PLN*, Aug. 2009, p.10]. Anecdotal evidence from assaults, riots and homicides at USPs and other federal prisons suggested a trend toward increased violence, but new data suggests otherwise.

The rate of serious prisoner-on-prisoner assaults in BOP facilities has steadily decreased from 13.06 assaults per 5,000 prisoners in 2005 to 10.46 in 2008.

Likewise, the rate of serious prisoner-on-staff assaults has decreased. In 2005

there were 3.70 serious assaults on staff per 5,000 prisoners, compared to only 2.17 in 2008. Traci Billingsley, a spokesperson for the BOP, acknowledged the decline. “As you can see from the numbers, we really haven’t experienced an increase in the rate of serious assaults on staff over the past several years,” she said. However, Billingsley also noted that “there is a sense that the assaults are more severe.”

While the rate of serious assaults has been in decline, the number of prisoner-on-prisoner homicides in BOP facilities has been increasing. In 2005 there were 12 prisoner homicides. In 2006 that number dropped to four, but rebounded in 2007 to 12 murders, then increased to 15 in 2008. Over the past ten years there has only been one prison staff member murdered in the BOP.

Less serious assaults on staff also have increased. In 2005 there were 38.94 non-

serious assaults on BOP staff members per 5,000 prisoners. In 2006 the number dropped to 37.45, then decreased again the following year to 34.45 but jumped to 40.29 assaults per 5,000 prisoners in 2008.

Less serious prisoner-on-prisoner assaults have been up and down, but mostly up with 58.64 per 5,000 prisoners in 2005, 64.35 in 2006, 69.52 in 2007, and 67.93 in 2008.

The new data from the BOP comes at a time when the American Federation of Government Employees (AFGE) – the union that represents federal prison guards – is pushing for additional funding from Congress to hire more guards, using the argument that violence in federal prisons is out of control. ☞

Sources: *U.S. Bureau of Prisons, Bureau of Justice Statistics*

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Released Prisoners More Likely to Die

by Brandon Sample

Recently-released prisoners are at a higher risk of death, according to studies published in the *New England Journal of Medicine* (NEJM) and the *American Journal of Public Health*.

For a NEJM report entitled *Release from Prison – A High Risk of Death of Former Inmates*, the authors reviewed data related to 30,237 prisoners released from the Washington Department of Corrections (DOC) between July 1, 1999 and December 31, 2003.

The results were alarming. Within a mean follow-up period of 1.9 years after being released, 443 of the former prisoners died. Of those, 253 died within a year after they left prison. The overall mortality rate for former prisoners was 777 per 100,000 person-years, or almost 3.5 times higher than the rate for people not released from prison, which was calculated at 223 per 100,000.

The primary cause of death among ex-prisoners tracked in the NEJM study was drug overdose, accounting for about a quarter of all fatalities. Of those, 27 occurred within two weeks of release. Cocaine was involved in most overdose-related deaths, followed by methamphetamine, heroin, methadone and antidepressants.

The second major cause of death was cardiovascular disease. Homicide ranked third, followed by suicide, cancer and motor vehicle accidents.

Deaths caused by overdose, homicide and suicide were predominant in released prisoners under the age of 45, while cardiovascular disease and cancer-related deaths were more common in those 45 and older.

Surprisingly, in-prison mortality rates were much lower than those among ex-prisoners – there were only 192 deaths per 100,000 Washington State prisoners between 2001 and 2002. The difference in rates between in-prison deaths and deaths of released prisoners was attributed to “fewer overdoses, homicides, and motor vehicle accidents during incarceration,” according to the NEJM study.

The report was careful to emphasize that it had only sampled data from prisoners released from the Washington DOC. Death rates among former prisoners may be higher or lower on a more general scale, the authors noted.

Nonetheless, the study recommended the adoption of “interventions aimed at decreasing the risk of death” for released prisoners, including better transition planning, education related to drug use, and preventative care to address cardiac risks. In conclusion, the authors wrote, such interventions might not only help prisoners but also produce “secondary benefits for society ... in the form of increased public safety.”

The results of the NEJM report were revisited in another study published in the *American Journal of Public Health* (AJPH), titled *All-Cause and Cause-Specific Mortality Among Men Released From State Prison, 1980–2005*. In that report, the authors reviewed the deaths of male prisoners released from the North Carolina DOC over a 25-year period, and concluded that

the standardized morality ratio (SMR) for former prisoners “was greater than for other male North Carolina residents.”

Specifically, released prisoners were found to be more likely to die due to homicide, accidents, HIV, substance abuse, liver cancer and liver disease. Where the expected SMR within a given population is expressed as 1.0, the SMR for released white prisoners was 2.08; for released black prisoners it was 1.03.

The AJPH study noted that the higher morality ratios reflected “ex-prisoners’ medical vulnerability and the need to improve correctional and community preventive health services.”

Sources: www.nejm.com, www.ajph.aphapublications.org

Maricopa County Detention Officer Held in Contempt for Taking Document from Defense Counsel’s File

by Matt Clarke

In November 2009, an Arizona state judge held Maricopa County Detention Officer Adam Stoddard in contempt of court and ordered him to hold a press conference and publicly apologize to defense attorney Joanne Cuccia, after Stoddard took a document from Cuccia’s file while she was participating in a court hearing.

On October 19, 2009, Cuccia appeared in Judge Lisa Flores’ courtroom to argue the case of Antonio Lozano, a defendant who Stoddard later claimed “was a documented member of the Mexican Mafia.” According to the contempt ruling, Cuccia had achieved a favorable outcome for her client and was arguing for a lenient sentence when Stoddard moved up next to the defense counsel’s table.

The courtroom video system showed Stoddard looking at a file on the table for 16 seconds before removing a document and viewing it for another 21 seconds. He then gave it to Deputy Francisco Campillo, literally behind Cuccia’s back, and Campillo took it away to have it photocopied.

According to Stoddard, he saw three or four inches of the bottom of a document in plain view and read the words

“going to steal” and “money” in the same paragraph. He claimed he was concerned that the document described a crime that was about to be committed, and later told the media he was extra vigilant regarding attorneys with Mexican Mafia members as clients because two lawyers (Jason Keller and David DeCosta) had been accused of smuggling drugs to Mexican Mafia clients in jail.

Cuccia filed a motion to hold Stoddard and Campillo in contempt of court. The motion was heard by Superior Court Judge Gary Donahoe, who found that Campillo was not in contempt as he only acquiesced to a colleague’s request to photocopy a document. However, Donahoe held Stoddard in indirect civil contempt and ordered him to hold a press conference no later than November 30, 2009 and provide “a sincere verbal and written apology” to Cuccia “for invading her defense file and for the damage that his conduct may have caused to her professional reputation.”

Judge Donahoe emphasized that Cuccia had done nothing wrong, and that Stoddard’s statement to the press linking her to two lawyers accused of smuggling drugs to clients in jail had hurt her reputa-

tion. Donahoe also found that Stoddard's conduct was unreasonable and that no security threat justified the seizure of the document from Cuccia's file. The court further held there was no evidence that a crime was about to be committed, and that a reasonable court security officer would have realized after scanning the 28-word paragraph in question that it contained nothing to justify the document's seizure.

Judge Donahoe ordered Stoddard to be jailed if he did not purge the contempt by holding the press conference and apologizing. See: *State of Arizona v. Lozano*, Superior Court for Maricopa County (AZ), Case No. CR2009-006227.

On December 1, 2009, Stoddard announced he would not comply with the contempt order. "I cannot and will not

apologize for putting court safety first," he said. "Judge Donahoe has ordered me to feel something I do not. He has ordered me to say something I cannot. The judge therefore put me in a position where I must lie or go to jail. I will not lie." He dutifully reported to jail, where he remained for 10 days.

The Maricopa County Sheriff's Department appealed Judge Donahoe's contempt order, and on April 6, 2010 the Court of Appeals upheld the contempt finding in a 15-page decision but vacated the sanction of a press conference and apology. The appellate court found that Judge Donahoe had properly found Stoddard in civil rather than criminal contempt, and that Stoddard's due process rights had not been violated as he alleged.

However, the Court of Appeals held "the record does not support the sanction imposed because the sanction does not attempt to remedy the disruption to the sentencing hearing and/or ensure Stoddard will not repeat his illegal acts."

The case was remanded to the Superior Court to "fashion an appropriate sanction for [Stoddard's] indirect civil contempt." Some options suggested by the appellate court included a monetary fine or "additional training in courtroom decorum, including the nature, purpose, and sanctity of the attorney-client privilege." See: *Stoddard v. Donahoe*, 224 Ariz. 152, 228 P.3d 144 (Ariz. App. Div. 1, 2010). ■

Additional sources: *Arizona Republic*, www.heatcity.org, www.azcentral.com

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Louisiana Judge, Attorneys Plead Guilty to Bribery Charges

by Michael Brodheim

In October 2009, following plea negotiations with federal prosecutors, a Louisiana judge and two lawyers pleaded guilty for their roles in a bail bond-rigging conspiracy that allowed about 100 prisoners over a five-year period to get out of jail without paying any bond money, just bribe money.

Wayne Cresap, a long-time St. Bernard Parish judge, pleaded guilty in U.S. District Court to taking part in a judicial bribery scheme which netted him between \$70,000 and \$120,000 from 2004 to 2009. The attorneys, Victor J. "V.J." Dauterive and Nunzio Salvatore "Sal" Cusimano, both of whom practiced in the St. Bernard Parish, pleaded guilty to charges of conspiracy to commit wire fraud.

Cresap was arrested by FBI agents in April 2009, about two weeks after the FBI confronted him in a parking lot about the payoff scheme. According to federal agents, Cresap admitted to his role in the scheme at that time. Although white-collar defendants are not usually arrested, the FBI was concerned that Cresap might commit suicide and took him into custody. Nonetheless, Cresap, whose crimes are punishable by up to five years in prison and \$250,000 in fines, was released shortly after his arrest.

Cresap, Dauterive and Cusimano all agreed to cooperate in other corruption investigations. Additionally, Cresap, a Democrat who had served in the 34th Judicial District since 1999, agreed to resign before he was sentenced. He filed a motion for interim disqualification with the Louisiana Judiciary Commission, and the Louisiana Supreme Court appointed a retired judge to oversee his cases.

According to the charges outlined in a bill of information filed in July 2009, Cresap accepted cash from the attorneys in exchange for converting secured bonds, for which money or property must be pledged, into personal surety bonds, which required only a written agreement to pay if the defendant skipped out on a court hearing. The lawyers received cash payments from the prisoners' families or friends in amounts that ranged from \$1,500 to \$3,000, according to Assistant U.S. Attorneys Brian Marcelle and Richard Pickens, who prosecuted the case. The bribes, veiled as retainer fees, were split with Cresap.

Cresap's attorney, Pat Fanning, described his client as truly remorseful for his crimes. Not surprisingly, U.S. Attorney Jim Letten, speaking at a news conference outside the U.S. District Courthouse in New Orleans, had a different perspective. He described the bribery scheme as "a pure act of corruption."

Dauterive and Cusimano were sentenced on April 22, 2010. Dauterive received 48 months in prison, three years supervised release and a \$25,000 fine;

Cusimano received 33 months in prison, three years supervised release and a \$6,000 fine.

Cresap is scheduled to be sentenced on August 12, 2010. Despite pleading guilty, he remains eligible to receive pension benefits from the Louisiana State Employees' System. See: *United States v. Cresap*, U.S.D.C. (D. Louisiana), Case No. 2:09-cr-00193-MVL-SS. ■

Sources: *Times-Picayune*, www.nola.com

Maryland Prison Guards Busted for Helping Gang Members

by Gary Hunter

In April 2009, four Maryland prison guards were indicted for participating in a variety of illegal activities involving the Black Guerrilla Family (BGF) at the Metropolitan Transition Center (MTC) in Baltimore. Guards Asia Burrus, Musheerah Habeebullah, Takevia Smith and Terry Robe were accused of supplying incarcerated BGF members with contraband and taking part in an extortion scheme run by the gang.

Smith, who also was accused of having sexual relations with prisoners, was recorded on a wiretap saying she was not concerned about losing her job. "I got the [corrections officers'] union behind me," she boasted.

The following month, on May 11, 2009, former prison guard Fonda D. White pleaded guilty to extortion charges. White conspired with Jeffrey L. Fowlkes, a member of the BGF, to extort a 54-year-old woman out of more than \$11,000.

In January 2007 the woman's son was transferred to the MTC, where White had previously worked as a guard and where Fowlkes was incarcerated.

Fowlkes began calling the woman, telling her that her son had amassed a large debt from cigarettes, drinking and gambling, and was in danger of being hurt or killed. Fearing for her son's life, the woman made a total of 27 payments to various addresses in Baltimore. Six of those payments, totaling \$4,250, were sent directly to White's residence.

In late April 2007 the woman notified the FBI, which set up wiretaps on both the

victim's phone and Fowlkes' contraband cell phone. White was recorded in several calls made to the victim.

The investigation revealed that White had been extorting prisoners for years. Between October 2005 and November 2007, she deposited a total of \$16,652.25 into her bank account. The deposits included personal checks, cashier's checks, and regular and postal money orders.

Fowlkes, who was also indicted, was sentenced on August 5, 2009 to 30 months in prison and three years supervised release. White was sentenced on August 18, 2009 and received six months in jail and two years supervised release. Both were ordered to pay \$4,250 in restitution.

Burrus, Habeebullah, Smith and Robe were accused of participating in a more sophisticated extortion operation involving gang members. In some cases, prisoners not affiliated with the BGF were forced to pay protection by charging money to prepaid debit cards known as "Green Dot" cards. Those who refused to pay protection became targets for violence. Guards sometimes assisted gang members in the extortion scheme by holding the Green Dot cards for them.

BGF is a dominant gang in the Maryland prison system. It has remained mostly a prison gang because of its policy that gang leaders lose their rank once they are released. However, the BGF has increasingly amassed foot-soldiers on the street, some of whom have clean records and, at least for a time, take jobs as prison guards.

Investigators believe that is how incarcerated BGF gang leader Eric Brown was able to obtain cell phones to direct the gang's activities on the outside. It also explains how Brown was able to enjoy salmon, shrimp, Grey Goose vodka and expensive cigars while incarcerated.

"I have worked in prison systems in three other states, and I have not [before] been faced with the challenges we have here," said Gary Maynard, Secretary of Maryland's Department of Public Safety and Correctional Services.

Burrus, Habeebullah, Smith and Robe, who were charged with supplying cell phones, heroin, other drugs and weapons to prisoners, all pleaded guilty. Burrus was sentenced to 18 months and three years supervised release on December 9, 2009. Smith received one year and one day in prison and three years supervised release in January 2010. Robe was sentenced to 24 months and two years supervised release on February 5, 2010. Habeebullah has not yet been sentenced.

A superseding indictment that named 15 BGF members or associates was issued on June 23, 2010, accusing them of "various criminal activities inside the Maryland Correctional System, including but not

limited to, drug-trafficking, extortion, robbery, bribery, money laundering, retaliation against witnesses and obstruction of justice." One of the defendants, Alicia Simmons, a prison guard, was accused of smuggling drugs and a cell phone to incarcerated BGF members in exchange for cash and pre-paid debit cards. See: *United*

States v. Brown, U.S.D.C. (D. MD), Case No. 1:09-cr-00183-WDQ. ■

Additional sources: *Associated Press*, www.baltimoresun.com, www.herald-mail.com, www.wbalv.com, www.abc2news.com, www.wboc.com, www.american-chronicle.com

New York City Jail Settles Excessive Force Suit for \$62,001

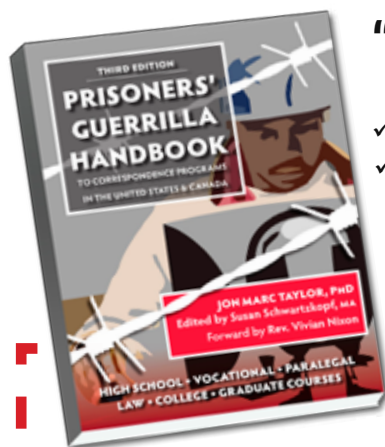
On August 11, 2009, the City of New York agreed to settle a 42 U.S.C. § 1983 suit brought by a former prisoner who alleged that he was beaten without provocation by guards at the George Motchan Detention Center.

In November 2006, while on his way to court, Severiano Martinez was reportedly attacked by guards from the New York City Department of Correction (DOC). The attack left him with a "right Zygomatic arch fracture, and facial, rib, thumb, neck, and eyelid bruising, swelling, and pain," according to his federal lawsuit. The DOC guards involved allegedly attempted to cover up what happened by placing Martinez in restraints and filing

false rules infractions against him.

The lawsuit raised a grab bag of state and federal causes of action ranging from violations of the Fourth, Eighth and Fourteenth Amendments of the U.S. Constitution to state law negligence, assault and battery claims. While the suit was pending the city made an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Under the offer, the city agreed to pay \$35,001 to Martinez plus \$27,000 to his attorneys.

Martinez accepted the Rule 68 offer. He was represented by attorney Brett H. Klein of Leventhal & Klein LLP, a Brooklyn law firm. See: *Martinez v. City of New York*, U.S.D.C. (E.D. NY), Case No. 1:07-cv-05440-RRM-RLM. ■



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Physician Assisted in Botched Execution Attempt in Ohio

by Matt Clarke

On September 5, 2009, guards at the Southern Ohio Correctional Facility in Lucasville prepared for an onerous task – executing state prisoner Romell Broom. They tried for two hours to find a usable vein in which to inject the three-drug lethal injection cocktail. Unable to find one, they called in a doctor to assist.

The Hippocratic Oath taken by physicians begins with the Latin words “Primum non nocere,” which translate to “first do no harm.” Taking that vow seriously, the American Medical Association (AMA) prohibits its members from participating in any form or fashion in executions – since helping to kill someone is indisputably doing harm. But it is a meaningless ban since the AMA has no means to enforce it or discipline those doctors who participate in executions. However, some doctors believe it is acceptable to assist in executions, in order to help prisoners avoid pain and ensure a peaceful death. To the extent that being forcibly killed by the state can be considered peaceful, that is.

Dr. Carmelita Bautista, the physician called in to assist during Broom’s execution, was not an AMA member. She was on the staff of Thomas Memorial Hospital in South Charleston, West Virginia, and occasionally worked in the prison’s infirmary. She later said that she did not even know executions took place at the facility before receiving the request for assistance. Nonetheless, once called she agreed to help during the execution, though she didn’t consider herself part of the execution team.

“I was just called to help see if I can find an IV site,” Bautista stated. “They just asked me if I can see an IV site, and I did not see any problem in that.” She said she spent less than five minutes in Broom’s cell and tried to insert an IV into his foot before giving up on finding a usable vein. Governor Ted Strickland then issued a one-week reprieve so prison officials could take “appropriate next steps” to be used during their next attempt to execute Broom.

Dr. Bautista emphasized that she was rushed into an immediate on-the-spot decision, and despite her willing assistance she was afraid to enter death row. “I was scared of going into that place. I told [the

nurse escorting me into the death house] ‘I’m so scared,’” she said in a deposition. “Because she told me that there was this guy who they were trying to see if they can get an IV to be executed.”

Despite her fears and the rushed nature of her decision, Dr. Bautista has not stopped working at the prison nor has she announced that she will not participate in future executions.

Broom is pursuing legal action in U.S. District Court seeking to prevent the state from trying to execute him again. That

case remains pending, and as of July 15, 2010, Broom remained on death row. See: *Broom v. Strickland*, U.S.D.C. (S.D. Ohio), Case No. 2:09-cv-00823-GLF-MRA.

Meanwhile, Ohio officials announced they will do away with the three-drug IV execution protocol in favor of a single drug given by IV and two drugs administered via intramuscular injection as a backup when usable veins cannot be found. ■

Sources: *Associated Press*, www.cbsnews.com

Seventh Circuit: Catholic Prisoner’s Religious Diet Lawsuit Remanded

by David M. Reutter

The Seventh Circuit Court of Appeals held a Catholic prisoner’s free exercise of religion was substantially burdened because he was denied a non-meat diet on Fridays and during Lent.

In 2003, Illinois state prisoner Brian Nelson sued Tamms Correctional Center chaplain Carl Miller, alleging violation of his rights under the First Amendment, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Illinois Religious Freedom Restoration Act (IRFRA). He sought declaratory and injunctive relief plus monetary damages.

Nelson designated himself a Catholic when he entered prison in 1983. In the late 1990s he took a greater interest in his faith, and came to understand three methods of penance under Catholicism: giving alms, works of charity and acts of abstinence. Given his incarceration, Nelson reasoned his only practical forms of penance were prayer and abstaining from eating meat.

When he arrived at Tamms, a “super-max” prison, in 1998, Nelson requested a meatless diet on Fridays throughout the year as an act of penance. He said he would accept the prison’s vegetarian diet for that purpose. His request was denied by Chaplain Miller, a Lutheran minister, because it was unsupported by the Bible and was not a requirement in a “church document.”

In a series of grievances filed in 2002, Nelson requested a diet that followed the Rule of St. Benedict No. 39, which states that “everyone, except for the sick who are

very weak, [should] abstain entirely from eating the meat of four-footed animals.” He noted that Muslims and Black Hebrew Israelites were automatically granted a diet substitution and not required to eat around meat on their tray. Requiring Nelson to do so without a substitute for the meat he was served, but refused to eat, resulted in three hospitalizations as his weight dropped from 161 pounds to 119.

A magistrate judge granted Miller’s motion for partial summary judgment in January 2007, and the district court ruled against Nelson on his remaining claims on March 31, 2008 following a bench trial.

On appeal, the Seventh Circuit held the district court had correctly determined that Nelson failed to administratively exhaust the issue of a full-time non-meat diet, but that the narrow issue of a meatless diet on Fridays and during Lent had been exhausted.

The Court of Appeals found that Tamms’ dietary request procedural requirements substantially burdened Nelson’s religious rights. Following its previous precedents, the appellate court held, “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

“[A] clergy verification requirement forms an attenuated facet of any religious accommodation regime because clergy opinion has generally been deemed insufficient to override a prisoner’s sincerely held religious beliefs,” the Seventh Circuit

wrote. Thus, Miller's demand that Nelson show a religious requirement for a non-meat diet, and submit documentation to that effect, made the desired exercise of Nelson's religious rights "effectively impracticable."

Nelson submitted evidence that he was forced to forego adequate nutrition to comply with his sincerely held religious beliefs due to the prison's failure to provide an alternative diet. That issue was remanded to determine whether Tamms'

dietary request procedure and Miller's conduct were "in furtherance of a compelling government interest and that it was the least restrictive means."

Nelson's First Amendment establishment clause claim failed because the prison's policies were not an "excessive entanglement" advancing or inhibiting religion. Also, since the warden at Tamms had ordered Nelson to receive a vegetarian diet in 2006, the injunctive relief claim was moot, and RLUIPA did not allow for

recovery of monetary damages. Damages under IRFRA must be determined by the Illinois Court of Claims, which has exclusive jurisdiction over such matters, thus that claim was dismissed.

The district court's judgment was reversed in part and affirmed in part and the case remanded for another trial, which is pending. Nelson is represented by attorney Alan Mills at the Uptown People's Law Center in Chicago. See: *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009). ■

Whole Foods Farms out Fish Farming to Colorado Prisoners

by Justin Miller

A food vendor is involved in a partnership with correctional facilities in Colorado that employ prisoners to raise tilapia and trout, which are then sold to Whole Foods, a popular grocery chain.

About 120 prisoners at the Arrowhead Correctional Center, a minimum-security facility for drug and alcohol offenders, earn around 60 cents a day plus bonuses to farm the fish. That amounts to about \$40 per month for prisoners employed in the Colorado Correctional Industries' fishery program.

Tilapia are popular both with consumers, for their taste, and fish producers, for the ease and efficiency of space in which they can be raised. The Arrowhead program also raises shrimp. Another tilapia farming program operates at the East Canon Prison Complex, and rainbow trout are raised at the Buena Vista Correctional Complex.

Eight prisoners are employed at Buena Vista, which produces 200,000 trout a year. Some are purchased by the state Division of Wildlife and released into local waterways. The trout sold for consumption

are first taken to the Skyline Correctional Center for cleaning and processing.

Not only do prisoners handle the farming of the fish, which is done in large greenhouses, but they construct the 12,000-gallon fiberglass tanks in which the fish are raised. "I've learned a lot about chemistry, pH, salinity, nitrites, ammonia. It keeps me busy and the days go by quick," said prisoner Bart Garcia.

Only the male tilapia, which are larger, are sold for consumption. The female fish are used solely for breeding. The Arrowhead program began six years ago and is now the largest industry at the prison, with about 100,000 pounds of tilapia sold annually.

"Whole Foods has a high demand for U.S. grown tilapia and we are the only operation in the U.S. certified to their standard," said Correctional Industries manager Dave Block. Prison staff are allowed to buy the fish at discount prices.

Prisoners involved in the program are supportive; still, some can't ignore the similarities between their own situation and that of the fish confined in tanks. "They are trapped," said one prisoner-

turned-fish-farmer. "I kind of feel the same way."

The tilapia sold at Whole Foods stores in Colorado are marketed as "local," but their prison-based origins are not disclosed – which, for people who don't want to support prison industry slave-labor programs, might be considered a bait-and-switch. ■

Sources: www.talkleft.com, www.gazette.com, *Pueblo Chieftain*

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SORNA Challenges Produce Mixed Results; Supreme Court Weighs In

by Brandon Sample

Over the past several years a split has developed between the federal courts of appeal over the scope and constitutionality of the Sex Offender Registration and Notification Act (SORNA), a component of the federal Adam Walsh Child Protection and Safety Act of 2006.

SORNA requires sex offenders to keep their registrations current and to notify state authorities each time they move, change jobs or change schools. Any offender who “travels” in interstate or foreign commerce who “knowingly fails to register or update a registration” can receive up to ten years in federal prison.

In *U.S. v. Husted*, the Tenth Circuit Court of Appeals considered whether the “travels” element of the Act applied to conduct that occurred before the effective date of SORNA, which was July 27, 2006. Sometime in April 2006, Michael Husted, a sex offender, moved from Oklahoma to Missouri without notifying officials in Oklahoma or registering in Missouri. Federal officials charged Husted under SORNA, arguing that his failure to register after moving to Missouri violated the Act.

The Tenth Circuit disagreed. Congress’ use of the word “travels,” the present tense form of “to travel,” limited the application of the Act to only those offenders who “travel in interstate or foreign commerce after the Act’s effective date,” the appellate court wrote. Husted had moved to Missouri in April 2006, before the Act took effect; therefore, his conduct was not covered by the Act and his conviction was reversed. See: *United States v. Husted*, 545 F.3d 1240 (10th Cir. 2008).

On December 22, 2008, the U.S. Court of Appeals for the Seventh Circuit reached a different result in consolidated appeals filed by Marcus Dixon and Thomas Carr. Dixon and Carr, both sex offenders, had failed to register after traveling to Indiana. Dixon, like Husted, argued that his conduct was not covered by the statute because he traveled in interstate commerce before SORNA became effective.

The Seventh Circuit disagreed. The word “travels” in the Act was not limited to interstate travel after SORNA took effect, the Court of Appeals wrote, noting that “the present tense is commonly used to refer to past, present, and future all at

the same time.”

However, the appellate court did find merit in Dixon’s ex post facto claim. As part of SORNA, Congress directed the Attorney General to promulgate regulations specifying the applicability of the Act to offenders convicted before its enactment. The Attorney General issued regulations on February 28, 2007 that applied SORNA’s provisions to all sex offenders, including those convicted before the Act’s effective date.

The Seventh Circuit found a problem with this. The net effect of the regulations was to require all sex offenders to register. But because the regulations did not say when offenders had to register, the Court of Appeals, analogizing the situation to contracts that do not specify a deadline for acceptance, and applying the due process principle of “fair notice,” held that sex offenders had to register within a “reasonable time” after the SORNA regulations were adopted.

In Dixon’s case, the “reasonable time” requirement was not met. Dixon’s travel in interstate commerce and his failure to register occurred before the Attorney General’s regulations were adopted. “Whatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero,” the appellate court observed. Accordingly, Dixon’s conviction was reversed. See: *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008).

Carr, on the other hand, did not register until five months after the Attorney General’s regulations took effect. “Five months is a sufficient grace period,” the Seventh Circuit held, rejecting Carr’s argument that he, like Dixon, did not have enough time to comply with the Act. Carr appealed to the U.S. Supreme Court, which granted cert on September 30, 2009.

Just when things were getting confusing, on December 8 and 9, 2008 the Tenth Circuit issued rulings in *U.S. v. Hinckley* and *U.S. v. Lawrance*, which further muddied the waters on the issue of whether SORNA applies to offenders who did not register before the Attorney General’s regulations were issued.

Both Hinckley and Lawrance traveled in interstate commerce and failed to

register after SORNA was enacted, but before the Attorney General issued regulations implementing the Act. The Tenth Circuit found this unproblematic, though, rejecting due process and ex post facto challenges by Hinckley and Lawrance, and holding that both were criminally liable for not registering.

The Attorney General’s regulations were not a condition predicate to liability under the Act, the Court of Appeals held, because the regulations required by SORNA only applied to offenders who were not already required to register under state law. Hinckley and Lawrance were already subject to state registration requirements. Both were thus required to register on the date SORNA took effect, July 27, 2006, and both of their convictions were affirmed. See: *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008), cert. denied; *United States v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008).

On January 13, 2009, the U.S. Court of Appeals for the Eighth Circuit entered the fray in *U.S. v. Howell*, rejecting a constitutional challenge to SORNA’s registration requirements. Howell, a sex offender, had argued that the Act’s registration requirements exceeded Congress’ authority under the commerce clause because the act of registering itself was an intrastate (not interstate) activity.

The Eighth Circuit disagreed. “Although [SORNA] may reach a wholly intrastate sex offender for registry information, [SORNA] is a reasonable means to track those offenders if they move across state lines. In order to monitor the interstate movement of sex offenders, the government must know both where the offender has moved and where the offender originated,” the appellate court wrote.

The registration requirements, then, “are reasonably adopted to the legitimate end of regulating ‘persons or things in interstate commerce’ and the ‘use of the channels of interstate commerce.’” Howell’s conviction was accordingly affirmed. See: *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009), cert. denied.

On March 13, 2009, the Fourth Circuit Court of Appeals joined the growing circuit split over the applicability of SORNA to offenders who failed to register prior to the date the Attorney General promulgated regulations imple-

menting the Act.

William Hatcher was charged with violating SORNA's registration requirements after he moved from one state to another and failed to register. He argued that SORNA's registration requirements did not apply because his failure to register occurred before the Attorney General's regulations were issued.

The Fourth Circuit reversed Hatcher's conviction, finding that "SORNA's registration requirements did not apply to pre-SORNA offenders until the Attorney General issued" the regulations on February 28, 2007. See: *United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009).

Given these varied rulings, it is no surprise that the U.S. Supreme Court

eventually stepped in to sort things out. On June 1, 2010, the high court issued a ruling in *Carr's* appeal, holding that SORNA's registration requirements do not apply to sex offenders whose interstate travel occurred before the Act's effective date. *PLN* will report this decision in greater detail in a future issue. See: *Carr v. United States*, 130 S.Ct. 2229 (2010). ■

Washington Supreme Court Holds No Judicial Immunity for Non-Judicial Conduct

The doctrine of judicial immunity does not apply to actions unrelated to judicial conduct, the Supreme Court of Washington decided on December 31, 2009.

In September 2002, Skagit County District Court Judge Stephen Skelton ordered Deputy Deanna Randall to take Anthony Reijm into custody following a court hearing.

Believing Reijm to be a model prisoner, Randall attempted to escort him to jail without handcuffing him. Instead Reijm made a break for it. John T. Lallas, a private security guard, attempted to block Reijm from running out the front door of the courthouse

and was injured in the process.

Lallas sued Deputy Randall and Skagit County claiming negligence. The trial court granted summary judgment to both defendants, holding they were entitled to quasi-judicial immunity from suit. After the Court of Appeals reversed, the Washington Supreme Court granted review. [See: *PLN*, Feb. 2009, p.37].

Deputy Randall and Skagit County argued they were immune from suit because Randall was performing a judicial function when she was escorting Reijm to jail on Judge Skelton's order. The Supreme Court disagreed.

Judicial immunity applies when the

function being performed is in a "judicial capacity," the Court wrote. In this case Deputy Randall was not performing a judicial function in transporting Reijm to jail, because "[j]udges do not normally escort prisoners to jail as part of their official duties," the Supreme Court concluded. Accordingly, judicial immunity did not apply because Deputy Randall's actions did not constitute "judicial conduct."

The judgment of the Court of Appeals reversing the trial court's grant of summary judgment to Randall and Skagit County was therefore affirmed. See: *Lallas v. Skagit County*, 167 Wash.2d 861, 225 P.3d 910 (Wash. 2009). ■

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\$145,000 Settlement by New York City After Holding Immigration Detainee Beyond 48 Hours

by David M. Reutter

A \$145,000 settlement by the New York City Department of Corrections (DOC) provides a new twist in the area of immigration law. The main allegation in the complaint was that the DOC had violated a detainee's rights by holding him for Immigration and Customs Enforcement (ICE) beyond the allowable time limit.

Cecil Harvey was a permanent U.S. resident; in 2003, he was taken to the Rikers Island jail to await disposition of a misdemeanor offense. After the criminal court ordered his release, the DOC held him on an ICE detainer. On the day of his scheduled court appearance, which was 35 days later, Harvey was turned over to ICE.

He remained in ICE detention for over two years. Harvey was granted supervised release on March 16, 2006 and began rebuilding his life. Unbeknownst to him, an arrest warrant had been issued on the misdemeanor charge, resulting in his arrest on September 2, 2006. That charge was dismissed on speedy trial grounds in December 2006.

ICE, however, had lodged another detainer. In late December, Harvey was again turned over to ICE and transferred to immigration detention in Alabama. Ultimately, he was deported to Barbados in October 2007. His detention at Rikers Island prevented him from presenting oral argument to the Second Circuit Court of Appeals, and his appeal was dismissed after he filed a pro se brief.

The main thrust of Harvey's subsequent federal lawsuit was that the DOC had a policy of holding immigration detainees under ICE detainers until ICE was ready to take them into custody. This violated 8 CFR § 287.7(d)(3), which only allows jails to hold someone awaiting transfer to ICE custody for 48 hours. Yet the DOC "frequently detains immigrants beyond the 48 hours authorized," Harvey alleged.

He eventually obtained representation by Professor Nancy Morawetz and interns Alisa Wellek and Laura Trice at New York University's Immigrant Rights Clinic. A \$145,000 settlement with the DOC was reached on April 20, 2009.

This case represents an important victory and reveals a method to encour-

age jails to release people held on ICE detainers after 48 hours have expired. According to Professor Peter Markowitz, director of the Immigration Justice Clinic at the Benjamin Cardozo School of Law in New York City, there is no legal means

for ICE to "renew" a detainer. In situations where immigration detainees are held beyond 48 hours, the jail can be sued for violating federal law. See: *Harvey v. City of New York*, U.S.D.C. (E.D. NY), Case No. 1:07-cv-00343-NG-LB. ■

Ninth Circuit: No Qualified Immunity for Refusing to Feed Prisoner

by Mark Wilson

The Ninth Circuit Court of Appeals has held that a prison guard was not entitled to qualified immunity for depriving a prisoner of 16 meals over a 23-day period.

In 2001, Ronald P. Foster was confined at California's High Desert State Prison in Susanville. A rash of assaults on staff was committed on his unit, particularly when guards attempted to handcuff prisoners through the food slots in their cell doors.

Foster did not participate in any of those assaults, but his unit was locked down and prisoners were fed in their cells. During the lockdown numerous weapons were confiscated during cell searches.

On July 27, 2001, prison officials issued a memo directing that the bright light in prisoners' cells must be on and anything covering the front or rear windows must be removed before the food port was opened. Failure to comply with this directive would result in forfeiture of meals.

Prison guard Sandra Cole was frequently responsible for serving meals during the lockdown. Between July and August 2001, Cole repeatedly refused to feed Foster, claiming his cell windows were covered with paper and he refused to comply with her orders to uncover them so she could see inside his cell. Foster stated that only the rear window was covered, that Cole could see in the cell, and that no other guard required him to remove the paper in the rear window or refused to feed him because the rear window was covered.

On September 12, 2001, the warden issued a memo intending "to correct the actions of prison staff who had 'taken it upon themselves to not feed inmates based upon the belief that any type of window covering presents a security risk.'"

He made it clear that staff did not have "permission to not feed the inmates." Even after the warden's memo was issued, however, Cole refused to feed Foster at least two more times. Foster claimed to have lost 15 pounds in two months, while his medical records reflected a 13-pound loss over a four-month period.

Foster filed suit in federal court, alleging that the denial of food had violated his rights under the Eighth Amendment. The district court granted summary judgment to the defendants, finding that although "Foster had established an Eighth Amendment violation on his denial of meals claim," Cole was entitled to qualified immunity because the constitutional right in question was not clearly established. Foster appealed.

On February 5, 2009, the Ninth Circuit found that "in total, Foster claims that he was denied 16 meals in 23 days. This is a sufficiently serious deprivation because food is one of life's basic necessities." The appellate court also held that Cole did not establish "how removing the paper from the rear window of a cell is a reasonable condition on the receipt of food. Nor has she explained how Foster's failure to remove the paper from his cell's back window jeopardized her safety or security during in-cell feeding."

Accordingly, the Court of Appeals wrote, "Cole's denial of food can constitute an unjustified and unnecessarily punitive response to a rules violation," and the Court held that "the repeated and unjustified failure" to feed prisoners "amounts to a serious deprivation."

Because "the risk that an inmate might suffer harm as a result of the repeated denial of meals is obvious," the

Ninth Circuit concluded “a jury could infer that Cole deliberately disregarded Foster’s need for adequate nutrition.” Consequently, the Court of Appeals found that “Foster has established a violation of his Eighth Amendment rights sufficient to withstand summary judgment.”

Turning to the question of qualified immunity, the Court held “there is no question that an inmate’s Eighth Amendment right to adequate food is clearly established.” The appellate court also determined that “a reasonable corrections officer should know that when an inmate can be fed without risk to the prison officer’s safety ... the prison official cannot

arbitrarily deny the inmate his meals. ... A reasonable officer should know that to do so could violate the inmate’s Eighth Amendment rights by imposing punishment without penological justification.”

The Court of Appeals rejected Cole’s claim that no Ninth Circuit authority on point made her aware that her conduct was unconstitutional. “The decisions from this Circuit and others alerting prison officials of their obligations to provide inmates with nutritionally adequate meals on a regular basis should have given Cole sufficient notice of the contours of the Eighth Amendment right,” the Court explained. “Cole’s conduct was not reasonable be-

cause she took no other action to ensure that her obligation to provide Foster with meals was met. Consequently, she is not entitled to qualified immunity.” See: *Foster v. Runnels*, 554 F.3d 807 (9th Cir. 2009).

The case was remanded to the district court, which denied Foster’s motion to appoint counsel. A jury trial was held on June 22, 2010, and after testimony was presented and exhibits entered, the defendants moved for judgment as a matter of law pursuant to Fed.R.Civ.P., Rule 50. The court granted the motion, dismissing the case. See: *Foster v. Cole*, U.S.D.C. (E.D. Cal.), Case No. 2:03-cv-01113-JAM-JFM. ■

Washington DOC Settles MRSA Death Claim for \$125,000

by *Brandon Sample*

The Washington Department of Corrections (DOC) has agreed to pay \$125,000 to the family of a prisoner who died from pneumonia caused by Methicillin-resistant *Staphylococcus aureus* (MRSA).

On March 27, 2008, Jeremy Swaser was given a check-up by medical staff at the Washington State Penitentiary in Walla Walla. He had been sick for a week, coughing, wheezing and unable to eat. Medical staff thought he had a virus and prescribed an inhaler and other medications, but not antibiotics.

Swaser was seen at the medical unit again the following day. He told Shirlee Weisner, a nurse practitioner at the prison, that he “never felt so bad,” that he had “a lot of nightmares” the night before, and was “disoriented.”

Later that day, Swaser was placed on Seriously Ill Notification Status after his diagnosis was changed to pneumonia. He was supposed to begin receiving antibiotics and be transferred to the ICU at Kadlec Medical Center, but neither happened.

In fact, it was not until March 30, 2008 that Swaser was sent to a hospital. At that point he was near death. After conducting extensive tests, doctors determined the true cause of Swaser’s illness was MRSA-induced pneumonia. Aggressive treatment was pursued over the next several days but it was not enough. Prison medical staff had waited too long to give him antibiotics, and he died on April 1, 2008.

According to Dr. Lisa Freeman-Grossheim, an expert retained by Swaser’s family in anticipation of litigation, Nurse

Weisner breached the standard of care that she owed Swaser. “The use of early, broad spectrum antibiotic administration could have prevented [Swaser’s] subsequent deterioration and death from MRSA pneumonia,” Dr. Freeman-Grossheim concluded in a report.

After Swaser’s family threatened to file suit over the prison medical staff’s

apparent negligence and deliberate indifference, the DOC agreed to pay \$125,000 to settle the matter. The settlement was finalized in January 2010.

The Swasers were represented by Daniel DeLue of Ferring & DeLue, a Seattle law firm. See: *In re: Claim of Jeremy Swaser*, Washington State Risk Management Division, Claim No. 31072413. ■

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\$3.5 Million Settlement to Former New York Prisoner Convicted Due to Perjured Testimony

The City of New York has paid \$3.5 million to settle a lawsuit brought by an innocent man who spent 12 years in prison after being wrongfully convicted of attempted murder. The conviction was obtained by a prosecutor who “knowingly present[ed] perjured testimony.”

While the conduct of the prosecutor in the conviction of Shih Wei Su was at issue, the civil rights complaint filed on Su’s behalf stated that the wrongful conduct “was much more than that of a single young prosecutor. It was perpetuated and ratified by high level officials in the Queens District Attorney’s Office.”

Su was convicted of the attempted murder of Richard Tan and Lawton Ki, who were shot and seriously wounded at a Queens pool hall on January 4, 1991. Initially, Su was not implicated by Tan and Ki or by their friend, Jeffrey Tom, who claimed to be present during the shooting.

The prosecutor overseeing the case, Linda Rosero, thought the case was weak; however, her supervisor challenged her to pursue it anyway. A few months before Su’s trial, Tom pleaded guilty to extorting money from a restaurant owner by instilling fear. In return for a sentence of probation as a youthful offender, the Queens District Attorney’s Office required Tom to testify against Su.

The record of that plea hearing was sealed by the court, and Su’s attorney was never advised of the plea deal. Before trial, Rosero misled Su’s defense counsel into thinking there was no deal. Tom was a key witness during the trial, saying Su gave an order to the assailant to shoot his two friends. He then “blatantly lied by falsely denying” that the prosecutor or judge had made “any promise” regarding his sentence in the extortion case.

When Su appealed his conviction the prosecution stated, “The record available on appeal suggests that the People and prosecution witness Tom fully disclosed the disposition of Tom’s pending criminal case.” Su received the help of Legal Aid Society attorney Katheryne M. Martone in late 1998 to review his conviction.

Martone successfully managed to unseal Tom’s plea hearing, revealing his perjured testimony at Su’s trial. The prosecution then tried to use procedural rules

to dismiss Su’s post-conviction petitions. Finally, on July 11, 2003, the Second Circuit Court of Appeals granted Su’s habeas corpus petition due to Tom’s perjury and the prosecution’s misconduct. See: *Su v. Fillion*, 335 F.3d 119 (2nd Cir. 2003).

Su was released on November 5, 2003 after prosecutors determined there was insufficient evidence to retry him. When Su filed his civil rights complaint due to

his wrongful conviction, he attached a memorandum summarizing 84 cases that had resulted in reversals due to misconduct by Queens prosecutors.

The state agreed to settle Su’s lawsuit for \$3.5 million, which included attorney’s fees. He was represented by New York City attorney Joel B. Rudin. See: *Su v. City of New York*, U.S.D.C. (E.D. NY), Case No. 1:06-cv-00687-RJD-CLP. ■

Washington DOC Agrees to Pay \$38,000 in Too-Much-Medicine Suit

On November 19, 2008, the Washington Department of Corrections (DOC) agreed to pay \$38,000 to a woman who was improperly administered her seizure medication.

The settlement resulted after Cindi J. Heihn, a prisoner at the Washington Corrections Center for Women in Gig Harbor, filed suit against the DOC in Superior Court. Heihn suffered a grand mal seizure as a result of an overdose of Tiagabine, a powerful anticonvulsant that was prescribed to help stabilize her mood.

Instead of gradually increasing Heihn’s dosage of Tiagabine so she could develop tolerance for the drug, DOC medical staff started her out with 16mg of Tiagabine, which was too large

a dose. Heihn claimed the medical staff was negligent because the drug was known to cause seizures if not properly administered.

Heihn was hospitalized from November 10 to November 15, 2004 as a result of the seizure. She sought damages for medical costs, loss of enjoyment of life, deformity, disfigurement, disability, mental anguish, and pain and suffering.

Of the \$38,000 settlement, \$10,771.85 was deducted to satisfy two outstanding criminal obligations that Heihn owed. She was represented by Evy McElmeel and Fred Diamondstone, two Seattle area attorneys. See: *Heihn v. State of Washington*, Superior Court for Pierce County (WA), Case No. 07-2-13942-2. ■

Kentucky Law Retroactively Applied to Award Street Credit

The Kentucky Supreme Court has held that a law that applies “street credit” to released prisoners effectively suspends existing statutory law that specifies time spent on parole does not count towards a prisoner’s maximum sentence.

The Court accepted transfer of appeals from two circuit courts concerning the application of House Bill 406 (HB 406), which was the Commonwealth’s biennial budget for 2008-10. The Pulaski Circuit Court granted the Attorney General’s request for an injunction prohibiting the Kentucky Department of Corrections (KDOC) from applying HB 406’s street credit provision retroactively, but the Franklin Circuit Court refused to grant a similar injunction.

The Pulaski court’s injunction applied only to people sentenced within that court’s jurisdiction, but the Franklin case sought statewide application. The Kentucky Supreme Court accepted the appeals to resolve the disagreement between the circuit courts.

Prior to the state’s adoption of HB 406, time spent on parole could not count as part of a prisoner’s maximum sentence to determine final discharge date eligibility.

Believing it to be the General Assembly’s intent, the KDOC began applying HB 406 retroactively. As of November 2008 the department had released 1,562 prisoners from custody and discharged 2,135 parolees. The Supreme Court found the KDOC was applying the law

retroactively, and treated it that way in adjudicating the matter.

The Court held that the KDOC was fulfilling legislative intent in applying HB 406 retroactively. While HB 406 did not specifically state it was to be retroactive, the Court said it could look at the funds appropriated to the KDOC to determine whether the General Assembly had in-

tended HB 406 to apply retroactively.

The Supreme Court found that the KDOC's budget was cut by \$12 million for FY 2008-09 and \$19 million in FY 2009-10 as a result of anticipated savings from the "broad application of the street credit provisions." The language of HB 406, furthermore, was written in the past tense, which supported retroactivity.

As such, the Kentucky Supreme Court held, in a corrected decision issued on January 4, 2010, that the Pulaski Circuit Court's injunction could not be enforced and the Franklin Circuit Court was correct in refusing to grant an injunction. See: *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009). ■

California Prisoner Wins Option of Kosher Meals Until Halal Meals Can be Provided

The Marin County Superior Court ordered San Quentin prison officials to provide Keith Allen Lewis, a Muslim prisoner, with access to Jewish kosher meals until he could be provided with the Halal meals prescribed by his faith.

Lewis had filed a petition for writ of habeas corpus requesting that the California Department of Corrections and Rehabilitation (CDCR) provide Halal meals to both him and other Muslim prisoners. Judge Lynn O'Malley Taylor found the CDCR had begun taking the necessary procedural steps (through the Administrative

Procedure Act) to provide Halal meals to Muslim prisoners, and therefore denied as moot Lewis's petition requesting that remedy.

The court noted, however, that the CDCR permitted Muslim prisoners at other institutions the option of selecting between a vegetarian diet and a Jewish kosher diet. To qualify for the latter, a prisoner need only obtain a religious meal card pursuant to section 54080.14 of DOM, the CDCR's Operations Manual.

The court found no reason why Lewis should not be given the same kosher meal option at San Quentin,

holding that the impact of such an accommodation on security and institutional safety would be "de minimus." See: *In Re: Keith Allen Lewis*, Marin County Superior Court (CA), Case No. SC158441A. ■

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News in Brief:

California: Beverly Hills attorney Michael H. Inman was charged on June 17, 2010 with attempting to smuggle heroin into a secure area of the downtown L.A. criminal court building. The 48-year-old lawyer was caught with approximately 14.25 grams of black tar heroin in a plastic bag and a trace amount of methamphetamine, prosecutors said. He was arrested when a police dog alerted to the drugs; if convicted he faces up to five years in prison.

Florida: State prisoner Michael L. Parker, 38, died at the Charlotte Correctional Institution after being stabbed multiple times by another prisoner on June 24, 2010. The prison has a suspect in the stabbing but won't release his name until the investigation is complete. Parker was serving a 30-year sentence for armed robbery and kidnapping.

France: French prisoner Nicolas Coccagn, perhaps tired of prison food, killed fellow prisoner Thierry Baudry in January 2007 and tried to eat his heart. Baudry was beaten, stabbed with scissors and suffocated; Coccagn then cut open his chest with a razor blade. After removing an organ, Coccagn allegedly eat part of it raw and cooked the rest on a makeshift

burner in his cell at the Rouen prison. However, he had cut out the wrong organ – instead of Baudry's heart, it was actually his lung. Coccagn went to trial on murder charges in June 2010; he was convicted and sentenced to 30 years.

Georgia: On June 6, 2010, Willie Lamar Porter, 39, set fire to the back seat of a Bibb County sheriff's van while being transported from a prison medical center to a local hospital for a mental evaluation. Deputy Scott Rickert injured his hand on the burning plastic seat when he extinguished the fire, and was taken to an area hospital for treatment. Porter was charged with arson and making terroristic threats after Rickert and another deputy took him to the Bibb County Law Enforcement Center.

Great Britain: Adders, Britain's only venomous snake, have been found scaling the walls of Her Majesty's Prison The Verne in southwestern England to soak up some recent sunshine. Officials posted signs warning the 600 prisoners at the facility that snakes "are falling from the ramparts into the prison." A prison insider joked to a local paper, "There's enough snakes in here without them falling from

the walls." One prisoner was bitten and rushed to the hospital for emergency care, but was not seriously injured. Adder bites are not fatal for healthy adults but require immediate, painful treatment.

Indiana: In the early morning hours of July 14, 2010, Morris Ramey, 24, was apprehended while trying to smuggle drugs to prisoners at the Plainfield Correctional Facility. Guards caught him tossing marijuana, tobacco and cell phones over the prison fence. They chased him into a nearby field, where he was arrested. Ramey had been released from the same facility just a week before after serving 18 months for cocaine possession. Authorities are trying to determine who was planning to pick up the contraband.

Mexico: On June 14, 2010, 29 prisoners were killed as rival gangs clashed inside a prison in the cartel-plagued Mexican state of Sinaloa. Inside the prison in Mazatlán, 20 prisoners were shot to death when a group of gang members opened fire on a rival gang. Hours later, eight more prisoners were stabbed to death by other prisoners. Also, gunmen killed 15 federal police officers in separate attacks; twelve officers died in an ambush near a

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high school in the western state of Michoacán, while assailants killed three officers in the northern city of Chihuahua.

Minnesota: In June 2010, Sean Quincy Carlberg, 26, a guard at the Minnesota Correctional Facility, was accused of sexually touching a prisoner. Carlberg allegedly asked a female prisoner to clean a building during her off-hours, then made sexual advances when she entered a room without a security camera. The unidentified prisoner told police that Carlberg helped her up when she tripped and then kissed her and put his hand under her shirt to touch her. A special investigator reported that Carlberg had been flirting and interacting with other prisoners inappropriately.

Montana: Frank Dryman was 20 years old when he shot and killed Clarence Pellett in Shelby, Montana in 1951. He narrowly avoided the death penalty, served about twenty years in prison, was released on parole and then absconded. Dryman remained free for the next 40 years; he changed his name to Victor Houston and moved to Arizona, where he operated a chapel. "They just forgot about me," he said. Dryman, now 79, was eventually tracked down by his victim's grandson, Clem Pellett, who hired a private investi-

gator to find him. Following his capture in March 2010, Dryman was returned to prison to resume serving his life sentence.

New Hampshire: Concord State Prison guard Kevin Valenti, 36, was indicted in May 2010 and charged with felony drug possession. He was reportedly caught with Clomiphene and testosterone, controlled substances used by body builders. Previously, in September 2009, Valenti and prison Sgt. Michael Erdmark were found liable in a lawsuit filed by prisoner Shawn Cheever, who alleged they had used excessive force in violation of the Eighth Amendment. Cheever won a federal jury verdict of \$80,000, and the court awarded almost \$30,000 in attorney's fees and costs. [See: *PLN*, March 2010, p.31].

New Jersey: On July 1, 2010, Paul Kerth, an alarm systems contractor, was sentenced to 364 days in jail and 5 years' probation for rigging bids to obtain contracts with the Department of Corrections. A DOC administrator, Frederick Armstrong, was sentenced to 3 years in prison for his part in the fraudulent scheme.

New York: Female prisoners at the Rikers Island jail participated in a cooking competition in May 2010; the judges included Alain Sailhac, former dean of

the French Culinary Institute, and Melba Wilson, owner of Melba's Restaurant in Harlem. The prisoners, who were taking culinary arts classes at Rikers, whipped up dishes that included corn chowder, oven-barbequed salmon, sautéed tilapia with lemon caper sauce, and apple strudel. Two teams competed in the cook-off; the team composed of younger prisoners won in the appetizer category, while the team of older prisoners took the prize for dessert. There was a tie for the main course.

Ohio: Gary Sawyer, 44, was arrested on July 13, 2010 outside of a state prison while awaiting word that his brother, William Garner, had been executed for a 1992 arson that killed five children. Sawyer, a convicted sex offender, was taken into custody by state police immediately following his brother's execution; he was charged with failing to register his address in violation of Ohio's version of Megan's Law.

Ohio: On May 31, 2010, a lightning strike at Belmont Correctional Institution killed one prisoner and injured five others who were on the recreation yard when a thunderstorm hit at 6:30 p.m. The prisoner who died, Dalin Anderson, 33, was serving time on drug possession charges.

Scotland: Officials at Addiewell Pris-

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News in Brief (cont.)

on, a privately-operated facility in West Lothian, have banned ceramic mugs after prisoners used them as weapons. An unnamed source at the prison said the mugs “make an instant weapon and smash on contact with someone’s head – they are quite effective at causing damage.” The ceramic mugs have been replaced with plastic cups.

Texas: Prisoners in Dormitory B of the Eden Detention Center rioted on April 11, 2010. The facility was placed on lockdown for several days following the disturbance. Eden is a BOP detention center operated by Corrections Corp. of America (CCA), and houses illegal immigrants convicted of federal offenses.

Texas: In June 2010, Williamson

County officials launched an investigation into possible sexual misconduct involving a guard at the T. Don Hutto Detention Facility, a CCA-operated prison that holds detainees for Immigration and Customs Enforcement (ICE). The incident reportedly involved sexual groping; the CCA guard, who was fired, was not identified. “We’re not going to put up with anything like that,” said Williamson County Judge Dan Gattis. “ICE and CCA need to get their act straightened up.” ICE ordered CCA officials to “implement a variety of reforms immediately.”

Utah: For the first time, an execution in the United States has been “tweeted” using a popular “microblogging” service called Twitter. Utah Attorney General Mark Shurtleff tweeted around midnight on June 18, 2010 that he had given “the go ahead” for the execution of death row pris-

oner Ronnie Gardner, who was killed by a five-man firing squad moments later. “May God grant him the mercy he denied his victims,” Shurtleff tweeted. The Attorney General also conducted a live streaming press conference on his state website following the execution, thus bringing the death penalty into the digital age.

Venezuela: A riot erupted on May 4, 2010 after rival gangs fought for control of cell blocks at the Santa Ana Prison in the western state of Tachira. Eight prisoners were killed and three were injured. Violence is common in Venezuela’s overcrowded prison system – in 2009 alone, 366 prisoners were killed and 635 wounded. A non-governmental group called the Venezuelan Prison Observer said about 32,624 prisoners are currently held in the nation’s jails, which have a capacity of only 12,000. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners’ Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. **\$35.95.** PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. 1041

The Ceiling of America, An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages. **\$22.95.** PLN's first anthology presents a detailed "inside" look at the workings of the American justice system. 1001

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, published by PLN, 221 pages. **\$49.95.** Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1057

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. **\$39.99.** Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037

Law Dictionary, Random House Webster's, 525 pages. **\$19.95.** Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. **\$14.95.** A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046

Legal Research: How to Find and Understand the Law, by Stephen Elias and Susan Levinkind, 568 pages. **\$49.99.** Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 352 pages. **\$34.99.** How-to handbook for anyone who conducts a deposition or is going to be deposed. 1054

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Starting Out! The Complete Re-Entry Handbook, edited by William H. Foster, Ph.D. & Carl E. Horn, Ph.D., Starting Out Inc., 446 pages. **\$22.95.** Complete do-it-yourself re-entry manual and workbook for prisoners who want to develop their own re-entry plan to increase their chances of success after they are released. Includes a variety of resources, including a user code to the Starting Out website. 1074

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu Jamal, City Lights Publishers, 280 pages. **\$16.95.** In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It, by Terry Kupers, Jossey-Bass, 245 pages. **Hardback only; prisoners please include any required authorization form. \$32.95.** Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003

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Crime and Punishment In America, by Elliott Currie, 230 pages. **\$16.95**. Effective rebuttal to right-wing proponents of prison building. Fact-based argument shows that crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention. 1019 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin Books, 368 pages. **\$16.00**. From Jack London, Malcolm X and Jack Henry Abbott to George Jackson and Edward Bunker, this anthology provides a selection of some of the best writing describing life behind bars in America, from those who have been there. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson, Lawrence Hill Books, 339 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

Marijuana Law, by Richard Boire, Ronin, 271 pages. **\$17.95**. Examines how to reduce the probability of arrest and prosecution for people accused of the use, sale or possession of marijuana. Info on legal defenses, search & seizures, surveillance, asset forfeiture and drug testing. 1008 ☐

Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice, by David Oshinsky, 306 pages. **\$16.00**. Analysis of prison labor's roots in slavery, plantations and self-sustaining prisons. 1007 ☐

Ten Men Dead: The Story of the 1981 Irish Hunger Strike, by David Beresford, Atlantic Monthly Press, 334 pages. **\$16.95**. Story of IRA prisoners at Belfast's infamous Long Kesh prison who went on a hunger strike in the 1980s in an effort to have the British government recognize them as political prisoners. Ten starved to death. 1006 ☐

10 Insider Secrets to a Winning Job Search, by Todd Bermont, 216 pages. **\$15.99**. Roadmap on how to get a job even under adverse circumstances—like being an ex-con. Includes how to develop a winning attitude, write attention-grabbing resumé, prepare for interviews, networking and much more! 1056 ☐

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The Prison and the Gallows: The Politics of Mass Incarceration in America, by Marie Gottschalk, Cambridge University Press, 451 pages. **\$28.99**. Great political analysis of the confluence of events leading to 2.3 million people behind bars in the U.S. 1069 ☐

Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi, Seal Press, 295 pages. **\$15.95**. Best book available that covers issues related to imprisoned women, based on interviews with hundreds of women behind bars. 1066 ☐

How to Win Your Personal Injury Claim, by Atty. Joseph Matthews, 7th edition, NOLO Press, 304 pages. **\$34.99**. While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. 1075 ☐

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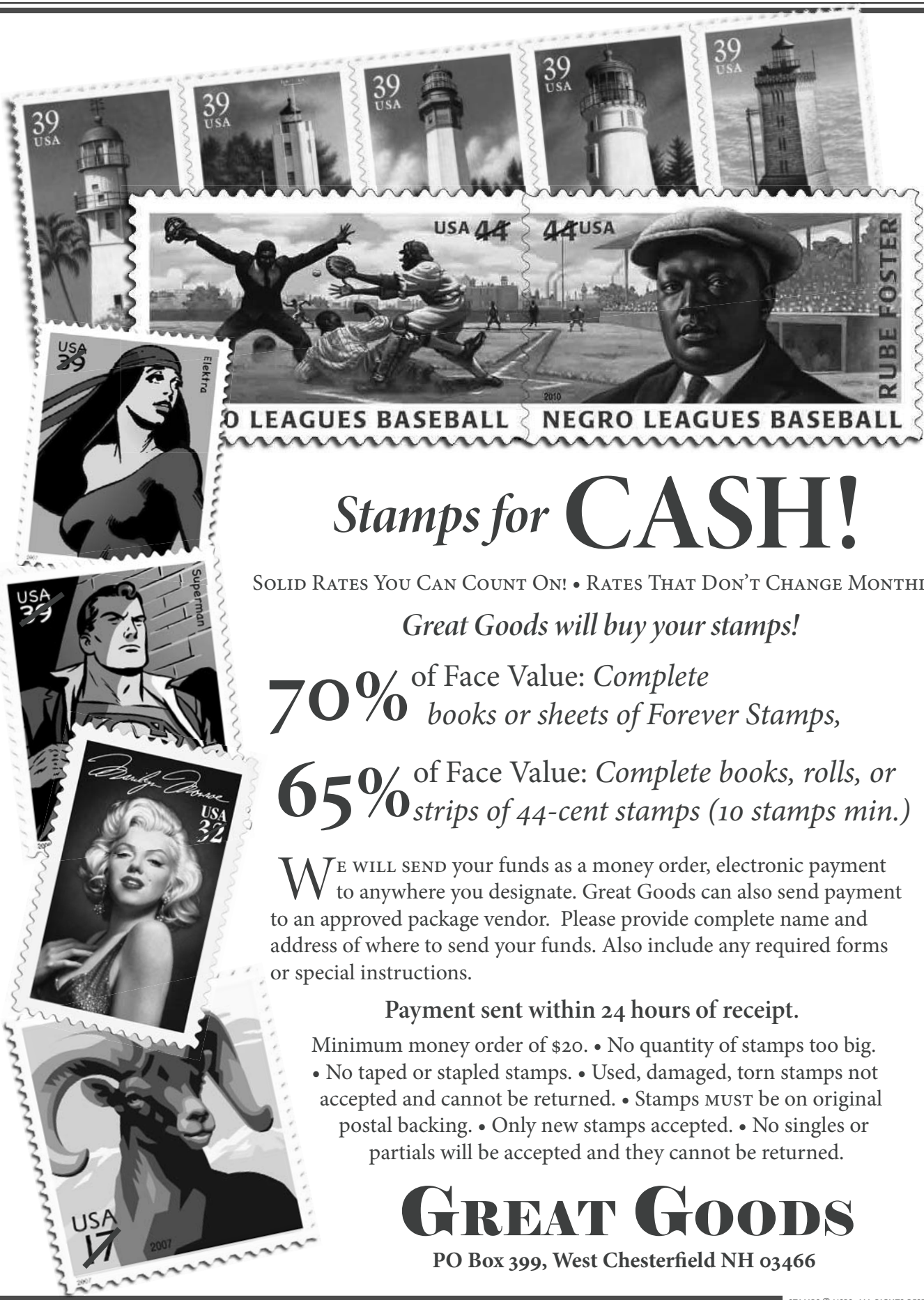
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September 2010

Thou Shalt Not: Sexual Misconduct by Prison and Jail Chaplains

by David M. Reutter

Traditionally, the role of a chaplain in the correctional setting is to serve as a spiritual advisor to prisoners and help them meet the requirements of their religious faiths. Equally traditionally, chaplains have generally been from conservative mainstream Christian faiths and often proselytize among prisoners for those faiths.

There is some debate as to whether it is proper to have government-paid chaplains at prisons and jails, based on the premise that such arrangements violate the principle of separation of church and state. There is also dispute concerning whether chaplains – who are overwhelmingly Christian – can adequately address

the religious needs of prisoners with many diverse faiths, including Islam, Judaism, Native American beliefs, Hinduism and Buddhism, among others, to say nothing of agnostics and atheists.

However, there is universal agreement that prison and jail chaplains should not abuse their role as spiritual leaders and use their positions of authority to fulfill their own deviant sexual desires. Such abuses do occur, albeit not with the frequency that other correctional staff victimize prisoners. [See, e.g.: *PLN*, May 2009, p.1].

While incidents involving sexual misconduct by chaplains are not common, they are indicative of a somber incongruity between the need to provide religious services for prisoners and the exploitation of those prisoners by abusive prison and jail clergy.

Sexual Abuse by Jail Chaplains

Former Henrico County, Virginia jail chaplain Toney Leon McDonald, 42, was arrested on May 17, 2006 and charged with engaging in sexual misconduct with two female prisoners.

According to one of the indictments, McDonald, a member of the Good News Jail and Prison Ministry, engaged in oral sex with prisoner Ashley Baskerville. Jail authorities recorded a conversation between the two; according to Sheriff Mike Wade, it “was obviously not the type of conversation that a chaplain ... should have.” McDonald was acquitted of sexual misconduct charges in New Kent County, but on October 12, 2006 he entered an Alford plea to similar charges in Henrico County. He received a 12-month jail sentence, which was suspended, plus 100 hours of community service. [See: *PLN*, Feb. 2007, p.36].

Before becoming the chaplain at the jail, McDonald had worked as a sheriff's deputy until he was arrested in 1991 and charged with possession of cocaine with intent to distribute and attempting to smuggle marijuana to a prisoner. He served one year of a six-year sentence in that case.

In April 2004, King County, Washington jail prisoner Terry Shanklin filed suit alleging that he had been sexually assaulted by Regional Justice Center Chaplain Warren Ungles, who coerced him into having oral sex and masturbating in exchange for help with his release plans.

Ungles claimed he was part of a church that believed God allowed male sex with preachers. Shanklin passed a polygraph test related to seven sexual assaults involving the chaplain; his lawsuit stated that he had suffered a divorce and mental breakdowns due to the emotional trauma of engaging in sex acts with Ungles.

Shanklin reportedly settled the case for \$7,500 in damages and \$1,435.92 in costs. See: *Shanklin v. King County*, King County Superior Court (WA), Case No. 04-2-10003-8 SEA.

In Texas, the chaplain at the Lubbock County Jail, Gilbert Herrera, 55, was indicted on sexual misconduct charges on July 28, 1999, two days after being fired for insubordination because he refused to cooperate with an internal investigation.

According to news reports, Chaplain Herrera had previously suffered from drug addiction and served time for burglary; he received a pardon from then-Texas governor Dolph Briscoe in 1978.

“This is just a very unfortunate inci-

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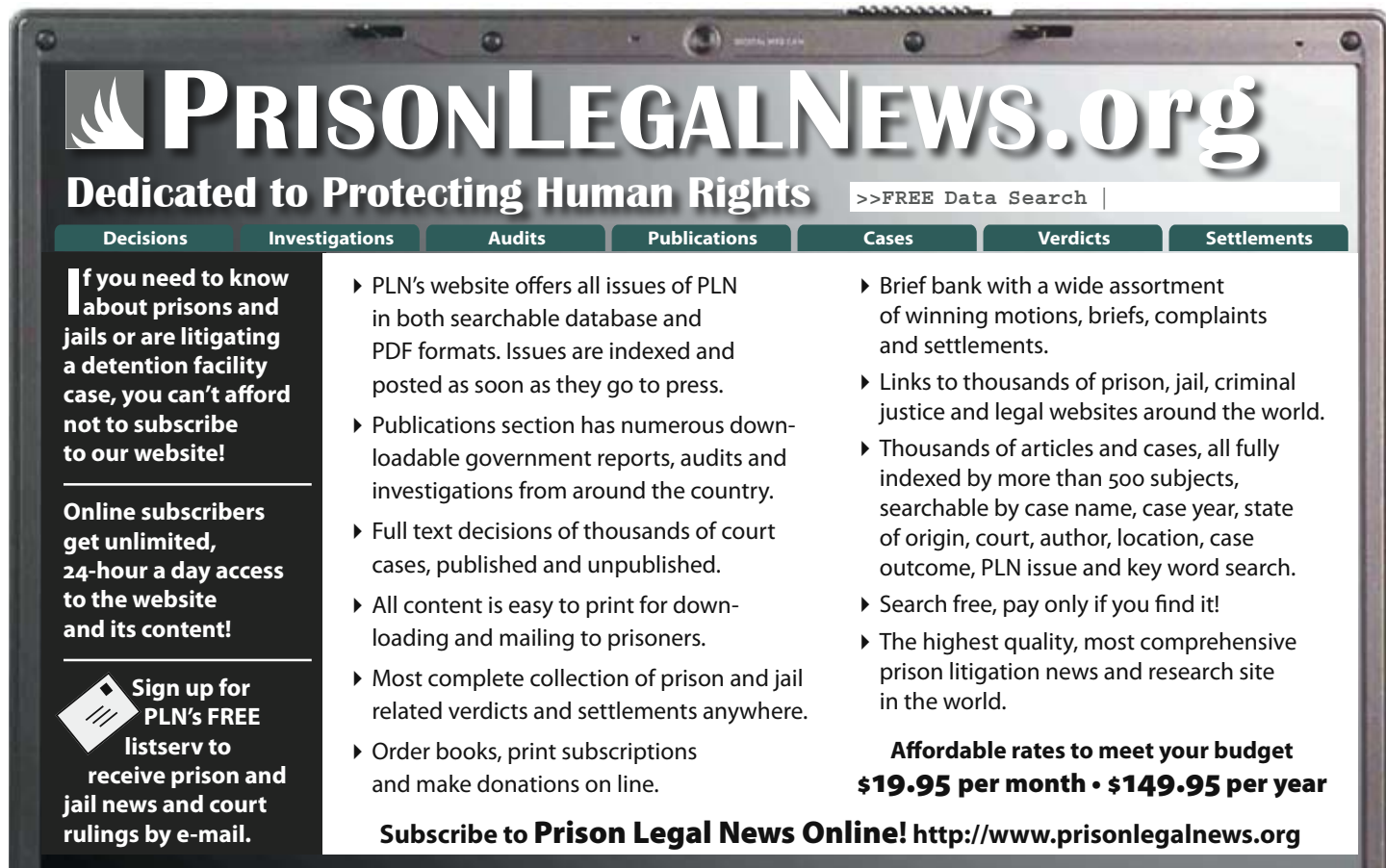
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Chaplain Sexual Misconduct (cont.)

dent not only for the sheriff's office but also for the Christian community as well," said Lubbock County Sheriff David Gutierrez. It was also presumably unfortunate for the female prisoner whom Herrera was accused of sexually assaulting.

On June 28, 2000, the former chaplain pleaded no contest to a misdemeanor charge of violating the prisoner's civil rights; he was sentenced to two years' probation. Despite pleading to the charge, Herrera maintained his innocence and said the accusations were politically motivated.

"We'll just leave it at that," his lawyer stated. Herrera had served as a jail chaplain for 10 years.

PLN previously reported on sexual abuse by jail chaplains in Florida and Indiana, both involving sex acts with female prisoners. [See: *PLN*, May 2007, p.34].

Paul L. Pierce, 61, the former senior chaplain at the Pinellas County Jail in Clearwater, Florida, apparently confused his missionary role at the facility with the missionary position when he had a three-year adulterous relationship with a prisoner from 2003 until 2006. Pierce reportedly had a love affair with Karleen Doris Bonow, a convicted prostitute.

"He's the chaplain of the jail; I always thought he would be there for me. It turned into he wanted sex, and I didn't know how to say no. I didn't want to lose his love," said Bonow. "And I played out the scenario [he] is going to leave his wife and he is going to marry me, and I'm going to live happily ever after and someone is really going to love me."

However, things changed dramatically when Bonow became pregnant. Chaplain Pierce told Bonow to "get rid of it" when he learned about her condition. "It crushed me. It devastated me when he told me about getting an abortion and I saw what kind of monster he could be," Bonow said.

Pierce resigned as chaplain at the jail on October 2, 2006 and was placed on administrative leave, pending investigation, from his chaplaincy position with the Largo Fire Department. The jail's internal investigation was closed after Pierce quit.

Homer Henderson, a chaplain at the Morgan County Jail in Indiana, also was accused of engaging in sexual misconduct with a prisoner. Susan L. Robbins

said Henderson had coerced her into performing oral sex on him in February 2006, when the chaplain escorted her and another prisoner to a local high school to take GED tests. In exchange for the sex act, Henderson allowed Robbins to visit her boyfriend and family members and go to a Taco Bell.

The chaplain tried to get Robbins to perform oral sex on him again the following day, but instead she opted to escape and was recaptured five months later. In addition to serving as a jail chaplain, Henderson was also the chaplain for the Indiana State Police. He resigned from both positions but was not criminally charged.

Prison Clergy Abuse Their Positions

Vincent Inametti, 48, a Roman Catholic priest, was employed as a chaplain by the U.S. Bureau of Prisons at the Federal Medical Center (FMC) in Carswell, Texas from August 2000 until September 2007 – when he was charged with engaging in sexual acts with female prisoners.

"Unfortunately, it was the wrong place and the wrong time," said Michael Heiskell, Inametti's attorney, who downplayed his client's gross misconduct by referring to it as a "lapse of judgment."

Inametti pleaded guilty on November 14, 2007 to sexually abusing two female prisoners at Carswell. [See: *PLN*, Feb. 2008, p.42]. Although he claimed the encounters were consensual, one of his victims disagreed, stating that Inametti had threatened to kill her if she told anyone about their trysts. The sex acts reportedly occurred in the prison's chapel.

"His role as a chaplain was one of trust," said attorney Tahira Khan Merritt, who represented one of Inametti's victims. "He was supposed to provide emotional and spiritual sanctuary for these women. He violated that trust."

Following Inametti's guilty plea, prison officials at Carswell remodeled the chaplain's offices, adding glass windows in all of the doors and installing a new video surveillance system in an effort to curtail future sexual misconduct.

On May 5, 2008, Inametti was sentenced to four years in federal prison and fined \$3,000. He remains incarcerated with a release date of October 2011. See: *United States v. Inametti*, U.S.D.C. (N.D. Texas), Case No. 4:07-cr-00171-Y.

Doris Jean Dykes, one of the prisoners victimized by the former chaplain, filed suit against the federal government for

Chaplain Sexual Misconduct (cont.)

failing to protect her from his sexual advances. She alleged in her complaint that she had been sexually abused by Inametti "on multiple occasions," that he "had an impulsive sexual disorder which caused him to prey on vulnerable women," and that he had reportedly said "Who's your Daddy? I'm your Daddy" during sermons at the prison.

The parties agreed to dismiss the suit under undisclosed terms in December 2008. See: *Dykes v. United States*, U.S.D.C. (N.D. Texas), Case No. 4:08-cv-00111-A.

Previously at FMC Carswell, Daryl Desjardin, a supervisory chaplain, was charged in April 1997 with sexual misconduct involving female prisoners. He pleaded guilty to one count of a sex act with a person under peripheral supervision and was sentenced to six months in federal prison, one year on supervised release and a \$5,000 fine.

Desjardin's attorney, James R. Claunch, who also represented an FMC Carswell staff counselor charged with sexual abuse, said his clients had pleaded guilty "because they were." See: *United States v. Desjardin*, U.S.D.C. (N.D. Texas), Case No. 4:97-cr-00047-BE.

An incident at SCI-Cresson, a Pennsylvania state prison, leaves one wondering who the victim was in the case. Under a contract with his Franciscan order, the

Third Order Regular of St. Francis, the Rev. Gerard Majella Connolly was hired on March 16, 2006 as the chaplain at SCI-Cresson.

From September 2006 through January 2007, Connolly, 66, had multiple sexual encounters with prisoner William Victor during counseling sessions. However, to keep the liaisons quiet, Victor in turn extorted \$7,600 in hush money from the chaplain. The illicit trysts came to light when prison officials questioned Victor about a money order he had received.

A subsequent investigation resulted in Connolly being charged with 12 counts of institutional sexual assault and five counts of introducing contraband – allegedly alcohol – into the prison. He was placed on probation for 23 months, after which his criminal record can be expunged.

Victor received two years' probation, to be served upon completion of his prison sentence, after pleading guilty to extorting hush money from the chaplain. He also filed a lawsuit against Connolly due to their sexual encounters; a settlement for an undisclosed amount was reached in April 2009. See: *Victor v. Connolly*, U.S.D.C. (W.D. Penn.), Case No. 3:07-cv-00292-KAP.

In Kentucky, state prison officials confirmed they did not receive a report from Corrections Corporation of America (CCA) regarding sexual misconduct by Randy Hagans, the chaplain at CCA's Otter Creek Correctional Center, which at the time housed female prisoners from Hawaii and Kentucky.

Hagans, 49, was charged with third-degree sexual abuse, a Class B misdemeanor, for having sex with a prisoner in 2008. He was scheduled to go to trial in Floyd County District Court on November 16, 2010.

The chaplain is one of six CCA employees to be charged with sexual abuse or rape at Otter Creek. [See: *PLN*, Oct. 2009, p.40]. Both Hawaii and Kentucky have since removed their female prisoners from the facility.

According to a lawsuit filed in June 2003 by former juvenile offenders who

served time at Oregon's state-run MacLaren Youth Correctional Facility, sexual abuse of prisoners by chaplains had occurred over a lengthy period of time.

The former prisoners alleged that while incarcerated at MacLaren as teenagers in the 1970s, they were sexually abused by the Rev. Michael Sprauer. They accused Sprauer, a Roman Catholic priest, of grooming them to engage in oral sex and mutual masturbation. Sprauer had served as a chaplain at MacLaren from 1972 to 1975, and later as the director of religious services for the Oregon Department of Corrections before retiring in 1999.

A total of 15 men eventually joined in the lawsuit against Sprauer, who tried to invoke doctor-patient and clergy-penitent confidentiality to avoid answering questions related to any treatment he had received for "sexual disorders or deviant behavior." The former chaplain admitted in a videotaped deposition that he had engaged in anonymous oral sex with men in restrooms in the 1970s and 1980s.

Sprauer was also accused of smuggling drugs into the Oregon State Correctional Institution and engaging in a consensual sexual relationship with state prisoner Thomas Ha. Ha claimed that he and the chaplain had sex in a bathroom in the prison chapel. "He said he loved me and would take care of me," Ha testified in the civil suit.

Although Sprauer denied that he had ever molested any juvenile offenders, a Multnomah County Circuit Court jury disagreed. On May 16, 2007, the jury entered a verdict in favor of two of the former prisoners, finding that Rev. Sprauer had sexually abused them when they were incarcerated at MacLaren, which was then known as the MacLaren School for Boys, and that the State of Oregon was negligent in failing to protect them.

The jury awarded almost \$1.4 million in damages – \$695,000 to Robert Paul, Jr., and \$690,000 to Randy Sloan. "I proved that he was a child molester," said Paul. "I proved that I was not lying. The truth came out, and that's what I wanted."

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"The jury [verdict], finally, will give my clients some justice, and, hopefully, some closure," said attorney Daniel Gatti, who represented the plaintiffs. See: *Sloan v. Sprauer*, Multnomah County Circuit Court (OR), Case No. 0311-12724.

At the Pendleton Juvenile Correctional Facility, a maximum-security prison run by the Indiana Department of Corrections, chaplain Billie Jo Pena was charged with performing oral sex on a 17-year-old prisoner. She was fired, pleaded guilty to sexual misconduct in March 2003, and was sentenced to three years' probation and ordered to complete a sex offender treatment program.

"Any kind of sexual contact between offenders, coerced or uncoerced, between offenders and staff, is against the law," noted Doug Garrison, Communications Chief for Indiana's prison system.

Also, in one case, a prison chaplain engaged in nonconsensual abusive conduct involving another staff member. In October 2005, a female California prison worker who was sexually harassed by a Muslim chaplain prevailed in a lawsuit filed against state prison officials.

Sallie Mae Bradley, a licensed clinical social worker at Corcoran State Prison from August 2000 to October 2000, was employed by National Medical Registry, Inc., which provided temporary contract services to the California Department of Corrections and Rehabilitation (CDCR). Bradley was assigned to the Substance Abuse Treatment Facility (SATF) at Corcoran, where she evaluated prisoners, prepared treatment plans and provided therapy.

On September 13, 2000, Bradley complained to prison officials that Omar Shakir, 48, a CDCR Muslim chaplain, "was stalking her at home and staring at her at work." She stated that even after

she made it clear that she had no interest in a romantic relationship with him, he engaged in a pattern of inappropriate behavior and harassment that included "knocking on [her] door at 4:00 a.m., making sexually suggestive comments, groping her, and leering at her in a way that made her extremely uncomfortable."

Soon after filing a complaint, Bradley was terminated from her position at SATF. Bradley then sued Shakir and CDCR officials in state court. In October 2005, a jury found in her favor on sexual harassment and retaliation claims, awarding \$439,000 in damages.

The superior court granted the defendants' motion for judgment notwithstanding the verdict on Bradley's retaliation claim and vacated the \$50,000 award for that claim, for a net verdict of \$389,000. She was also awarded \$305,000 in attorney's fees. See: *Bradley v. Shakir*, Superior Court of Kings County (CA), Case No. 01-C-2235.

On January 17, 2008, the California Court of Appeal for the Fifth District upheld the jury's verdict and reinstated the award for the retaliation claim, finding that "Shakir was engaged in classic stalking behavior, terrorizing, intimidating and humiliating Bradley and taking full advantage of his free access to her at work to accomplish his inappropriate goals," and that the CDCR did nothing to stop his sexual harassment.

The appellate court noted that Shakir had been fired from the CDCR on June 13, 2001 after he threatened a warden and other prison officials; there was also evidence that "Shakir had prior criminal convictions known to [CDCR] when they hired him and that he had been disciplined on several occasions for providing contraband to the inmates, for being rude to an officer, and for failing

to inform his supervisor of his location." See: *Bradley v. California Dept. of Corrections and Rehabilitation*, 158 Cal. App.4th 1612, 71 Cal.Rptr.3d 222 (Cal. App. 5 Dist. 2008).

Some Accusations Lead to Acquittals

Sometimes, despite credible allegations of sexual abuse involving prison and jail chaplains, criminal charges result in acquittals or overturned convictions. Factors that contribute to such outcomes include jurors not crediting the testimony of prisoners due to their criminal records, the belief that clergymen would not engage in such egregious sexual misconduct, and legal technicalities.

Such was the case with jail chaplains in Texas and New Hampshire.

On April 30, 1999, Freddie E. Wier, 61, the head chaplain of the jail in Harris

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Chaplain Sexual Misconduct (cont.)

County, Texas, was charged with official oppression and illegal sexual contact. He was accused of fondling, digitally penetrating and performing oral sex on a female prisoner in 1997. [See: *PLN*, July 2002, p.15; Nov. 1999, p.26].

According to a federal lawsuit filed by jail prisoner Olga Lydia Paz, Wier had encouraged her to engage in sexual acts in exchange for buying gifts for her son. Paz accused the chaplain of fondling her breasts and inserting his fingers into her vagina while she wrapped the gifts. She said she was "very confused by what Chaplain Wier had done to me. I had looked to him for the spiritual help I needed and he took advantage of my confusion and vulnerable position."

Court documents stated that "[b]oth Paz and Wier were given polygraph examinations regarding the events that transpired in the summer of 1997. Paz's polygraph test result indicated that she was 'Strongly NDI [No Deception Indicated],' while Wier's indicated that deception was 'strongly indicated.'"

During an investigation into the accusations against Wier, jail officials found that "prior Personnel Affairs/Internal Affairs cases involving complaints of sexual misconduct against Chaplain Freddie Wier" had been voiced by three other female prisoners – Mary Bernard, Villette Rochford and Diana Rocha. They alleged sexual acts that included being fondled by the chaplain and performing oral sex on him. Another Harris County prisoner, Bridget Storm, later came forward and claimed she had been sexually abused by Wier, too.

Wier's first trial on the sexual misconduct charges ended in a mistrial. He was acquitted at a second trial in July 2000, after his attorney told the jury that even if they believed "the convict" who said she had been sexually abused by Wier, they could not find him guilty because he was an independent contractor at the jail and not a public employee. Charges were not filed in regard to Wier's alleged sexual misconduct with other female prisoners, as the statute of limitations had expired.

Paz's federal civil suit went to a jury trial in July 2001, which found in favor of both Wier and Harris County, and she

was ordered to pay \$1,718.68 in the defendants' costs. See: *Paz v. Wier*, U.S.D.C. (S.D. Texas), Case No. 4:99-cv-01645.

In New Hampshire, Chaplain Ralph Flodin was hired in July 2006 as a part-time spiritual services coordinator for the Strafford County Jail. In that capacity it was his duty to coordinate and oversee religious activities at the facility, administer to the spiritual needs of prisoners and staff, and conduct services such as Bible study groups.

After a jail guard saw a 24-year-old female prisoner crying because she was upset about being in a car accident that killed her friend, she was referred to one-on-one counseling with Flodin.

At their first meeting, Flodin discerned the prisoner was "very frail-looking and shaken." He told her, "I got a feeling that you're hurting very deeply." Because Flodin, 72, appeared to "really care" about her and talking to him made her "feel good," the woman met with the chaplain from 20 to 25 times over a nine-month period.

During the course of their meetings, Flodin and the prisoner allegedly "engaged in sexual acts with one another." Flodin admitted to deputies in a recorded confession that he had sexually touched the woman and kissed her, which was "wrong."

The chaplain was indicted, and a jury found him guilty of two counts of sexual assault and aggravated felonious sexual assault. At sentencing, Flodin claimed the prisoner was the aggressor and the deputies had coerced him into confessing.

His attorney, Stephen Brown, said Flodin was not the kind of person who deserved to serve time. "Is this the type of man that needs to go to state prison with those type of people?" Brown asked the court.

The prosecutor apparently thought so. "Sadly, what we have is another instance when someone within the jail community has used his or her authority to coerce sexual favor," stated County Attorney Tom Velardi.

The trial court sentenced Flodin to 2-10 years in prison on September 5, 2008. [See: *PLN*, May 2009, p.1]. However, the New Hampshire Supreme Court reversed his conviction in November 2009, as there was no evidence that the chaplain was providing "therapy" to the female prisoner at the time the sexual abuse occurred, as required by the elements of the criminal statute.

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“However inappropriate the sexual conduct may have been, the charged sexual acts did not occur within the context of a ‘therapy’ relationship” as required by the law under which Flodin was convicted, the Supreme Court wrote. See: *New Hampshire v. Flodin*, 159 N.H. 358, 986 A.2d 470 (N.H. 2009).

Prisons a Dumping Ground for Abusive Clergy?

In recent years there have been a number of high-profile cases involving sexual abuse by religious officials, particularly in the Catholic Church. The evidence in those cases found that church leaders who knew about accusations of sexual misconduct by priests would often move them from one parish to another as allegations arose.

There is also anecdotal evidence that abusive clergy were sent to prison – not to serve time, but to serve as chaplains. Presumably this was done so they could no longer molest members of their congregations. After all, the typical adult male correctional population does not allow many opportunities for sexual misconduct involving women or children, who were frequently the preferred victims of abusive church officials.

For example, on August 8, 2002, the Rev. John P. Blankenship, 65, retired from his position as chaplain at the Federal Correctional Complex in Petersburg, Virginia after his involvement in child sexual abuse decades earlier became known.

According to a diocese spokesman, Blankenship had “sexual encounters” with a 14-year-old male parishioner in

1982; he acknowledged his wrongdoing, apologized to the victim and subsequently paid for the boy’s college education and counseling.

Blankenship became a prison chaplain in 1983 – the year after the sexual abuse occurred. The church reportedly allowed Blankenship to continue working at the prison because he “had no contact with minors” in that position, according to an article in the *Richmond Times Dispatch*.

Blankenship pleaded guilty in January 2003 to four counts of sodomy for sexually abusing his 14-year-old victim two decades previously; he admitted he had “made a tragic mistake,” and was placed on indefinite supervised probation. He will not spend any time in prison – beyond the time he served as a prison chaplain, that is.

His victim, Robert G. Preson, who agreed to make his identity public, supported the plea agreement. “Mr. Blankenship’s acceptance of his responsibility for the crimes he perpetrated some 20 years ago was a necessary step enabling me to go forward with my life,” he said.

In October 2005, the Rev. James E. Jacobson, 80, a Jesuit priest

who had served as a prison chaplain in Oregon for 25 years, was accused in a lawsuit of sexually assaulting two women when he worked in remote Eskimo villages in Alaska decades earlier. One of his victims was allegedly assaulted in 1965, and the church removed Jacobson from her village after she became pregnant. Another of his victims was sexually abused in 1974-75 and also became pregnant.

In a deposition, Jacobson admitted that he had had sex with at least seven women when he served as a priest in Alaska in the 1960s and 1970s; he also said he used church funds to pay for prostitutes and knew of two other children he had fathered.

The lawsuit was filed by one of the women he had impregnated and two men

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Chaplain Sexual Misconduct (cont.)

who said Jacobson was their father based on DNA paternity tests. They requested damages for back child support, emotional distress, loss of self-esteem and other injuries. Jacobson sought to dismiss the suit, arguing that his vow of poverty prevented the plaintiffs from collecting compensation from him.

A second lawsuit was filed in 2006 by a woman who accused Jacobson of raping her three times in 1967 when she was 16 years old. That victim said the priest told her that having sex with him would bring her closer to God.

The claims against Jacobson, 11 other priests and three church volunteers accused of sexual abuse, involving a total of 110 plaintiffs, all Alaskan natives, were resolved by the Society of Jesus, Oregon Province in November 2007 with a \$50 million global settlement. See: *Doe v. Jacobson*, Superior Court of Bethel (Alaska), Case No. 4BE 05345-CI.

Jacobson had previously received the Chaplain of the Year Award from the Salvation Army in 2003 and the American Catholic Correctional Chaplain Association's Maximilian Kolbe Award. He was sent to Oregon and assigned to be a prison chaplain after leaving Alaska; he retired from his chaplaincy position in 2005.

"We are saddened that one of our members has failed to live the life he promised, and we hope that we might find a way to reconcile with those whose lives have been affected by this tragic failure," stated the Rev. John D. Whitney, a supervisory church official in Portland, Oregon.

Another priest who committed acts of sexual abuse and was then assigned to work as a prison chaplain was Thomas Harkins. Harkins was accused of molesting two young girls in the 1980s, one while he was assigned to the St. Anthony of Padua Church in Hamonton, New Jersey. The church paid a total of \$195,000 to settle lawsuits in both abuse cases.

In 1993, Harkins was sent to the Cathedral of the Immaculate Conception in Camden, New Jersey; according to a report in the *Philadelphia Inquirer*, "the parish apparently was chosen because it had few families." The church then assigned Harkins to work as a prison chaplain in 2000.

"He should not have been returned to

ministry," acknowledged Camden Diocese spokesman Andrew Walton. "Law enforcement should have been notified. This would be a serious and inexcusable failure on the part of the diocesan administration to fulfill its obligation to the community." While the church thought that Harkins was unsuitable to minister to members of the public, he was evidently suitable for prisoners.

In California, Matthew Bleecker, 25, sued the dioceses of San Bernardino and San Diego in October 2004, claiming he had been sexually molested as a child by the Rev. Michael Bucaro, a Catholic priest. According to the lawsuit, the abuse began when Bleecker was about five years old.

Since 1983, Rev. Bucaro, 52, had been assigned as a prison chaplain at the California Institute for Men, a state prison in Chino. Bucaro countersued Bleecker, who was himself in prison serving a two-year sentence, claiming slander. The slander suit was condemned as "vicious and un-Christian legal hardball tactics" by a victims' advocacy group.

"Victims already have enormous feelings to overcome: guilt, shame and blame," noted Mary Grant, a regional director for Survivors Network for those Abused by Priests (SNAP). "For victims who may be thinking of taking that courageous step of reporting a crime to law enforcement or exposing their perpetrator, this can scare them back into silence."

Bucaro resigned from his prison chaplain position, saying he was concerned for his safety. The church settled Bleecker's lawsuit in January 2008 as part of a global settlement involving other cases. See: *Doe v. Roman Catholic Bishop*, Superior Court of San Bernardino (CA), Case No. SCVCC119080.

Also in California, the Rev. Anthony Ross, 56, who oversaw the Santa Rosa diocese's detention ministry, which included both adult and juvenile prisoners, was suspended and banned from ministering at local correctional facilities in April 2002.

Ross' suspension occurred after he was accused of molesting a 15-year-old boy twenty years earlier when he served as a priest at the Cathedral of St. Raymond in Joliet, Illinois. He apologized to his victim in a written statement, saying, "I have caused pain to the young man from Illinois and his family because of my actions in the early 1980s, for which I am profoundly sorry."

Ross had reportedly sent letters to his victim, including a valentine with the message "For a special boy," and requests for nude photos, after he entered a treatment facility for priests who engaged in child sexual abuse, according to a lawsuit filed against Ross and the Roman Catholic Diocese of Joliet.

When Bishop Joseph Imesch was confronted with Ross' sexual misconduct in 1993, he transferred Ross to Santa Rosa to serve in the jail ministry. The lawsuit against Ross and the Diocese was voluntarily dismissed in December 2006 under undisclosed terms. See: *Doe v. Imesch*, Will County Circuit Court (IL), Case No. 2006L-135.

A prison chaplain with the Nevada Department of Corrections, James F. Kelly, 70, retired in February 2003 after being placed on leave by the Catholic Church when he was implicated in a lawsuit alleging sexual abuse at Father Flanagan's Boys' Home, where he had worked in the 1970s.

According to the suit, filed by Arizona resident James Duffy, Kelly was one of two church members who molested him at the Boys' Home when he was a child. Kelly was not named as a defendant in the lawsuit, which was eventually dismissed in January 2006.

Kelly said he "absolutely, vehemently" denied the sexual abuse accusations, and had decided to retire because he did not want to remain on leave.

According to the *Associated Press*, Kelly previously had been accused of sexual misconduct when he was a priest in New York in 1983 and 1984. The church investigated and determined that Kelly's conduct did not constitute sexual abuse; however, he was ordered to participate in therapy. He later went to work for the Nevada prison system, where he served as a chaplain for seven years.

Lastly, Pastor Alan R. Sienkiewicz, 60, worked as a volunteer chaplain at the Schuylkill County Prison in Pottsville, Pennsylvania for almost a decade, until he was arrested in October 2008 and charged with multiple felony counts of indecent assault. He was accused of repeatedly molesting a 14-year-old girl.

The sexual abuse allegedly occurred at Sienkiewicz's home, at a church parsonage and in a truck that he owned. The chaplain was released on bail and suspended from his position at the prison. He never went to trial on the charges, though, as he died on July 4, 2009.

Conclusion

Sexual abuse of prisoners by members of the clergy can only occur in situations where silence and secrecy are allowed to prevail, and where insufficient safeguards are provided by prison and jail officials. It is tragic when religious leaders responsible for guiding prisoners to the light of their faith instead misuse their positions for their own dark sexual desires. It is also tragic when church officials use prisons and jails as dumping grounds for clergymen who engage in sexual misconduct.

"This kind of behavior profoundly diminishes the ability of chaplains to help create prisons and jails that are humane, lift people out of crime and preserve a person's right to freely worship while

incarcerated," stated Rev. Dwight Cuff and Tom O'Connor, Ph.D., with the International Prison Chaplains' Association.

Hopefully, with the introduction of new standards for the prevention of sexual abuse in correctional facilities under the Prison Rape Elimination Act (PREA), there will be fewer incidents of sexual victimization by prison and jail chaplains. As of August 2010, however, the PREA standards had not been promulgated by the U.S. Attorney's Office, it does not appear they will be in the near future [See: *PLN*, March 2010, p.22] and the standards were significantly watered down after opposition from prison officials.

In the meantime, prison and jail chaplains who are inclined to prey on prisoners rather than pray with them should ask

themselves, "what would Jesus do?" The answer should be obvious: Thou shalt not rape or sexually abuse members of your incarcerated congregation. Or anyone else, for that matter. ■

Sources: *The Oregonian*, *Tribune-Democrat*, *WTSP-TV*, *The Telegraph*, *Herald-Leader*, www.fosters.com, *Dallas Morning News*, *Associated Press*, <http://lubbockonline.com>, www.firstcoastnews.com, *The Daily Item*, www.justdetention.org, *Fort Worth Weekly*, *Statesman Journal*, www.mcall.com, *Richmond Times Dispatch*, *Las Vegas Review-Journal*, *Spokane Review*, www.adn.com, *Philadelphia Inquirer*, *The Press-Enterprise*, *San Bernardino Sun*, www.bishop-accountability.org, *Chicago Tribune*, www.pressdemocrat.com, www.news-miner.com

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- \$25000 COMBINED DIRECT CALIFORNIA APPEAL WITH CONSOLIDATED HABEAS CORPUS PETITION
- \$5000 PETITION FOR REVIEW TO THE CALIFORNIA SUPREME COURT
- \$15000 APPEALS TO NINTH CIRCUIT COURT OF APPEALS
- \$15000 PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Clergy Who Advocate for Prisoners Barred from Prisons and Jails

As described in this month's cover story, prison and jail chaplains accused of sexual misconduct often resign, retire, are fired or are sometimes prosecuted. In other cases, though, well-meaning clergy members who seek to help prisoners have been locked out of jails and prisons by staff who don't appreciate their advocacy efforts.

Such was the case with Gail Hanson, a volunteer chaplain for eight years at the Cameron County Jail in Brownsville, Texas. Hanson, 61, complained about conditions at the facility for women prisoners – such as poor food, cold temperatures and lengthy pre-trial detention. In response, instead of addressing those issues, in March 2008 Cameron County Sheriff Omar Lucio prohibited the chaplain from visiting the jail.

Chief Deputy Gus Reyna, Jr. later told a local newspaper that Hanson's complaints on behalf of prisoners might "even rise to the level of threatened security breach," stating, "While spiritual guidance may be helpful, personal involvement and advocacy for inmates is not within the acceptable limits of spiritual guidance and counseling, and may foment unnecessary and counter-productive unrest among the jail population."

Some chaplains, however, including Hanson, realize that it is insufficient to address prisoners' spiritual needs if their physical needs remain unmet. For example, Hanson would complain when women prisoners did not have sufficient toilet paper, sanitary napkins and underwear, or had to sleep on the floor; she helped them communicate with their families and even took one prisoner into her home who needed a place to stay as a condition of her release.

Some would describe Hanson's actions as living her faith; Cameron County jail officials deemed her advocacy efforts a potential security problem.

"Preventing someone from volunteering their time to help rehabilitate prisoners because she was critical of the county is outrageous," said Scott Medlock, director of the Prisoners' Rights Program of the Texas Civil Rights Project (TCRP). "Mrs. Hanson should be commended for her dedication to ministering to the women held in the jail, not punished for speaking the truth about what she saw behind prison bars."

With representation by the TCRP,

attorney Edward A. Stapleton and the law firm of King and Spaulding, Hanson sued Cameron County on First Amendment grounds, seeking to overturn the sheriff's ban that prevented her from ministering to prisoners. She is not seeking monetary damages.

"This is an important test case," said Medlock, "both because of its free-speech implications and also because not many like this have been litigated. And that is because most sheriffs are not abusing their power the way Sheriff Lucio is. This case tests the power of a sheriff to retaliate against those who speak out."

Hanson's lawsuit, filed in state court and later removed to federal court, is still pending. On January 1, 2010, the district court denied the county's motion to dismiss her complaint. See: *Hanson v. Lucio*, U.S.D.C. (S.D. Tex.), Case No. 1:09-cv-00202.

In a similar incident in 2006, volunteer chaplain Lance Voorhees was barred from the Taylor County, Texas jail after he complained about mistreatment of prisoners. He filed a complaint with the Texas Commission on Jail Standards to no avail. According to Adam Munoz, the Commission's executive director, sheriffs can ban volunteer chaplains at their discretion.

In Iowa, the Rev. Val Peter, a former executive director of Boys' Town (formerly Father Flanagan's Boys' Home), was barred from visiting the Iowa Correctional Institution for Women. His offense? While visiting a prisoner in October 2009, the 75-year-old priest took written notes during the meeting, as was his usual practice. As he was leaving a prison guard demanded that he surrender the notes because he had written down another guard's name; instead, Peter tore off the note with the name, put it in his mouth and ate it – an act that he described as "a prophetic gesture," citing Ezekiel 3.

His visitation privileges were suspended for a year, a decision that was upheld by prison officials. "Keep in mind that visiting is a privilege, and it can be terminated for good cause at any time," remarked Iowa Dept. of Corrections spokesman Fred Scaletta.

In July 2010, the Rev. A.J. Guyton, 73, a Baptist pastor, was banned from the Peoria County Jail in Illinois. Sheriff Mike McCoy confirmed that Guyton was not welcome at the facility, at least on a temporary basis, after the pastor made

uncomplimentary remarks about guards during a sermon and encouraged prisoners to write petitions expressing their concerns. Guyton had ministered at the jail for more than 25 years.

"We felt some of the reverend's comments were not religious in orientation or nature and do not follow his charge, which is to preach the gospel and help inmates with their religion," said Sheriff McCoy.

Rev. William B. Pickard, 63, a Catholic priest, has been barred from visiting prisoner Nicholas Pinto, who was the victim of a vicious assault by another prisoner at the Lackawanna County Prison in Pennsylvania in August 2010. Four months earlier Pickard, an advocate for prisoners at the facility, had informed members of the prison board that Pinto previously had been assaulted and was "a likely target" for future attacks.

Rev. Pickard was not allowed to visit Pinto after he was hospitalized in critical condition, because guards claimed he had pushed them. Pickard said he merely brushed by them. "It would be better if he didn't come" to visit prisoners, said Warden Janine Donate. The assault on Pinto, which occurred in the jail's protective custody unit, resulted in attempted murder charges against another prisoner.

Lastly, the *Associated Press* reported on July 21, 2010 that when part-time pastor Gerald Otahal arrived at the Kentucky State Penitentiary to pray with a prisoner on death row, he was turned away. Kentucky prison officials had decided to strictly adhere to a policy that limits visits by members of the clergy.

Referring to the prisoner he ministered to, Otahal said, "He has no outlet now. He has no one to pray with. No one to talk to him about the hereafter. Good grief. I'm just astounded they took this away."

The Kentucky Department of Corrections moved to enforce the policy after a pastor wanted to minister to more than one death row prisoner. Religious advisors now have to be one of three people on a prisoner's visitation list before they are allowed to visit.

"You have a right over their life," Otahal said of prison authorities. "You don't have a right over their soul." He also noted that pastors should be welcomed in state prisons, so they can "talk to [prisoners] about how to live a better life."

Apparently, though, when it comes to allowing members of the clergy to

visit with and minister to prisoners, there is no higher power than prison and jail officials. ■

Sources: *Texas Observer*, www.wishtv.com, www.omaha.com, www.texascivilright-sproject.org, *Brownsville Herald*, www.chicagotribune.com, www.pjstar.com, *Associated Press*, www.thetimes-tribune.com, www.citizensvoice.com

Federal Court Finds Nation of Islam Publication Not Racially Inflammatory

by David M. Reutter

On March 31, 2010, a Louisiana U.S. District Court held that the denial of access to a religious publication based solely on the inclusion of a section called "The Muslim Program" was a violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The court's ruling came in a lawsuit filed by Louisiana prisoner Henry Leonard, who was incarcerated at the David Wade Correctional Center (DWCC). Leonard had been a member of the Nation of Islam (NOI) since 1985. He subscribed to *The Final Call*, the NOI's official publication, and first began receiving it at DWCC in October 2005.

Beginning on June 14, 2006, DWCC started rejecting *The Final Call* because it contained racially inflammatory material that was considered a threat to security. Of greatest concern to prison officials was "The Muslim Program" on the last page of each issue, which includes statements about "What Muslims Want" and "What Muslims Believe." Leonard filed suit over the DWCC's censorship policy.

The district court held that Leonard's claims were very similar to those raised in *Walker v. Blackwell*, 411 F.2d 23 (5th Cir.

1969). At issue in that case was *Muhammad Speaks*, an NOI publication that was the precursor to *The Final Call*. "The Muslim Program" had appeared in both publications since 1965. In *Walker*, the Fifth Circuit found that writing "arguably much more controversial than 'The Muslim Program'" was not racially inflammatory.

As such, the district court said it must find likewise in Leonard's case. It did so while applying the four-prong test in *Turner v. Safley*, 482 U.S. 78 (1987). The court held that DWCC's policy requiring rejection of publications that contain racially inflammatory material did not itself violate the Constitution, but its implementation as applied to Leonard was in conflict with the First Amendment.

DWCC was unable to provide an example of violence or unrest in an institutional setting that could be attributed to *The Final Call*, and the court found that the "wholesale prohibition of the publication is simply too broad when balanced with the Plaintiff's right to the free exercise of his religion."

There was no alternative means for Leonard to practice his religious beliefs, as DWCC does not provide NOI materials and *The Final Call* is the "primary organ

to propagate [the NOI] religion."

As Leonard had received the publication in the past with no negative impact on guards or other prisoners, the court found there would be minimal impact by allowing him to continue receiving it. Finally, DWCC policy already requires staff to review *The Final Call*. Continuing to review the publication for inflammatory material other than "The Muslim Program" was a ready alternative that "is not an enormous administrative burden when compared with the Plaintiff's ability to practice and grow in his religion of choice."

Accordingly, the district court found the censorship policy at DWCC, as applied, violated Leonard's First Amendment rights. The court also held that the policy violated RLUIPA because it was not the least restrictive means to further a legitimate governmental interest. Leonard's motion for summary judgment was therefore granted and prison officials were ordered to let him receive future issues of *The Final Call*.

Leonard was represented by Shreveport attorney Nelson W. Cameron and the ACLU of Louisiana. See: *Leonard v. State of Louisiana*, U.S.D.C. (W.D. Louisiana), Case No. 5:07-cv-00813-DEW-MLH; 2010 WL 1285447. ■

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From the Editor

by Paul Wright

After 20 years of publishing *Prison Legal News* I have been asked if it ever gets old or if I get tired of reporting the same news for decades. While there are common themes in prison and jail news over the years (medical neglect and guard brutality being the most common), new things are always arising and then there are new variations on the old.

One thing that I look for whenever there is a mainstream media story is “what is the prison angle” for *PLN* readers. For the past few decades the sexual assault of children by members of the clergy has been all too common and the sexual assault of prisoners by staff members has been even more common. This month’s cover story reflects that connection as we report in detail on an inter-related phenomenon: clergy members who rape prisoners and prisons that serve as dumping grounds for clergy who rape their parishioners outside prison.

PLN had reported such cases in the past but it was only while researching broader articles on a national basis, about the prevalence of sexual assault of prisoners by staff, that the scope of the problem became apparent. How prevalent is difficult to say given the lack of reliable data on sexual assaults by staff and also since, compared to say guards, there are a lot less clergy working in prisons and jails – yet given the opportunity, some can and do act with the worst of intentions. The flip side of the coin are the clergy who, in addition to providing for prisoners’ spiritual needs, also advocate on behalf of prisoners and seek reform of existing prison systems. As we note, those clergy members are targeted for removal from prisons and jails with a rigor rarely seen when abusive staff are the problem.

This year marks *PLN*’s 20th anniversary and we are celebrating 20 years of independent, hard-hitting journalism and advocacy exposing the realities of the American gulag. Our survival over the past two decades is thanks to our readers and supporters. Subscribers will soon be receiving our annual fundraiser and I hope that readers are extra generous this time around to help us mark our anniversary. When *PLN* started in 1990 I don’t think anyone expected we would last 20 years. I certainly didn’t.

Our second book, *The Habeas Corpus Citebook*, is nearing completion and

should be ready for shipping by mid-October. We will announce its availability as soon as we have copies in our office that are ready to ship. Also, the long-awaited fourth edition of the *Prisoners’ Self-Help Litigation Manual* by John Boston and Dan Manville has been published, and as this issue of *PLN* goes to press we are contacting the publisher about distributing the book and will announce it as soon as we have an answer.

For the past two decades that I have been *PLN*’s editor, the only thing that has consistently saddened me has been writing the obituaries for our supporters who have died over the course of our publication. A few months ago when I heard that political prisoner and former *PLN* columnist Marilyn Buck was being released on July 15, 2010 after 25 years in prison, I was elated at the prospect of finally meeting Marilyn after so many years of communicating by mail. Marilyn was convicted in 1985 of various political offenses aimed at protesting US imperialism, including bombing the US senate and the naval war college. She was sentenced to 80 years in prison.

Marilyn was one of our earliest subscribers when *PLN* began publishing in 1990. She contributed articles to a wide variety of publications on the topics of women prisoners, prisons in general, political prisoners and radical politics, and poems as well. Marilyn was also a quarterly columnist for *PLN* in 2000 and 2001; her column was appropriately titled *Notes from the Unrepententiary*.

Unfortunately, Marilyn died on August 3, 2010 at the age of 62 due to untreated uterine cancer, less than a month after being released from federal prison. Prisoners in general and women prisoners in particular have lost a powerful advocate. It is sad to say that the medical neglect of the Bureau of Prisons succeeded in silencing a proud, powerful woman where the guns of the FBI and assorted police agencies failed.

On that very unhappy note, please enjoy this issue of *PLN* and please encourage others to subscribe. As the holidays approach, if you are looking for a good holiday gift consider giving a subscription to *PLN* or one of the books we distribute. 📖

\$35,000 Settlement in Indiana Jail Failure to Protect and Medical Care Suit

by David M. Reutter & Mark Wilson

Indiana’s Marion County Jail (MCJ) has paid \$35,000 to settle a federal civil rights complaint that alleged deliberate indifference to a prisoner’s safety and serious medical needs.

The lawsuit was filed by Joseph R. Grieveson, a federal detainee incarcerated at MCJ from 2000 to 2002. Between November 30, 2000 and March 21, 2001, he was assaulted seven times by both other prisoners and a guard.

During Grieveson’s first six months at the jail he shared a cell with former Indianapolis Colts quarterback Art Schlichter. A federal grand jury was investigating Schlichter for gambling schemes involving his attorney, Linda Wagoner, who allegedly smuggled items into the facility for Schlichter. Grieveson’s friend, Norman Buff, was involved in the Schlichter investigation.

Grieveson believed “that he was considered a ‘snitch’ ... because of his

association with Buff.” On several occasions, Buff asked guards to move Grieveson away from Schlichter. He was finally moved on November 18, 2000, to a 45-bed dorm.

Twelve days later Grieveson was beaten unconscious by another prisoner who “called Grieveson a ‘snitch’ and said the beating was a ‘favor for Schlichter.’”

Grieveson repeatedly informed guards that he had a broken nose, was bleeding down his throat and was in intense pain. Grieveson’s sister called the jail, attempting to get him medical care. Three days after the assault he was finally taken to a hospital, where he was diagnosed with a broken nose, prescribed pain medication and advised to see a plastic surgeon.

A guard initially refused to give Grieveson his medication, “saying ‘You don’t need it. Be a man and stop whining.’” MCJ staff later gave Grieveson all of his prescribed pain pills at one time, but a stronger

prisoner took them away from him, leaving him without medication for a week.

On December 31, 2000, Grieveson was assaulted a second time. He asked to be moved and also requested that he be given “only one dose of medication at a time.” He was assaulted again on January 17, 2001, but not taken to a hospital for two days – and only then after repeated calls from his family.

Grieveson had to have a broken tooth surgically removed. He was again prescribed pain medication and issued the entire prescription at once. The medication was again stolen by another prisoner.

On January 22, 2001, a “guard slammed Grieveson’s arm in a steel door and threw him repeatedly against the bars in a basement holding cell. The guard reportedly told Grieveson to stop complaining and stop ‘causing trouble.’” Grieveson was taken to the hospital and treated for an injured shoulder. He was prescribed pain medication and told to apply “cold packs to the injury.” Guards denied him an ice pack, however, saying “we don’t give those out here.” He was again issued his entire pain medication prescription, which was again taken by a stronger prisoner.

In February 2001, Grieveson was “pummeled” in the face for snoring, and on March 4, 2001 he was assaulted a sixth time when he tried to stop other prisoners from stealing his food and property. A guard witnessed that assault and told Grieveson “to learn how to fight harder or don’t come to jail.”

Grieveson filed a grievance concerning the repeated assaults on March 14, 2001, expressing his fears and requesting to be moved to a safer cell block. Buff also relayed his concerns about Grieveson’s safety and asked that he be moved. He was not.

The seventh and worst attack occurred a week later, when a prisoner who

was a former client of Schlichter’s attorney hit him “in the face and slammed his face into a steel table, knocking Grieveson unconscious.” After regaining consciousness, it took him 90 minutes to get a guard’s attention.

“Grieveson suffered ... a broken left eye socket, damage to his optic nerve, and injuries to his ribs, face, jaw, and nose.” On March 28, 2001, a plastic surgeon concluded that immediate surgery was needed to address the damage to his eye. The surgery was to occur within a few days, but was not performed because Grieveson was transferred to a federal prison. It took 35 days for his medical records to follow. By the time he saw another doctor it was too late to correct the injury to his eye.

Grieveson sued various jail officials in federal court, alleging they had failed to protect him from harm or provide him with adequate medical care. He also raised state law negligence claims. The district court dismissed some of his claims and granted summary judgment to the defendants on the remaining claims. Grieveson appealed.

The Seventh Circuit found that for all but one of the assaults, “Grieveson presented no evidence that any of the named defendants were aware that Grieveson was perceived as a snitch by his fellow inmates.” Therefore, there was “no genuine issue of material fact concerning the assaults Grieveson suffered at the hands of angry, unstable, violent inmates because there is no evidence demonstrating that any of the named officers knew about these threats to Grieveson’s safety.”

However, the appellate court held that Grieveson’s claim concerning the sixth attack survived summary judgment because he alleged a guard had witnessed the incident but failed to intervene and told him he needed to “learn how to fight harder.” Those facts exhibited a “quintes-

sential deliberate indifference.”

The Court of Appeals also concluded that “Grieveson’s claim for deliberate indifference to his medical needs survives summary judgment ... to the extent that the claim relates to delay in treatment after Grieveson’s first assault.” He failed to “show that the named defendants were personally involved in the other delays.”

Finally, the Seventh Circuit reversed the dismissal of Grieveson’s state law negligence claims, explaining that “Grieveson’s burden on a negligence claim is far less than his burden on a § 1983 deliberate indifference claim,” and “negligence law exists to deal with the very types of allegations Grieveson made here – that certain individuals *should* have acted differently in light of the duties applicable to them, and that their failure to abide by the relevant standard of care caused Grieveson personal injury.” See: *Grieveson v. Anderson*, 538 F.3d 763 (7th Cir. 2008).

On remand, Grieveson successfully moved to have the U.S. District Court judge recuse herself from his case. The court noted that “A careful review of the criminal proceedings, rather than demonstrating a bias or prejudice against the Defendant by the undersigned judge, reveals a concerted effort by her to ameliorate the harsh conditions / effects of Defendant’s incarceration in the Marion County Jail....” However, as the judge had “independent knowledge relating to the pending civil claims because of or growing out of [Grieveson’s] criminal prosecution,” she recused herself in January 2009.

The parties agreed to settle the case in August 2009 for \$35,000 following seven years of litigation, and the court entered a stipulation of dismissal in October. Grieveson was represented by Indianapolis attorney Michael K. Sutherlin. See: *Grieveson v. Cottey*, U.S.D.C. (S.D. Ind.), Case No. 1:02-cv-01862-LJM-TAB. ■

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***Boulder Weekly* Investigation Ends the Practice of Shackling Colorado Prisoners in Labor**

by Pamela White

Ryan Owens caught her first case at age 27 after becoming addicted to methamphetamine. She was sent into treatment, but relapsed almost immediately after graduating. When she got into trouble again, she went on the run, afraid of being sent to jail.

A mother with two children, she was also pregnant.

She wasn't on the run long, however, when law enforcement caught up with her. She spent her first five days in Denver City Jail heavily pregnant and sleeping on the floor on a dirty blanket. Then she was transferred to Denver County Jail, where she stayed for a time, before being transferred to El Paso County on her due date — and then back again.

During transport, she was kept in full restraints, including ankle shackles and a belly belt, an excruciating experience. Though she begged the guards to remove some of the shackles, they refused, instead joking about whether or not the trip would make her go into labor.

"It hurt so bad," she says. "It was miserable. I cried the whole way down there and the whole way back."

She was in Denver County Jail when she finally went into labor. She was brought to the hospital in wrist and ankle irons, then chained by her ankle to a hospital bed. The humiliation was extreme. Worse was her inability to make use of the comforts available to other women to help ease the pain of labor, such as the hot tub.

The experience, she told the Colorado State Senate and House judiciary committees, left her feeling that she'd been treated "like an animal."

I listened to Owens testify at the House Judiciary Committee hearing and watched as her testimony resonated with others in the audience, including a former prisoner who had tears running down her face. And I feel great satisfaction in knowing that what happened to Owens will never happen again — at least not in Colorado.

On Thursday, May 27, 2010, Gov. Bill Ritter signed Senate Bill 193, nicknamed "the shackling bill," into law.

The bill was introduced and carried by Sen. Evie Hudak, who learned about

the shackling of prisoners in labor from a *Boulder Weekly* investigation into the treatment of pregnant prisoners. Rep. Claire Levy sponsored the bill in the House.

When the law goes into effect on Jan. 1, 2011, it will regulate the use of shackles on prisoners throughout pregnancy, prohibiting the use of shackles on prisoners during labor and delivery, except under extreme circumstances where a prisoner poses an immediate danger to herself or others or represents a threat of escape.

With the governor's signature, Colorado became the ninth state to prohibit the shackling of prisoners in labor.

For former prisoners, like Owens, who gave birth while in custody, the new law offers a chance to heal one of the worst memories from their time behind bars.

"It's so great," she says. "That's a memory that will never go away. That's how my son came into this world. I take full responsibility for the reasons that I was there, but the fact that nobody else has to go through that is huge to me. My [labor and birth] is done and over with. It is what it is. But the fact that this is a law now — it does heal."

For the coalition of women's groups and medical professionals who pushed for the bill's passage, the new law marks a leap forward for the medical treatment of women prisoners and for human rights in the state's jails and prisons.

"This takes us out of the dark ages in the Department of Corrections and our jails," said Sen. Hudak, "and it's long overdue."

For me, the journalist who investigated the issue and then took the unusual step of carrying it to Capitol Hill and even writing the first draft of the bill, the new law serves as validation for what I've always believed — that newspapers are still capable of bringing about significant change.

Disbelief and Shame

The toughest thing about launching Senate Bill 193 was lawmakers' disbelief. Upon reading through the bill for the first time, many responded like Sen. Keith King.

"Do we know this really happens?" he asked.

King went on to become a vocal supporter of the bill when he learned that somewhere between 50 and 60 prisoners were giving birth in chains each year in Colorado.

As my investigation revealed, how and when prisoners were shackled depended entirely on where they were being held. In Boulder County, prisoners were not shackled during labor, but in nearby Denver County, prisoners were being shackled to their hospital beds by a long, heavy chain fixed to one ankle. In some mountain jurisdictions, women were actually being given furlough from jail to give birth and were allowed to have family with them in the hospital. DOC prisoners, on the other hand, were being taken to the hospital in wrist restraints and sometimes ankle shackles and belly belts and were shackled to their beds by one extremity throughout labor — depending on which nurse and guard were on duty.

Once these facts were laid out, most lawmakers were astonished and even ashamed.

Hudak says that compared to some other bills she's carried, SB 193 wasn't a difficult bill to explain to people. During the bill's first hearing before the Senate Appropriations Committee, Hudak asked her fellow senators if any of them had ever given birth or been present when their spouses gave birth. She then asked whether they could imagine themselves or their wives trying to escape.

"They finished the sentence before it came out of my mouth, and they really understood that it's ridiculous that a woman in labor would try to escape or would be successful if she tried," Hudak says.

SB 193 prohibits the use of belly shackles and ankle irons on pregnant prisoners at any point during their pregnancy, out of concern that shackling in this manner poses a danger to the fetus, uterus, and placenta should the belt put pressure on the prisoner's pregnant abdomen or should the prisoner trip and fall.

The bill also prohibits the use of any kind of shackles on prisoners during labor and delivery, except in extreme cases when a prisoner poses an immediate danger to

herself or others or represents a serious flight risk. If they are shackled, it must be done using the least restrictive restraint necessary for maintaining safety, and the incident must be detailed and saved as a public record.

Further, the bill enables prisoners to have a member of the medical staff present during her strip-search on return to jail or prison.

The bill moved swiftly through the legislative process. It received the unanimous support of the Senate and passed with a single “no” vote in the House, cast by Rep. Mark Waller.

“The only hesitation came from the Department of Corrections,” Hudak says.

The DOC, which runs the state’s prisons, originally took a neutral position, but perhaps showed its true stance by attaching a significant cost to the bill, claiming that they would need to hire more guards if they left laboring prisoners unshackled.

But the fiscal note was struck from the bill by the Senate Appropriations Committee during a hearing in which Sen. Bob Bacon admitted to feeling ashamed that Colorado needed a bill like SB 193.

“I was particularly pleased in the Senate that they took the fiscal note off because they didn’t believe that additional guards would be necessary,” Hudak says.

After the fiscal note was removed, however, the DOC took a more aggressive stance against the bill. There were indications that its representatives would ask the governor for a veto and look for ways to stall the bill until it died if it weren’t amended.

Rep. Claire Levy worked with the DOC to craft a version of the bill they could support, removing language from the House version that would have prohibited shackling prisoners during transportation to or from a medical facility for childbirth, as well as during the immediate postpartum recovery period. Had it not been for those changes, Levy says the bill might have faced an uphill battle with the governor.

“I’m sorry that the Department of Corrections was successful in weakening the bill in the House,” Hudak says. “They were more successful in convincing the representatives that shackling was necessary during transport. I still don’t believe it is. But as is common in the legislative process, you might not get everything you

want, but this goes a long way.”

Because of Levy’s efforts, the DOC testified in favor of the bill.

Although the law doesn’t go into effect until Jan. 1, the DOC plans to implement new procedures before then.

“As you are aware, our procedures were in place and different than some other jurisdictions prior to passing of the bill,” Joanie Shoemaker, deputy director of prisons for the DOC, wrote in an e-mail to *Boulder Weekly*. “We have begun the process of changing policy and designing the tracking tool. We will implement as soon as that is finalized even if the bill has not been enacted.”

Reproductive Justice

Julie Krow has heard more about women’s experiences being shackled during labor than most people. Krow oversees The Haven, a residential substance-abuse treatment program for pregnant and parenting women. About 70 percent of the clientele at The Haven have entered the program after being diverted from the criminal justice system or after being released from jail or prison.

Concerned about the treatment of prisoners during labor, Krow pulled to-



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Boulder Weekly Investigation (cont.)

gether a focus group of Haven clients who had given birth while in custody and asked them to share their experiences.

"To me, the thing that was really telling was that the experiences were all over the map," Krow says. "Some of the women were traumatized by the experience and had had a terrible experience. Some people from some of the rural mountain towns said it wasn't like that for them."

It seemed to Krow that such a wide discrepancy in how prisoners were treated meant that there was room for compassion — and consistency — in shackling policies.

Krow testified in favor of SB 193 and discussed the bill with her clients during the legislative process. She was pleased to hear that the governor had signed the bill and said her clients are also happy to learn that the shackling of prisoners during labor is coming to an end in Colorado.

For Dr. Eliza Buyers, an obstetrician-gynecologist in Denver and the legislative chair of the Colorado Section of the American Congress of Obstetricians and Gynecologists (ACOG), the new law means safer pregnancies and births for prisoners and the achievement of a legislative goal here in Colorado.

"The issue of shackling pregnant and laboring women is one that the American Congress of OB/GYNs has been talking about on a national level for well over five years," Buyers says. "Providers have become involved in this issue because, beyond the physically demeaning aspects of this practice, there are also serious medical concerns."

Those concerns include everything from possible damage to the fetus, uterus

or placenta caused by pressure from belly shackles to delays in emergency treatment caused by an inability to remove shackles quickly enough.

"Labor is a dynamic, physical and, at times, very rapid process," Buyers says. "The use of restraints on pregnant prisoners is medically hazardous, and prohibiting this practice is necessary for health providers to deliver safe medical care."

ACOG had been hoping to present a bill in Colorado next year, but when Buyers heard a bill was being drafted, she immediately became involved. She brought a medical perspective to the drafting process and testified at both the Senate and House judiciary hearings.

Lorena Garcia, director of policy and organizing for COLOR, the Colorado Organization for Latina Opportunity and Reproductive Rights, also had plans to push for a ban on the shackling of prisoners in labor next year. When she learned that an effort was under way this year, she became actively involved in the process of drafting and lobbying for the bill.

"COLOR's mission is reproductive justice, and being able to give birth in a humane fashion no matter the location is a piece of reproductive justice," Garcia says. "With the passage of SB 193, it brings us a step closer now that even women who are incarcerated can also have reproductive justice."

Garcia says she was surprised and gratified when the bill received such overwhelming bipartisan support.

"I'm very pleased to see that the state of Colorado has a vested interest in ensuring that one of our most vulnerable populations is treated fairly, and that population is incarcerated women," she says.

Garcia says she also finds hope in the fact that, in the end, it wasn't a lobbyist or activist group that brought the issue of shackling pregnant prisoners to the table.

"I think this process being driven by a citizen and a constituent proves that there is value in our everyday Coloradans advocating for rights," she says.

For Owens, who graduates from treatment later this month and whose son recently turned 2, testifying before state lawmakers was an empowering experience.

"It was extremely empowering, even though my hands were shaking," she says. "The only thing that kept going through my head was that people need to hear what

really happens. People need to hear from the inside. So many times people don't hear people like us." This time, thanks in part to Owens, people in the highest levels of state government got the message loud and clear.

"I think the fact that another woman won't have to feel [what I felt] is amazing," she says. "It's huge to me. It's awesome. It really is."

How the Law has Changed

Before Senate Bill 193:

- Each jurisdiction had its own policy regarding the shackling of prisoners during pregnancy, transport, labor and delivery.

- Pregnant prisoners could be shackled with ankle shackles, belly belts and wrist shackles.

- Many prisoners were kept in shackles throughout their labor.

- No medical personnel were present during prisoners' strip-search upon return to jail or prison.

- Because records pertaining to pregnancy and birth are private medical records, it was difficult to determine exactly how pregnant women were being treated.

After Senate Bill 193:

- There is one statewide policy regulating the shackling of prisoners throughout pregnancy, including transport, labor and delivery.

- Belly belts and ankle shackles are banned for use on pregnant prisoners.

- When shackling pregnant prisoners, guards must use the least restrictive restraint possible for maintaining safety.

- No prisoner may be shackled during labor or delivery unless she presents an immediate danger to herself or others or poses a serious threat of escape, and then she may only be shackled by the least restrictive restraint necessary.

- A prisoner may choose to have a member of the jail or prison's medical staff with her when she is strip-searched after returning from giving birth.

- Any use of shackles on a prisoner during labor or delivery must be recorded (without identifying medical information) and maintained as a public record for five years. ■

This article was originally published in Boulder Weekly (www.boulderweekly.com) on June 3, 2010, and is reprinted with permission. Pamela White is the editor of the Weekly.

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\$10 Million Settlement for Former Colorado Prisoner Cleared by DNA

by David M. Reutter

On February 16, 2010, Colorado's Larimer County Commission approved a \$4.1 million settlement with a former prisoner who served 10 years of a life sentence for a murder he didn't commit. The settlement agreement covers employees in the Larimer County district attorney's office, while claims against Fort Collins police officials were resolved separately for \$5.9 million.

Timothy Masters was convicted in 1999 of the February 12, 1987 murder of Peggy Hettrick. He was convicted without any physical evidence tying him to the crime, and was exonerated by DNA evidence in 2008. Police had suspected him of the murder because he drew violent pictures, wrote violent stories and had seen Hettrick's body on his way to school but didn't report it because he thought it was a mannequin. Prosecutors secured a conviction in part through the use of a psychological profile that they claimed Masters fit.

His attorneys said the settlement does not make up for a decade spent under police scrutiny and then another decade in prison. "It's not like he walked down the street and found a lottery ticket," stated attorney David Wymore. "He's had a lot of suffering."

Two former prosecutors named in Masters' lawsuit, Jolene Blair and Terence Gilmore, weren't happy with the settlement. "We had just begun to fight this case," said Blair's attorney, Kevin Kuhn. "And we would have prevailed in this case."

"It's really a shame that to this day they won't admit they convicted an innocent man," countered David Lane, another of Masters' attorneys. "There is no amount of money that can make up for what happened to him."

Blair and Gilmore, who are now Larimer County district judges, were censured by the Office of Attorney Regulation (OAR) of the Colorado Supreme Court in September 2008 for failing to turn over evidence to Masters' trial counsel that would have been favorable to his defense. They "directly impaired the proper operation of the criminal justice system in the trial of Timothy Masters for murder," OAR officials found.

"This is a slap on the wrist," said Wymore. "This is a form of punishment,

but it doesn't go far enough.... This man spent 10 years in prison, and the prosecutors who put him there aren't even being sentenced to an ethics class?"

The two judges are up for retention elections in November 2010. "I hope the voters of Larimer County remember the justice denied Timothy Masters regarding the retention of Gilmore and Blair," Lane stated.

Larimer County's insurance company will pay \$3 million of the \$4.1 million settlement and the remainder will come from the county's special risk management fund. The county spent around \$400,000 defending against Masters' lawsuit before agreeing to settle. See: *Masters v. City of Fort Collins*, U.S.D.C. (D. Col.), Case No. 1:08-cv-02278-LTB-KLM.

The City of Fort Collins settled Masters' claims for \$5.9 million in June 2010, bringing his total settlement award to \$10 million – or about \$1 million for each year he spent in prison. The city refused to admit fault, calling the settlement a "business decision that reflects the

financial realities and risks of proceeding to trial."

That didn't sit well with Masters. "They're just trying to cover their ass," he said. "It frustrates me they won't admit they screwed up."

On June 30, 2010, the police detective who helped send Masters to prison was indicted on eight felony counts of perjury. Lt. Jim Broderick, a 31-year veteran of the Fort Collins police force, was accused of lying in affidavits and in court to secure Masters' conviction; he was suspended following the indictment.

"He framed the guy," Wymore stated, bluntly. "And to frame a guy, you've really got to hide and be deceptive about a lot of evidence, and that's what he did."

Masters said he was "pleased to see a glimmer of hope that the man most directly responsible for my wrongful incarceration might be held accountable for his actions to some extent." ■

Sources: *Denver Post*, www.coloradoan.com

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Prison Nursery Programs Promote Bonding, Reduce Recidivism

by Gary Hunter

Several studies, highlighted by the Women's Prison Association (WPA) in a recent report, have shown that allowing infants born in prison to remain with their incarcerated mothers enhances bonding and leads to decreased recidivism.

Prior to the 1950s, nurseries for prisoners who gave birth were fairly common. But by the 1970s every state prison and jail system except one had eliminated efforts to keep mothers united with their newborns. Only the nursery in New York's Bedford Hills Correctional Facility, which was founded in 1901, has remained in continuous operation.

Not surprisingly, it was also during the 1970s that the United States ushered in draconian lock-'em-up policies and practices. According to a report released by the WPA's Institute on Women & Criminal Justice in May 2009, the number of women incarcerated in the U.S. increased by 832 percent between 1977 and 2007. The report also stated that in 2004, "four percent of women in state prisons and three percent of women in federal prisons were pregnant at the time of admittance."

Currently only seven states have prison nursery programs: Illinois, Indiana, Ohio, Nebraska, New York, South Dakota and Washington. Two states, California and West Virginia, are in the process of creating prison nurseries. Just one jail system, Rikers Island in New York, offers such a program.

In other jurisdictions pregnant prisoners are usually separated from their newborns within a matter of hours. Female prisoners in Texas can't live with their children after giving birth, but are allowed liberal visitation through the Love Me Tender program at the Carole Young Medical Facility.

Prison nurseries vary greatly from state to state as there are no standardized requirements or federal guidelines. The Illinois program at the Decatur Correctional Center only accommodates five mothers and their children, while New York's Bedford Hills facility can house 29 mother/infant pairs. The Bedford Hills program includes a parenting center, prenatal center, day care center and child advocacy office.

In June 2010, Indiana prisoners raised

money for the Wee Ones Nursery at the Indiana Women's Prison, which is funded through donations and grants. Within the first week prisoners had contributed \$4,000 to the program, which was founded in 2008 and has provided services for 30 incarcerated mothers and their children.

"I just know that I was motivated and feeling strong about keeping my baby here, because my other two kids, I lost them, because after coming to prison, I had to let somebody adopt them," said Indiana prisoner Balbina Hernandez, 33, who participated in the Wee Ones program with her newborn daughter, Angelina, for one year.

The length of participation in prison nursery programs varies. South Dakota only allows prisoners to nurse their babies for thirty days, while the Washington Correctional Center for Women lets children live with their incarcerated mothers for up to three years. For most facilities the average duration is 12 to 18 months.

To be eligible for nursery programs, most states require that women be pregnant upon their arrival at prison. They must also sign a waiver releasing prison officials from responsibility for children who may get sick or injured. Prisoners who become pregnant during their incarceration (e.g., on furlough) or who plan to give their child up for adoption are disqualified.

Despite the variations, every prison nursery program currently reports favorable results for both the prisoners and children involved.

The University of Nebraska conducted a study of the nursery program at the Nebraska Correctional Center for Women. According to that study, prisoners who participated in the program received 13 percent fewer disciplinary cases than those in general population. A five-year evaluation concluded that women who were immediately separated at birth from their newborn children returned to prison at a rate of 33.3% within five years of release. Women who participated in the prison nursery program had a 9% recidivism rate.

A study conducted at the Ohio Reformatory for Women (ORW) had even more impressive results. Established in 2001, 118 mothers and their newborns took part in the ORW nursery program over a five-year period. The three-year

recidivism rate for women in the program was a mere 3% compared to an overall 38% for general population prisoners, both male and female.

A 2002 follow-up survey of prisoners in the New York State Department of Correctional Services yielded less dramatic but still noteworthy results. For women who participated in the nursery program, 13.4% returned to prison within three years of release compared to 25.9% of female prisoners in general population.

The most extensive study was conducted by Prof. Mary W. Byrne at Columbia University. Her longitudinal research covered prison nursery participants at New York's Bedford Hills and Taconic Correctional Facilities. Ninety-seven prisoners and 100 infants who participated in the nursery programs from 2003 to 2008 were studied. The results indicated that mothers and their children developed a stronger attachment as a result of such programs, and according to a "one-year follow-up, the women also appear to have a lower recidivism rate than similar women in the community."

According to Dr. Byrne, "Prison nurseries offer needed services to a population of women and infants who might otherwise be overlooked." Dr. Angela M. Tomlin, an Adjunct Assistant Professor of Pediatrics at the Indiana University School of Medicine, agreed, stating, "The prison nursery is an investment in the future, one mother and baby at a time."

Despite such favorable data and endorsements, prison nursery programs are not without their critics. For example, a 1992 study conducted by Dr. L. Catan found that while children in prison nurseries did develop a strong bond with their mothers, they also demonstrated deficiencies in motor skills and cognitive development. Follow-up studies have concluded that those deficiencies disappear soon after children leave the prison environment.

Legal Services for Prisoners with Children (LSPC), a non-profit advocacy organization, endorses community-based rather than in-prison programs for mothers and their infants. While acknowledging the benefits of prison nurseries, LSPC supports "implementing a true community-based program without guards for parents who have sole custody of their

young children instead of putting these children in prison,” noting that prison officials “have difficulty providing adequate care for adults; they certainly aren’t qualified as experts in child rearing.”

In addition to prison nurseries, the WPA report also profiled community-based residential parent programs for prisoners in Alabama, California, Connecticut, Illinois, North Carolina, Massachusetts and Vermont, and in the federal Bureau of Prisons, which operates Mothers and Infants Nurturing Together (MINT) programs at facilities in Florida, Texas, Connecticut, Illinois and West Virginia.

Almost all prison nursery programs include some educational component for prisoners such as GED, parenting and care-giver courses. Children participating in the longest programs are offered Head Start classes. In almost every case, female prisoners involved in nursery programs are incarcerated for non-violent drug offenses.

“Prison nursery programs keep mothers and infants together during the critical first months of infant development, and the research shows that these programs produce lower rates of recidivism among participating mothers,” said Chandra K.

Villanueva, the primary author of the WPA report. She also emphasized the need for community-based alternatives that will “enable women to address the issues that brought them into the criminal justice system in the first place.”

Unfortunately, although an estimated 744,200 male prisoners in the U.S. are parents, no comparable programs exist that allow incarcerated fathers to live and bond with their young children. If there were such programs, it is likely that male prisoners also would benefit from closer familial relationships and lower recidivism rates.

“A strong bond between a father and his family helps that inmate succeed upon release and shows children how important they are in their parent’s life,” acknowledged Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation (CDCR). In June 2010, the CDCR and the Center for Restorative Justice Works brought hundreds of children to four California prisons to visit their incarcerated fathers for Father’s Day through the Get on the Bus program.

According to a February 2009 report by The Sentencing Project, titled *Incarcer-*

ated Parents and Their Children: Trends 1991-2007, as of 2007 there were 1.7 million children in the U.S. with a parent in prison. About half of those children were under 10 years old. ■

Sources: *Women’s Prison Association: “Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives”* (www.wpaonline.org), *The Sentencing Project*, *Huffington Post*, www.prisonerswithchildren.org, www.corrections.com, *Galveston Daily News*, www.wthr.com



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Texas Judge Sharon “Killer” Keller Receives Sanctions

by Matt Clarke

On January 20, 2010, San Antonio Judge David A. Berchermann, Jr., acting as a special master for the Texas State Commission on Judicial Conduct, issued findings of fact in a disciplinary complaint against Sharon Keller, the presiding judge of the Texas Court of Criminal Appeals (TCCA).

The disciplinary action resulted after Keller refused to keep the court clerk's office open late on September 25, 2007 to accept post-conviction filings in the capital case of Michael W. Richard, who was scheduled to be executed that evening. On the morning of September 25 the U.S. Supreme Court had agreed to hear arguments in a case involving a challenge to the three-drug protocol used to execute prisoners in Kentucky, which was similar to the protocol used in Texas. This eventually led to the staying of all executions in the U.S. until the Kentucky case was decided. [See: *PLN*, Dec. 2008, p.37].

According to the Texas Defender Service (TDS), a coalition of attorneys opposed to the death penalty who were representing Richard, TDS contacted the court before the 5:00 p.m. closing time for the clerk's office, explained they were having computer difficulties and asked Keller to keep the clerk's office open late to allow them to file their pleadings. Keller said no, twice, stating “We close at 5:00 p.m.” Richard was executed later that night. [See: *PLN*, July 2008, p.22].

According to Berchermann, that widely-publicized account was wrong; instead, he faulted TDS for most of the problems. He said the TDS attorneys waited until two hours after the Supreme Court ruling was announced to begin drafting the pleadings in Richard's case, then assigned a junior staff attorney to the project. Further, they should have raised the issue in a previous filing long before the Supreme Court's decision. Berchermann said the TDS lawyers never contacted the clerk's office or Keller directly; rather, their paralegals contacted Abel Acosta, a TCCA deputy clerk. Acosta contacted Edward Marty, TCCA's General Counsel, and it was Marty who called Keller and was twice told “no.”

However, Keller's “no” response was to extending the hours of the clerk's office, not to accepting late filings. By unwritten and unpublicized policy, the

TCCA assigned a judge to be the contact person for each death penalty case. In Richard's case the judge was Cheryl Johnson. Berchermann said Acosta and Marty should have called Johnson, who was available to personally accept late filings, instead of Keller, who was the only person who had authority to extend the clerk's office hours.

Berchermann placed the bulk of the blame on TDS. He assumed that, had the TDS attorneys called the court clerk or Keller, they would have been informed that Johnson was assigned to the case and could accept late filings. He claimed the computer problem experienced by TDS only prevented them from emailing the documents and did not delay the completion of the pleadings. He said the documents were completed at 5:56 p.m., not 5:20 p.m. as TDS stated. Finally, Berchermann said that TDS should have known to start calling all of the TCCA judges individually to see if one would accept the late pleadings in Richard's case, an alternate method of filing documents with the court.

As for Judge Keller, Berchermann noted her conduct was uncommunicative and she “should have been more open and helpful. Further, her judgment in not keeping the clerk's office open past 5:00 to allow the TDS to file was highly questionable.” However, she “did not violate any written or unwritten rules or laws.” Therefore, although “there is valid reason why many in the legal community are not proud of Judge Keller's actions,” her conduct did “not warrant her removal from office or even further reprimand beyond the public humiliation she has surely suffered.”

The State Commission on Judicial Conduct rejected Berchermann's findings and reprimanded Judge Keller on July 16, 2010 for interfering with TDS's attempts to file the late pleadings in Richard's case, stating her conduct was “clearly inconsistent with the proper performance of her duties as a judge of the Court of Criminal Appeals.”

“By failing to require or assure that staff subject to her direction and control complied with the execution-day procedures on September 25, 2007, Judge Keller interfered with Richard's access to court and right to a hearing as required by law,” the Commission concluded.

The Commission issued a public warning but did not recommend that Keller be removed from office. See: *In Re Keller*, Texas State Commission on Judicial Conduct, Inquiry No. 96.

“The people of Texas have been publicly warned ... that we have an ethically compromised judge on the Texas Court of Criminal Appeals who did not accord a person about to be executed with access to open courts or the right to be heard according to law, yet she has been allowed to keep her job,” observed Scott Cobb, president of the Texas Moratorium Network, an anti-death penalty organization.

Keller filed a petition for writ of mandamus with the Texas Supreme Court seeking to void the Commission's order, and has indicated she will take other legal action to clear her name. Ironically, she is availing herself of the same court system that she denied to Richard.

In an unrelated ethics complaint, Keller was accused of failing to fully disclose her personal finances in statements filed in 2007 and 2008. On April 28, 2010 the Texas Ethics Commission found she had committed ethical violations, having failed to report stock and other income totaling at least \$61,500 in her 2007 statement and \$121,500 in 2008. She also did not disclose over \$2.4 million in real estate holdings. The Commission imposed a \$100,000 fine – reportedly the largest ethics fine in Texas.

Keller claimed her father had made investments for her and her son without her knowledge, and noted she had filed amended statements when the discrepancies were brought to her attention. She said she would appeal the fine, which her attorney described as “excessive.” See: *In the Matter of Sharon Keller*, Texas Ethics Commission, No. SC-290354.

On August 16, 2010, the Texas Supreme Court declined to reverse the public warning imposed on Keller by the State Commission on Judicial Conduct. With ethically-challenged judges like Keller on the bench, it's little wonder that the Texas criminal justice system has such a wretched reputation. ■

Additional sources: *Texas Moratorium Network*, <http://lgritsforbreakfast.blogspot.com>, *Austin Statesman*, *Houston Chronicle*

Court Rebuffs BOP for Third Time in PLN Records Suit

by Brandon Sample

The score is now PLN - 3, BOP - 0 in a protracted legal battle over the disclosure of records related to settlements and judgments paid by the federal Bureau of Prisons (BOP).

In August 2003, PLN submitted a Freedom of Information Act (FOIA) request to the BOP for "all documents showing all money paid by the [Bureau] ... for lawsuits and claims" from January 1, 1996 through July 31, 2003.

PLN requested a fee waiver for the documents, which the BOP promptly denied, claiming that PLN lacked the ability to effectively disseminate the information to the public.

PLN then filed suit, arguing it was entitled to a fee waiver. U.S. District Court Judge Reggie Walton agreed and granted summary judgment against the BOP. Round one to PLN. See: *Prison Legal News v. Lappin*, 436 F.Supp.2d 17 (D. D.C. 2006) [PLN, Sept. 2006, p.15].

Thereafter, federal prison officials provided PLN with over 11,000 documents; however, the vast majority were useless because they were so heavily redacted.

PLN filed another summary judgment motion, contending that the BOP failed to conduct an adequate search for records and that most of the redactions were improper. In support of its motion PLN argued the declaration of BOP paralegal Wilson J. Moorer, the sole piece of evidence relied upon by the BOP to support the adequacy of its search and asserted FOIA exemptions, was not based on personal knowledge and therefore did not constitute admissible evidence.

On March 26, 2009, Judge Walton again sided with PLN, ordering the BOP to conduct new searches or submit additional evidence showing they had "employed search methods reasonably likely to discover records responsive to plaintiff's request and which shows that the responsive documents and parts of documents not produced to the plaintiff have properly been withheld under the FOIA exemptions claimed by the Bureau." Round two to PLN. See: *Prison Legal News v. Lappin*, 603 F.Supp.2d 124 (D. D.C. 2009) [PLN, June 2009, p.26].

Following the court's decision the

BOP moved for reconsideration, claiming it had submitted additional declarations concerning the adequacy of its records search and redactions, but due to a purported "transmission error" the declarations were not filed by the court's electronic docket system. Accordingly, the BOP asked the court to reconsider its ruling in light of that circumstance.

PLN opposed the BOP's motion on fairness grounds, arguing that it was the responsibility of BOP's counsel to monitor the docket and, as such, the defendants should not be permitted another "bite at the apple."

Putting aside whether the BOP's neglect in monitoring the docket was excusable, Judge Walton held the BOP's additional evidence remained insufficient to support the alleged adequacy of its records search and asserted exemptions. The "declarants fall short of explaining, in reasonable detail, the scope and method of the search," the court found.

"Without providing further description or specific detail concerning the search, the declarants' conclusions that as a result of the search 'all responsive claims were identified,' do not provide sufficient information for the Court to independently determine if the search was adequate," Judge Walton wrote.

Similarly, the court concluded that the BOP had failed to justify the FOIA exemptions it invoked. None of the BOP's "newly filed" declarations addressed any of the exemptions, and the only other declaration in the record that did – Moorer's – had been held inadmissible because it was not based on personal knowledge. As such, the record was devoid of an adequate basis "to find the Bureau's invocation of the FOIA exemptions is proper," the district court stated.

The BOP's motion for reconsideration was therefore denied without prejudice on February 25, 2010. Round three for PLN. This case remains ongoing, with renewed cross-motions for summary judgment pending. PLN has been ably represented in this litigation by Ed Elder, Mara Verheyden-Hilliard, Radhika Miller, Carl Messineo and Adam Cook. See: *Prison Legal News v. Lappin*, U.S.D.C. (D. D.C.), Case No. 1:05-cv-01812-RBW. ■



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Failed Extortion Scheme Led to Washington Prisoner's Suicide Attempt, Lawsuit Says

by David M. Reutter

According to a suit filed on behalf of a Washington state prisoner who attempted to commit suicide, a guard at the McNeil Island Corrections Center retaliated against prisoners who failed to pay extortion fees.

Leon G. Toney was left in a coma and permanent vegetative state after trying to hang himself in his segregation cell at McNeil on September 18, 2008. The lawsuit says he had a history of depression and suicidal ideation.

Toney's suicide attempt came only six-and-a-half hours after being placed in segregation when he was found with a cell phone charger. Preceding the discovery of the charger, prisoner Luis Perez was caught with a cell phone after a guard heard a female voice coming from his cell. A search of the phone revealed nude photos of Toney.

An investigative report by Washington State Patrol detective Juli Gundermann uncovered information that formed the basis for part of the lawsuit. Her report noted that Toney had lost his visitation privileges for 90 days when he was caught engaging in sexual conduct with his wife, Rene Matthews, in the prison visitation room on July 18, 2008.

Gundermann was briefed by Washington State Department of Corrections chief investigator George Gilbert about details of his investigation. Gilbert learned that prison guard Natasha Davson was smuggling cell phones to prisoners for \$500 and allowing them to have sex with visitors for \$150. The sex acts allegedly occurred in an area known as "the boom boom room." Prisoner Ronnie Hamilton informed Gilbert that the July 18 disciplinary charge was a result of Rene not paying Davson for her visit with Toney.

Davson was fired before her probationary period ended. She also was arrested and charged with a misdemeanor count of introduction of contraband, but the charge will likely be dropped due to the expiration of the one-year statute of limitations, stated deputy prosecutor Kevin Benton.

The investigation determined there was no foul play and Toney had hung himself. The prison's video cameras, however, revealed that guards did not make cell checks as recorded in the log book.

The lawsuit claims Toney tried to commit suicide due to a failed extortion scheme that resulted in fabricated disciplinary charges, which put pressure on him and increased his depression and loneliness. An hour before he attempted suicide, Toney told a nurse he had not slept in two or three days and gave her a medical request seeking help. The nurse later wrote in Toney's medical file that his situation was not emergent and he was not going to hurt himself.

The failure to act on that information in light of Toney's mental health history resulted in his suicide attempt, the lawsuit contends. Toney is represented by John R. Connelly, Jr. and Nathan P. Roberts of Tacoma. The suit remains pending. See: *Toney v. State of Washington*, Pierce County Superior Court (WA), Case No. 10-2-05353-6. ■

Additional sources: *The Olympian*, www.thenewstribune.com

Deplorable Conditions at Los Angeles ICE Facility Result in Settlement

by Brandon Sample

Being locked up is bad enough. But imagine being held in a basement without basic essentials like drinking water, clean clothes, the ability to shower, a toothbrush and toothpaste, and medical care. Thousands of immigration detainees in Los Angeles were routinely subjected to such conditions at "B-18," an Immigration and Customs Enforcement (ICE) holding facility located, literally, in the basement of a federal building.

"You actually walk down the sidewalk and into an underground parking lot. Then you turn right, open a big door and voilà, you're in a detention center," said Ahilan Arulanantham, director of Immigrant Rights for the ACLU of Southern California (ACLU).

The problems at B-18 were due, in part, because the facility was not designed for long-term detention. In fact, according to ICE policy, prisoners were not to be kept there for more than 12 hours.

However, ICE officials circumvented that rule by shuttling detainees back-and-forth between B-18 and local jails. A detainee would spend 12 to 18 hours at B-18, be held overnight at a county jail and then return to B-18 in the morning. This cycle would repeat itself over and over, forcing prisoners to endure B-18's squalid conditions for weeks or sometimes months.

In early April 2009, the ACLU and the National Immigration Law Center stepped in, along with the law firm of

Paul, Hastings, Janofsky and Walker, LLP. Representing four B-18 detainees, they filed a class-action lawsuit against Janet Napolitano, Secretary of Homeland Security.

The suit detailed many of the horrific conditions that detainees had to endure at B-18. Male and female prisoners were denied changes of clean clothing and access to soap, clean drinking water, sanitary toilets, and toothbrushes and toothpaste. There were no benches, mats, pillows or beds in any of the holding rooms, forcing detainees who were occasionally kept at B-18 overnight to sleep on the floor. Further, the holding rooms were designed for only 40 or 50 people yet regularly held over 100, exacerbating unsanitary conditions, and were kept at frigid temperatures.

Beyond these deficiencies, detainees also were denied recreation and could not send or receive mail, let alone receive attorney visits. Prisoners were even denied access to pencil and paper.

ICE agreed to settle the case in September 2009, a mere five months after the lawsuit was filed. The terms of the settlement ended the most egregious practices at B-18, guaranteeing that detainees are provided access to clean drinking water, hand sanitizer, female sanitary napkins, writing materials and toilets that work properly, and have the ability to send and receive legal mail.

The settlement also required ICE to allow attorney visits during business

hours and limited the number of detainees that can be kept in a holding room to the room's design capacity. Most importantly, the settlement ended the practice of shuttling detainees back and forth between B-18 and county jails.

"No longer can ICE stuff people into overcrowded cells or deny detainees their right to see a lawyer," said Karen Tumlin, a managing attorney with the National Immigration Law Center. "This settlement serves as a safeguard against what was once an almost everyday situation at B-18: unlawful treatment and unsanitary conditions." See:

Castellano v. Napolitano, U.S.D.C. (C.D. Cal.), Case No. 09-cv-02281-PA.

However, the problems at B-18 may be only the tip of a much larger ICE-berg. According to a December 16, 2009 article in *The Nation*, ICE operates 186 "unlisted and unmarked subfield offices" that are used for short-term detention for prisoners in transit. It is unknown how many of those facilities have abusive conditions similar to those that existed at B-18. ■

Additional sources: *The Nation*, *ACLU press release*

\$2 Million in Settlements for Wrongful Arrest, Conviction in Ohio

Two former Ohio prisoners have accepted settlements totaling \$2 million after being wrongly imprisoned for crimes they did not commit. One of the men, Derris Lewis, spent 18 months in jail pending trial on murder charges. The other, Robert McClendon, served 18 years in prison for rape.

Lewis was arrested for the murder of his 17-year-old twin brother, Dennis Lewis, who was shot and killed by masked intruders in his mother's home on the morning of January 18, 2008. His mother, who was wheelchair-bound, was held at gunpoint while the robbers ransacked the house, confronted Dennis and fatally shot him.

A Franklin County jury deadlocked on the aggravated murder charge on March 9, 2009, resulting in a mistrial. Afterwards, prosecutors and Columbus police concluded that a palm print from Derris, which they had introduced to prove their case, had not been left in his brother's blood inside his mother's home as they originally thought.

"On behalf of the Department of Public Safety and the Division of Police, I want to apologize to Mr. Lewis and his family for the mistake that was made during the homicide investigation of Dennis Lewis," said Columbus Public Safety Director Mitch Brown. "Today's settlement is a clear acknowledgement that a mistake was made, and we wish Mr. Lewis the best of luck in his future endeavors."

The February 10, 2010 settlement agreement with the City of Columbus was reached without a lawsuit, but Lewis' attorneys filed a complaint in federal court in case there was a problem with having the settlement approved by the

city council.

Lewis will receive \$950,000 but elected to take an interest-bearing annuity with payments over 20 years, which will pay approximately \$1.2 million. See: *Lewis v. Young*, U.S.D.C. (S.D. Ohio), Case No. 2:10-cv-00125-ALM-EPD.

In the other case, Robert McClendon, 54, received \$1.1 million from Ohio officials after he was wrongly convicted and spent 18 years in prison. He was released in August 2008 upon receiving assistance from the Ohio Innocence Project, which used DNA evidence to clear him of the 1991 abduction and rape of a female relative.

McClendon settled his claims against the state in May 2010; he had sought compensation as a "wrongly imprisoned individual" pursuant to ORC § 2743.48. See: *McClendon v. State of Ohio*, Court of Claims of Ohio, Case No. 2009-02073-WI. ■

Sources: *Columbus Dispatch*, *Associated Press*

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Five Sentenced in Oregon Prison Food Bribery Scandal

by Mark Wilson

Four men who paid Oregon's prison food services administrator \$1.2 million in bribes to obtain state contracts have been sentenced to 3 months in prison for their role in the worst corruption case in Oregon's history.

As previously reported in *PLN*, shortly after a January 10, 2007 raid by IRS and FBI agents, California food brokers Michael Levin, William Lawrence and Howard Roth, as well as Maryland food broker Douglas Levene, pleaded guilty to one count of bribery and one count of tax fraud in exchange for cooperating with the prosecution of former Oregon Department of Corrections (ODOC) food services administrator Farhad "Fred" Monem. [See: *PLN*, Aug. 2008, p.1].

Assistant U.S. Attorney Kent Robinson said the food brokers' cooperation was a "key element" of their plea agreements. Although each defendant faced a maximum of 13 years in prison and a \$500,000 fine, Assistant U.S. Attorney Christopher Cardani said the government would recommend the low end of the sentencing range so long as they fulfilled their obligations.

With his co-conspirators turning against him, Fred Monem tried to cut a deal of his own. However, when Monem and his wife – who was also involved in the bribery scheme – met with federal prosecutors on June 28, 2007, they learned that Monem's deal would include a stiff prison sentence.

Apparently unhappy about the prospect of eating prison food for an extended period of time, three days later Monem fled for his homeland of Iran, which does not have an extradition treaty with the United States. He left behind a teenage son suffering from serious psychiatric problems linked to the onset of schizophrenia, and his wife, Karen.

On November 19, 2008, Karen Monem pleaded guilty to one count of money laundering. At that time Cardani informed the district court, "it is the understanding of the FBI that Fred Monem has been herding sheep in Iran. We are confident he is there. He refuses to return voluntarily to face the charges." [See: *PLN*, July 2009, p.20].

U.S. District Court Judge Ann Aiken sentenced Karen to one year in prison in February 2009. On September 8, 2009,

she sentenced Levin, Lawrence and Roth to 3 months in prison, nine months on home detention and 1,000 hours of community service. Since their April 2007 plea agreements, the men have collectively paid approximately \$1.5 million to settle tax and civil claims. They also participated in a Los Angeles anti-crime program that involved preparing, serving and donating thousands of meals.

ODOC Director and former state senator Max Williams attended the sentencing hearing for the trio of food brokers. "It is my hope that the sentence handed down today will stand as a warning to the serious consequences of bribing a public official," he said. Yet three months in prison for bribes that resulted in \$21 million in food sales to ODOC over a four-year period somehow doesn't seem like a "serious consequence." The lack of oversight by Williams which allowed the corruption to flourish is also not encouraging.

On October 27, 2009, Aiken sentenced Levene to 3 months in prison

and nine months on home detention. The prosecutor had requested a 2½-year prison term, presumably because rather than paying the State of Oregon a \$1.8 million judgment, Levene opted to file for bankruptcy. He had paid Monem tens of thousands of dollars in cash bribes, sometimes when they met in Las Vegas to go gambling. ODOC officials were aware of Monem's trips to Vegas but thought he was doing consulting work.

Once confident that there would be "consequences for Mr. Monem for his conduct," more than three years later federal prosecutors don't sound as certain. "I'm not aware of whether he is still tending sheep in Iran," said Cardani. Judge Aiken suggested that Monem's self-imposed exile from the U.S. might be an appropriate punishment in itself – although bilked Oregon taxpayers may disagree. Prisoners who had to eat the poor-quality food that Monem accepted bribes to purchase might disagree, too. ■

Source: *The Oregonian*

Technology, Budget Cuts Make Sex Offender Monitoring More Difficult

by Matt Clarke

Technological innovations and tech-savvy sex offenders, combined with budget cuts, have made it harder for law enforcement authorities to monitor the nation's estimated 716,750 registered sex offenders (RSOs).

That does not include all RSOs, as some are not required to register and around 100,000 have failed to comply with registration requirements and are being sought by law enforcement. According to the National Center for Missing and Exploited Children (NCMEC), the number of sex offenders has increased 78% since 2001.

Part of the reason for the rise in RSOs is the Bush administration's emphasis on prosecuting sex crimes against children, which has been re-emphasized by the Obama administration, driving up child sexual exploitation prosecutions by 147% since 2002. In the first year of the Obama administration funding for child sex abuse task forces rose from \$16 million to \$75

million, and 81 new Department of Justice prosecutors were hired to handle a larger number of sex offender cases.

While the federal government has increased spending on child sex abuse prosecutions, budget cuts among the states have hampered efforts at monitoring RSOs. For example, Virginia cut its budget for parole and probation departments by \$10 million in 2009, including a \$500,000 decrease for the program that electronically monitors violent sexual predators.

"The burden on probation and parole officers is going to explode," said NCMEC president Ernie Allen.

The budgetary problem is compounded by laws that require registration for all sex offenders rather than only those who are the most dangerous or most likely to reoffend, which stretches scarce resources.

"It's causing the workload to be such that you can't keep up with the problem

people,” said criminal justice professor Jeffery Walker at the University of Arkansas-Little Rock. “The question is how do you separate those who do not appear to be a problem and those who are hiding something?”

Further complicating the monitoring of RSOs is the proliferation of electronic sources and devices that sex offenders can use to access pornography, including illegal child pornography – such as chat rooms, instant messaging, texting, email, cell phones, web cams and social networking sites like MySpace and Facebook.

A District of Columbia police detective was surprised to be having an online conversation with a church deacon who had recently been convicted for sending child porn to the same detective. An investigation revealed the former deacon was using a smuggled cell phone to access the Internet from his cell in the D.C. Correctional Treatment Facility, where he was awaiting sentencing. Another RSO, on probation for molesting a 9-year-old girl, was caught downloading child porn to his PlayStation Portable as he was walking to a probation meeting.

One option available to law enforcement officials is computer monitoring,

which involves installing software on a sex offender’s computer. The software records and reports every keystroke, email, chat, program accessed and Internet site visited, and provides remote monitoring of computer use. However, the Achilles heel of computer monitoring is that it is not available for non-computer electronic devices such as cell phones and game systems; further, it doesn’t prevent an RSO from using a second, unreported computer or from accessing someone else’s computer system or public computers at a library.

Consequently, some law enforcement officials say nothing can replace home visits, vigilance and instinct when it comes to keeping an eye on sex offenders. But that only works when such monitoring is done competently. For example, Philip Garrido faithfully registered as a sex offender in California for 10 years while sexually abusing Jaycee Lee Dugard, whom he had kidnapped and held in a tent in his backyard, despite home visits by parole and sheriff’s officers. [See: *PLN*, Dec. 2009, p.48].

Even GPS technology is insufficient, as monitoring is not always done in real-time and does not prevent crimes by RSOs,

only provides evidence after an offense has occurred. [See, e.g.: *PLN*, Dec. 2009, p.20]. When 13-year-old Alycia Nipp’s body was found in a field in Vancouver, Washington on February 22, 2009, it was later discovered that she had been killed by Darrin Sanford, a Level 3 sex offender who was on GPS monitoring at the time. The GPS data placed him at the scene of the murder; Sanford pleaded guilty and was sentenced to life without parole.

“You have to use [GPS] very responsibly,” said Peter Ibarra, a sociologist at the University of Illinois-Chicago. “It’s a technology that cannot stand alone, especially if you’re thinking about using it with offenders who imperil the public.”

Connecticut officials have reevaluated the use of GPS to monitor sex offenders as a result of errors, signal loss and tampering. “To some extent, it’s been oversold and misunderstood,” stated Bill Carbone, director of the Court Support Services Division of Connecticut’s Judicial Branch. “I think it is a tool – not the sole tool – needed for proper supervision of offenders.”

Sources: *Washington Post*, *USA Today*, www.oregonlive.com

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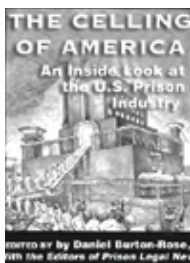
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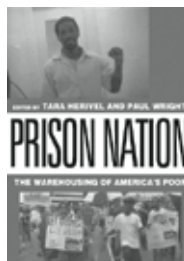
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Wisconsin Doctor Sentenced for Sexually Abusing Prisoner Patients

In March 2010, a former doctor employed at the Stanley Correctional Institution in Wisconsin pleaded no contest to seven misdemeanors related to abusing or mistreating prisoners at that facility. In exchange for entering into a plea agreement, prosecutors reduced the charges from six felony counts.

Dr. Brian J. Bohlmann, 47, received a sentence of seven months in jail for the misdemeanor charges, which were brought in Chippewa and Winnebago Counties. He also agreed to give up his medical license for three years; significantly, he will not have to register as a sex offender.

Male prisoners said Bohlmann touched them inappropriately and had them remove their clothes when that had nothing to do with their medical complaints. [See: *PLN*, May 2009, p.1].

Three prisoners had harsh words for Bohlmann at the doctor's sentencing hearing. "If I had my way, you'd be charged and prosecuted with sexual assault like you should be, go to prison and register as a sexual offender and never practice medicine again," said one of the doctor's former patients.

The sentencing judge, however, said that although he was aware of the prisoners' concerns, he felt it was significant that Bohlmann had given up eight years of his life to learn to become a doctor and treat patients, which he would not be able to do for three years under the plea agreement. "Beyond that, I'd be very surprised if someone would hire him as a physician again to give him the opportunity to do what he did to you gentlemen and others," said Judge James Isaacson.


Although Bohlmann also pleaded no contest to a felony charge of second degree sexual assault by correctional staff, no conviction was entered and the charge will be dismissed following a three-year deferred prosecution agreement.

Prosecutors said the plea bargain was a necessary compromise. "While I'd like to do what they want me to in regards to this matter, I can't risk what would happen if he was found not guilty," stated Assistant Chippewa County District Attorney Wade Newell.

Additionally, Bohlmann was charged with identity theft, prescription fraud and bail jumping in Dane County, stemming from allegations that he wrote prescriptions for controlled substances that one of his friends obtained for his personal use.

The prescriptions included Oxycodone and Hydrocodone.

Bohlmann's medical license was suspended for three years on March 17, 2010. See: *In the Matter of the Disciplinary*

Proceedings Against Brian J. Bohlmann, M.D., Wisconsin Medical Examining Board, Order No. 0000097. 

Additional source: *WQOW*

Congress Passes Law to Reduce Crack/Powder Cocaine Sentencing Disparity

by Anthony Papa

On August 3, 2010, President Obama signed into law historic legislation that reduces the two-decades-old sentencing disparity between federal crack and powder cocaine offenses. House Republicans and Democrats are in agreement that U.S. drug laws are too harsh and must be reformed. The tide is clearly turning against the failed war on drugs.

Before the changes, a person with just five grams of crack received a mandatory sentence of five years in prison. That same person would have to possess 500 grams of powder cocaine to earn the same punishment. This disparity, known as the 100-to-1 ratio, was enacted in the late 1980s and was based on myths about crack cocaine being more dangerous than powder. Scientific evidence, including a major study published in the *Journal of the American Medical Association*, has proven that crack and powder cocaine have identical physiological and psychoactive effects on the human body.

Advocates pushed to totally eliminate the disparity, but ultimately a compromise was struck between Democrats and Republicans to reduce the 100-to-1 disparity to 18-to-1. The 100-to-1 ratio has caused myriad problems, including perpetuating racial disparities, wasting taxpayer money, and targeting low-level offenders instead of dangerous criminals. African Americans comprise 82 percent of those convicted for federal crack cocaine offenses but only 30 percent of crack users, and 62 percent of people convicted for crack offenses were low-level sellers or lookouts.

We are sad to say that the bill, the Fair Sentencing Act of 2010 (S.1789), is not retroactive and does not impact people who are already incarcerated. This was another compromise that Democrats had to make to get Republicans on board, even though Democrats have majorities in both the Senate and the House. There were rumors that the U.S. Sentencing

Commission would eventually make the new law retroactive, but this is not the case. The Commission can only make changes to the Sentencing Guidelines, not the mandatory minimum sentencing (MMS) laws. Only Congress can make changes to MMS laws.

However, S.1789 does give the U.S. Sentencing Commission "emergency authority" to amend the crack sentencing guidelines within 90 days after the law goes into effect. This amendment will allow the new 18-to-1 crack/powder ratio to appear in the emergency advisory guidelines. Any temporary emergency amendment would only apply to prisoners sentenced on or after the amendment goes into effect and would last until a permanent amendment is made.

The U.S. Sentencing Commission estimates that about 3,000 prisoners charged with federal crack offenses will receive shorter sentences due to S.1789. The changes in the law would shorten federal crack sentences by an average of 27 months. Overall, the compromise bill is expected to save an estimated \$42 million in criminal justice spending over the first five years.

Prisoners who will not benefit from the new changes are those who are already sentenced and those convicted in state courts for state crimes. Also, these changes do not apply to federal mandatory minimums for any other type of drug – only crack cocaine.

As a former prisoner who received a 15-to-life sentence under New York's Rockefeller Drug Laws, I know firsthand the reality of being sentenced under mandatory minimum sentencing laws. I eventually served 12 years and was set free after being granted clemency by Governor Pataki in 1997. When I came out I became an activist helping those left behind to regain their freedom. I started an organization called "The Mothers of

the New York Disappeared,” which played a significant role in the recent reform of the Rockefeller Drug Laws in 2009. I now work for the Drug Policy Alliance, an organization that is dedicated to promoting treatment instead of incarceration, and that leads the way in reforming draconian drug laws throughout the United States.

My advice for prisoners serving long

sentences under MMS laws is to not give up hope. I did not, and eventually regained my freedom. We will continue to fight to change the existing crack/cocaine laws and to help prisoners who are serving sentences dished out under unfair and ineffective war-on-drug statutes. The Fair Sentencing Act is a huge step forward in reforming our country's overly harsh and

wasteful drug laws, but much more needs to be done. ■

Anthony Papa is the author of “15 to Life” and the Manager of Media Relations for the Drug Policy Alliance (DPA) in New York City. DPA's Deputy Director of National Affairs, Jasmine Tyler, also contributed to this article.

Former Prisoner Accepts \$179,000 for Wrongful Conviction Under New Florida Law

by David Reutter

After initially declining to accept \$179,000 under Florida's Victims of Wrongful Incarceration Compensation Act, Leroy McGee agreed to receive compensation pursuant to that statute for serving 43 months in prison for a crime he didn't commit.

McGee, 42, was convicted of a 1991 gas station robbery. He had a time card from his janitorial job at Fort Lauderdale High School that indicated he was working at the time of the robbery. Further, he did not match initial descriptions of the robber and his fingerprints were not found at the crime scene.

However, at trial his attorney “failed to raise a single objection during the case and attempted to enter the wrong time card into evidence.” His conviction was reversed after he finished serving his prison sentence, with Judge Paul Backman saying McGee's trial lawyer had provided “absolutely the worst performance in the courtroom I've ever seen.”

Under the Victims of Wrongful Incarceration Compensation Act, which was enacted in 2008, exonerated prisoners are eligible to receive \$50,000 for each year they spent in prison. McGee refused to accept compensation under the statute because it failed to cover the costs associated with hiring an attorney.

“Most exonerees come out of prison with limited resources or no resources at all. It is one of the reasons why they were convicted in the first place and were unable to effectively prove their innocence for so many years,” observed Seth Miller, executive director of the Innocence Project of Florida. “But to get compensation, you have to spend money you don't have to get a lawyer.”

Additionally, under a “clean hands” provision, the Act bars exonerated prisoners from receiving payments if they have been convicted of any other felony unrelated to the wrongful conviction. Fortunately McGee had an

otherwise clean record.

He agreed to accept \$179,000 in compensation pursuant to the Act after his attorney, David Comras, agreed to represent him at no charge. By signing papers to accept the payment from state officials on February 16, 2010, McGee became the first Florida prisoner compensated under the statute.

“I delayed taking this compensation to let the public know that there are a number of ways to improve the wrongful incarceration compensation statute. With the economy like it is, it was time to accept the compensation and continue this fight,” he stated.

For additional information on compensation for the wrongly convicted, see the related article in this issue of *PLN*, “Innocence Project Report on Compensation and Reentry Services for Exonerated Prisoners.” ■

Sources: *Legal News for Florida Criminal Lawyers*, www.floridainnocence.org

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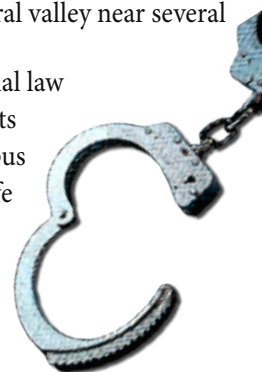
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Ohio Cuts Prison Industry Jobs

by Matt Clarke

In February 2010, Ohio Penal Industries (OPI) announced it planned to close several prison industry programs and reduce its prisoner work force from 1,554 to 1,269 due to budget cuts. Previously, OPI stated in December 2009 that it was discontinuing its wood office furniture operation as part of “additional cost-savings measures.”

Industry jobs are highly sought after by Ohio prisoners, as they pay between \$.21 and \$1.23 an hour and provide work skills and experience that can be used to help find post-release employment if the prisoners are ever released. Participation in prison industry programs is tied to a reduction in recidivism, from an overall rate of 38% to just 18% for OPI workers. However, those figures are questionable since some prison industry workers are lifers who will either never be released or will be too old to work when they are released.

Industry jobs performed by Ohio prisoners include manufacturing toilet paper, making dentures, crafting eyeglasses, producing institutional clothing, milking dairy cows and slaughtering cattle. The slaughterhouse operation at the Pickaway Correctional Institution supplies 3.7 million pounds of meat per year to Ohio’s prison system, saving the state \$3.3 million.

OPI also manufactures both Ohio and U.S. flags, at a rate of almost 3,000 flags annually. Prisoners who work on the “flag line” are paid \$.57 an hour; the flags sell on OPI’s website for between \$33 and \$51 each.

At the OPI’s eyeglasses manufacturing operation at the Ohio Reformatory for Women, 22 workers make over 520 pairs of glasses for Ohio prisoners each month. Likewise, the toilet paper manufacturing facility at the Belmont Correctional Institution saves the state money by supplying the prison system and some highway rest areas with toilet paper.

Thus, the reduction in industry jobs may be penny-wise but pound-foolish, both in terms of reduced recidivism rates for OPI workers and cost savings to the state resulting from products produced by prison industry programs. Of course, such savings are only possible because OPI workers are paid far below the minimum wage. Whether the figures provided by the state are accurate is another matter. Every state to audit its prison industry operations

invariably concludes most of the products can be bought on the open market at a lower cost. While the prisoners are paid a pittance, the bloated bureaucracy of prison industries, the civilian supervisors and the guard force are not. Hence any savings tend to be illusory at best.

Following the closure of eight OPI programs, 24 prison industries still operate in Ohio’s prison system, including the flag manufacturing operation. ■

Sources: www.dispatchpolitics.com, Associated Press, www.opi.state.oh.us

Alabama’s Indigent Defense System “Perfect Storm” for Ineffective Assistance

by David M. Reutter

“Alabama’s right-to-counsel system has the ‘perfect storm’ of characteristics that virtually guarantee ineffective assistance of counsel to the poor,” observed David Carroll, research director for the National Legal Aid & Defender Association.

Carroll was referring to a system that gives state court judges unbridled discretion to appoint attorneys to cases, and therefore lets them assign work to lawyers who, for example, make contributions to the judges’ election campaigns.

“Most states with state funding have independent right-to-counsel commissions with authority to promulgate and enforce standards. There is no such accountability in the Alabama system,” said Carroll. “This means attorneys who move dockets quickly and who kick back some of the money to the judge’s reelection campaigns can be financially rewarded. The ‘perfect storm.’ Judges are happy, defense attorneys are happy. The only problem is that clients’ rights are being trampled on.”

In Mobile County, six attorneys received six-digit payments from the indigent defense system, which is funded by state general revenue funds and revenue collected from a \$50 civil case filing fee. The top earner, attorney Habib Yazdi, made \$267,193 in fiscal year 2009; he had a total caseload of 516 appointments.

The second-highest earner, Lee L. Hale, Jr., made \$217,239 for 241 cases in FY 2009. Almost a third of those appointments came from Judge Charles A. Graddick. At one time, Graddick worked with Hale’s father, Lee L. Hale, Sr.

Hale Jr. denied claims of favoritism. What he did not deny was making \$1,850 in contributions to Graddick’s

2004 reelection campaign. In fact, he was unapologetic about it. “I make lots of contributions to lots of people,” he said. “If someone is doing a great job, I want them kept in office. It is what it is.”

Yazdi and attorney Gregory Hughes, another of the top six indigent defense fund earners in Mobile County, also made campaign donations to Judge Graddick.

Carroll singled out Yazdi as an example of an attorney taking on too many cases. “My guess is that the majority of them are felonies. If so, the attorney in question could very well be handling three times as many cases as he should,” Carroll said.

The indigent defense situation in Alabama is particularly bad because it leaves no one to file a complaint or issue a warning when the system breaks down.

“[T]he reason I call Alabama the ‘perfect storm’ is because in other systems there’s usually someone that cries out. If you have a public defender system that is underfunded, attorneys are carrying way too many cases and not able to handle it. So, they will refuse to handle more cases,” Carroll noted. “In Alabama, because the defense attorneys are making so much money, and the judges are happy with it and county managers don’t have any control, so they’re happy with it – there’s no one to speak on behalf of the client.”

Circuit Court Judge Joseph “Rusty” Johnston said he found nothing wrong with Alabama’s – and especially Mobile County’s – indigent defense system.

“You couldn’t have a public defender’s office large enough to handle all the cases in Mobile County. If you want to handle the situation here expeditiously, you’d need to have enough lawyers to handle all the cases on your worst day,” Johnson

stated. "That would amount to a lot of wasted time. So, you try to get private [attorneys] to do this stuff as much as they can. A public defender system would be slower and more expensive, I know that much."

Such a system, however, would eliminate cozy relationships between judges and lawyers who donate to their election campaigns, while providing better representation for poor defendants.

Legislative efforts to establish an indigent defense office and oversight commission failed in 2008. At that time, Alabama Supreme Court Justice Sue Bell Cobb said, "I want to make sure poor de-

fendants are getting a good solid criminal defense and that Alabama's tax dollars are being spent wisely." Apparently neither has occurred.

Another bill to reform Alabama's indigent defense system is presently pending in the state legislature (SB 497). However, even if it passes, that bill provides for a paltry \$85 per hour payment rate for attorneys who take noncapital cases and \$100 per hour for death penalty cases — hardly enough to attract highly qualified defense counsel. ■

Sources: www.lagniappemobile.com, www.timesdaily.com

\$130,000 Settlement in Tennessee Jail Prisoner's Beating, Rape

Local officials in Shelby County, Tennessee paid \$130,000 to settle a lawsuit by a man who was beaten and raped while held at the Shelby County Jail.

The plaintiff, identified in federal court documents as E.R. to protect his privacy, was arrested for a warrant that had been outstanding since 1983. The warrant should have been recalled in 1995.

When Shelby County Sheriff's deputies pulled E.R. over on June 9, 2007 for a seat belt violation, he "produced a valid Tennessee driver's photo operator's license" that indicated his name, address and date of birth.

The dispatcher informed the deputies that there was a warrant for a person with a similar name. Despite E.R.'s protestations that his name and birth date were not the same as those on the warrant, the deputies arrested him anyway.

Within an hour after he was placed in a jail cell, E.R. was "savagely beaten and raped by prison inmates." E.R., who was 50 at the

time, had never been arrested before.

He did not file a complaint about the assault at the time; he was released on June 10 after it was shown his arrest was due to mistaken identity, and was subsequently referred to a psychologist and hospitalized the following month.

At the psychologist's direction, E.R. reported the assault in August 2007. The District Attorney's office declined to prosecute the other prisoners because the delay in reporting the crime precluded the collection of physical evidence.

Two treating psychologists and an independent expert confirmed that E.R. suffered from post-traumatic stress disorder as a result of the brutal attack.

The Shelby County Board of Commissioners approved a \$130,000 settlement in the case on February 15, 2010. E.R. was represented by Memphis attorney Glenn Wright. See: *E.R. v. City of Memphis*, U.S.D.C. (W.D. Tenn.), Case No. 2:08-cv-02378-BBD-tmp. ■

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U.S. Supreme Court Holds Restitution Deadlines Not Jurisdictional

Under the federal Mandatory Restitution Act (MRA), 18 U.S.C. § 3664(d)(5), “the court shall set a date for the final determination of the victim’s losses, not to exceed 90 days after sentencing.” The U.S. Supreme Court, however, held on June 14, 2010 that a sentencing court which misses the 90-day deadline retains the ability to order restitution when it has made clear prior to the deadline’s expiration that it would impose restitution, leaving open only the amount.

Brian R. Dolan pleaded guilty on February 8, 2007 to a federal charge of assault resulting in serious bodily injury. He was sentenced on July 30, 2007 to 21 months in prison and 3 years’ supervised release. The district court stated it had insufficient information regarding restitution and would leave that issue open.

Sixty-seven days after sentencing, the probation office prepared an addendum to Dolan’s presentence report that included \$104,649.78 in restitution. However, the court did not hold a restitution hearing until February 4, 2008. Dolan argued the law no longer authorized the district court to impose restitution due to the expiration of the 90-day statutory deadline.

The court disagreed and ordered restitution; on appeal, the Tenth Circuit affirmed. The Supreme Court noted there was no dispute that the district court had missed the deadline. To determine the consequences of the missed deadline, the Court was required to examine the statutory language and relevant context, and what they revealed about the purposes that the time limit was designed to serve.

A “jurisdictional” deadline is absolute and unwaiverable, preventing a court from permitting or taking the action attached to the deadline by statute. A “claims-processing rule” does not limit a court’s jurisdiction; it is a deadline that regulates the timing of motions or claims and can be waived unless brought to the court’s attention. Finally, there are deadlines that create a time-related directive that is legally enforceable but does not deprive a judge or public official of the power to act if the deadline passes.

The Supreme Court found the MRA’s deadline was of the third type, and set forth six factors that led it to reach that conclusion. In sum, those conclusions are

based on the importance of restitution and the harm to victims if restitution is not imposed.

In a dissenting opinion, Chief Justice John G. Roberts wrote that such considerations were “a series of irrelevancies that cannot trump the clear statutory text.” He argued the MRA specifies a deadline to alter the sentence, which becomes final upon imposition. “The court had

no more power to order restitution 269 days after sentencing than it did to order an additional term of imprisonment,” Roberts stated.

The Supreme Court’s 5-4 decision affirmed the judgment of the Tenth Circuit, demonstrating that a statutory deadline is only a deadline when the government says it is. See: *Dolan v. United States*, 130 S.Ct. 2533 (2010). ■

Pay-to-Stay Jails Unsuccessful in Ohio

by David M. Reutter

Part of the legacy of the punitive criminal justice philosophy of the 1990s is pay-to-stay incarceration, which involves jails charging prisoners booking fees and per-diem fees. [See: *PLN*, July 2010, p.10].

The rhetoric behind pay-to-stay programs is that it is wrong for criminals to be “rewarded” with free room and board while their victims suffer and the public struggles to fund overcrowded prisons and jails.

The concept has turned out to be a huge flop in Ohio, often costing more than it returns to county coffers. Several factors have contributed to this failure, notably the fact that most people who end up in jail are poor and can’t afford to pay.

Another factor was an Ohio federal court’s finding that it was unconstitutional to impose pay-to-stay fees on prisoners who had not been convicted. That ruling required Hamilton County officials to refund about \$1 million in jail fees and pay \$150,000 for a prisoner education program after the county was sued in 2000. [See: *PLN*, Aug. 2003, p.20; June 2002, p.18].

The following year Butler County, Ohio was sued. That litigation settled when county officials agreed to return \$63,846.37 to 2,431 current and former prisoners. [See: *PLN*, Aug. 2003, p.21]. When the county failed to add 10 percent interest to the refund checks as required by the settlement, the court ordered an additional \$5,000 to be paid to the Legal Aid Society of Greater Cincinnati.

Extreme budget cuts caused Hamilton County to resurrect its pay-to-stay policy in 2008, but it limited the program to a \$40 booking fee imposed on convicted prisoners sentenced to jail. Through January 31, 2010 the county had

collected \$402,000 in fees – well below the \$1.65 million annual revenue predicted by the sheriff.

Clermont County Sheriff A.J. Rodenberg said the pay-to-stay program was more trouble than it’s worth. “A complete failure is the best way to describe it,” he observed. “When it came time to collect the pay-for-stay, it ended up costing almost as much if not more to run the program.”

The Clermont County jail now collects only small co-payments from prisoners for medical and dental visits, and for over-the-counter drugs such as aspirin and antacids.

Some officials still believe that jails should generate money. “We are looking at any way we can to have some sort of revenue from the jail,” said Major Norman Lewis, who served as warden of Butler County’s jail in 2000 when it operated a pay-to-stay program. “If we can do this legally, we’ll look at it. If it’s practical, we’ll implement it.”

The Corrections Center of Northwest Ohio (CCNO), which houses prisoners for five counties and the City of Toledo, implemented a pay-to-stay program on November 2, 2009. The jail assesses a “reception fee” of \$100 plus a per-diem fee of \$67.77, saying it “recognizes the importance of offender accountability, the cost of incarceration and its increasing tax burden on the citizens of Northwest Ohio.”

CCNO has contracted with a private company, Intellitech Corp., to collect the fees. Pre-trial detainees who are found not guilty can receive a refund of any fees taken from their jail accounts. ■

Sources: www.enquirer.com, www.ccnoregionaljail.org

U.S. Department of Agriculture Subsidizes Jail Building in Texas

by Matt Clarke

The U.S. Department of Agriculture (USDA) is considering whether to grant or loan \$5 million to Webb County, Texas to build a new county jail. The USDA has already given Jim Hogg County, Texas \$5 million to expand its jail – 25% as a loan and 75% as a grant.

Webb County Sheriff Martin Cuellar said the county needs a new jail because they are losing out on the opportunity to earn about \$500,000 a year by housing federal prisoners. The federal government often contracts with local jails to house prisoners, particularly immigration detainees, and some counties use contracts with the U.S. Marshals Service as a reliable source of income.

One complication in Sheriff Cuellar's plan is the Rio Grande Detention Center, a 1,500-bed private prison in Laredo owned and operated by the GEO Group, a Florida-based company formerly known as Wackenhut Corrections. The Rio Grande facility opened in October 2008 following controversy over GEO's record of alleged human rights abuses at some of the company's other Texas prisons.

Corrections Corporation of America (CCA) operates the 480-bed Webb County Detention Center near Laredo, too, which houses U.S. Marshals detainees and is another source of competition.

Funding for the new Webb County jail would come through the USDA's Rural Communities Facilities Program, which also provides money for community centers, clinics, schools, nursing homes, telemedicine programs and water infrastructure projects.

According to Sheriff Cuellar, it is helpful to know federal officials who can provide assistance when applying for USDA grants and loans. He should know – his older brother is U.S. Rep. Henry Cuellar. Rep. Cuellar also worked with Jim Hogg County Sheriff Erasmo Alarcon to secure the \$5 million from the USDA that will increase that county's jail capacity from 18 to 48.

In November 2008, Jim Hogg County voters approved another \$5.2 million in bonds to help build the new jail. Alarcon said the facility will save the county money; currently they are paying other counties

to house their excess prisoners. Further, although it has been years since Jim Hogg County held a federal detainee, Alarcon thinks the new jail might allow him to get into the cash-for-federal-prisoners game.

Sheriff Cuellar said he often has to send Webb County prisoners to jails in neighboring Dimmit or Zapata Counties, paying them \$40 to \$45 per diem. He hopes the USDA funding will let him expand his jail, fix existing roof and elevator problems, and perhaps even air condition the facility. He noted the county could be fined \$5,000 a day by the Texas Commission on Jail Standards if improvements aren't made soon.

Still, some question whether the USDA should be in the business of helping to build jails or if such funding could be better spent on community projects that do not involve incarceration – even though, as Sheriff Cuellar put it, a new jail that houses federal prisoners "could be something very profitable to the county."

Source: *Texas Tribune*

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Democratic Chairman's Rhetoric Supports Restoration of Voting Rights, but Actions Speak Louder than Words

by David M. Reutter

Restoration of voting rights for former prisoners is a key issue for many members of the Democratic National Committee (DNC), because ex-felons are disproportionately minorities and according to conventional wisdom, minorities are more likely to vote for Democratic candidates. It would be natural, therefore, for the DNC's chairman to support restoration of voting rights.

"I think folks who serve their time should have their rights restored, especially those who have been convicted of nonviolent felonies," said DNC chairman and former Virginia governor Timothy M. Kaine.

Despite Kaine's apparent support for re-enfranchisement, however, Virginia is one of only two states that refuse to restore the voting rights of ex-felons upon the completion of their sentences without approval from the governor. That restriction applies to all felons, not just those convicted of violent offenses.

When Kaine's term as governor was ending in January 2010, he was asked by WTOP political reporter Mark Plotkin why he did not sign an executive order restoring the voting rights of former prisoners he thought were deserving.

"Our analysis of Virginia's law is that I can't just do a blanket restoration – I have to restore people by name," Kaine explained, describing the one-page form that ex-felons use to request restoration of their voting rights as being "as near an automatic process as can be."

"You fill it out, you ask for your rights back. You demonstrate that you've served your time and that you've been out and you haven't committed any problems for a couple of years," said Kaine. "If your felony was a nonviolent felony, we restored every right of everybody who applies. If it's a violent felony, we dig into it a little more."

While it's true that Kaine restored the voting rights of thousands of ex-felons, including those convicted of murder, rape and other violent crimes, he also declined to restore the rights of some nonviolent felons if they had received an infraction as minor as a speeding ticket since completing their sentence.

Frank Anderson's request to have his voting rights restored was denied on December 16, 2009 for that very reason. Although he was convicted of burglary years earlier and had not reoffended, he was informed that to have his rights restored he must have no legal violations for three to five years, and that "moving violations, such as speeding" disqualified him. Thus, even nonviolent offenders who had speeding tickets could not regain their voting rights under Kaine's

tenure as governor.

As for a blanket executive order to restore the voting rights of former prisoners, Kaine's administration said it feared a court would overturn it or a subsequent executive order by another governor would do likewise. Nearly 300,000 Virginians are disenfranchised due to felony convictions. ■

Sources: WTOP, www.hamptonroads.com, www.notlarrysabato.typepad.com

\$850,000 Award in Delaware Prisoner's Suicide; State Declines to Renew CMS Contract

A federal district court has awarded \$850,000 to the family of a Delaware prisoner who hanged himself, after entering default judgment against First Correctional Medical, Inc. (FCM). In other Delaware news, the state's prison system did not renew its contract with Correctional Medical Services (CMS).

In 1997, Christopher Barkes was involved in a car accident while under the influence of alcohol, which resulted in the deaths of two people. He was sentenced to two years in prison and a lengthy period of probation for vehicular homicide.

The consequences of the accident went well beyond prison for Barkes. The deaths he caused left him wracked with extreme guilt, and he was diagnosed as suffering from post-traumatic stress disorder. He made at least one suicide attempt while held at the Howard R. Young Correctional Institution (HRYCI), and two other attempts between November 2003 and September 2004 while on probation.

Barkes was incarcerated at HRYCI on November 13, 2004 for loitering, a violation of his probation. The intake form noted he was taking several medications used to treat depression and bipolar disorder; it also noted he had previously attempted suicide.

Despite this information, Barkes was not given his medication or examined by a qualified professional to assess his psychological condition. Further, he was housed alone in a cell during his initial period of imprisonment, a known critical time for detecting potential suicides.

On November 14, 2004, Barkes was found hanging from a bedsheet; resuscitation efforts failed and he was declared dead at a local hospital. His estate filed suit against FCM and various staff members in February 2006.

The district court entered default judgment against FCM on June 6, 2008 after the company failed to appear at a hearing on its failure to obtain counsel. In March 2010 the court entered an order that found damages could not be awarded under Delaware's survival statute, but could be recovered under the wrongful death statute.

The court awarded \$150,000 to Barkes' widow and \$350,000 to each of Barkes' two daughters. Claims remain pending against other state prison employees. See: *Barkes v. First Correctional Medical, Inc.*, U.S.D.C. (D. Del.), Case No. 1:06-cv-00104-LPS-MPT.

Also in Delaware news, the state declined to renew its contract with CMS after the existing contract expired in January 2010. As previously reported in *PLN*, medical care in Delaware prisons has been under the oversight of a federal monitor due to an agreement with the U.S. Department of Justice. [See: *PLN*, Feb. 2010, p.12; March 2009, p.32; Nov. 2008, p.10; Feb. 2008, p.24; July 2007, pp. 8, 10].

The new contract for prison medical care will involve 10 smaller agreements that focus on specific services. Thus far, 24 companies have bid to provide health services to Delaware prisoners. Whether the new privatized system will work better

than the old one is unknown.

"We're excited but still a little nervous. The hard part is going to be putting this contract together," said Delaware Corrections Commissioner Carl C. Danberg.

"Ultimately, the proof of whether or not this whole new system works is going to be in whether or not the provision of health care works."

In other words, if prisoners receive

adequate medical and mental health treatment, which had been lacking under the state's contract with CMS. ■

Source: *The News Journal*

U.S. Supreme Court Holds Government May Offset Attorney Fees to Collect Litigant's Debt

On June 14, 2010, the U.S. Supreme Court held that "fees and other expenses" awarded to a prevailing party are "payable to the litigant and ... therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes the United States."

After attorney Catherine Ratliff prevailed in a Social Security benefits claim for her client, she moved for an attorney fee award of \$2,112.60. The unopposed motion was granted, but before the fees were paid federal officials discovered that Ratliff's client owed the United States a debt that predated the award.

The government then used its statutory authority to impose an administrative offset to recover the debt from the attorney fee award. The district court held Ratliff lacked standing to intervene to

challenge the proposed offset. On appeal, the Eighth Circuit accepted Ratliff's argument that attorney fees awarded under the Equal Access to Justice Act (EAJA) are awarded to a prevailing party's lawyer and may not be used to offset or otherwise satisfy a litigant's federal debt.

In rejecting that ruling, the Supreme Court found the plain language of 28 U.S.C. § 2412(d)(1)(A) does the opposite – "it 'awards' the fees to the litigant, and thus subjects them to a federal administrative offset if the litigant has outstanding federal debts."

While the Social Security Act allows for direct payments to attorneys, subsection (d)(1)(A) contains no such language. The Court noted that the textual language of that subsection is virtually identical to 42 U.S.C. § 1988, the law that provides

for attorney fees and costs in civil rights cases.

It was noted that until 2006, the government "frequently paid EAJA fees in Social Security cases directly to attorneys." The policies for the administrative offset program changed in January 2005 to prohibit such payments when a litigant has an existing debt. Nonetheless, the Supreme Court found the plain language of the statute imposed duties on the federal government to collect the debt.

The Eighth Circuit's opinion was therefore reversed and the case remanded for further proceedings. This ruling may affect prisoners' civil rights cases when they are represented by counsel and have pre-existing debts owed to the federal government. See: *Astrue v. Ratliff*, 130 S.Ct. 2521 (2010). ■



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Pennsylvania Legislator / GEO Board Member Faces Criminal Charges

by Matt Clarke

On November 12, 2009, Pennsylvania state representative John M. Perzel was charged with 82 counts of theft, conflict of interest, conspiracy, obstruction of justice and hindering apprehension or prosecution as a result of Attorney General Tom Corbett's long-running investigation into political corruption, nicknamed "Bonusgate." Perzel, a Republican and former Speaker of the House, had for years been a member of the board of directors of GEO Group, the nation's second-largest private prison firm.

Perzel, his brother-in-law, a nephew, two former chiefs of Perzel's staff and five other people with ties to the Pennsylvania House GOP caucus (including two former district attorneys) were charged with spending around \$10 million in state funds to develop advanced computer programs that were used by Republicans to give them an advantage during elections.

According to William Tomaselli, a state-paid special projects coordinator who was granted immunity by prosecutors, Perzel was aware that the programs were utilized to benefit GOP candidates. "The goal was to win elections. It was a campaign piece," Tomaselli alleged.

Perzel has denied any criminal conduct and claims the charges are "political opportunism" by Corbett, a fellow Republican who is running for governor. Corbett countered that Perzel was the mastermind behind a "sophisticated criminal strategy" to spend \$10 million in public funds on Republican political campaigns.

The same day he was indicted, Perzel resigned as a member of GEO Group's board, a position he had held since 2005. Perzel was paid a salary of \$20,000 a year as a GEO board member plus board fees and options; those fees and options were worth \$147,953 in 2008. In contrast, he receives around \$78,000 a year as a state lawmaker.

On October 28, 2009, the first day he was able to do so, Perzel exercised an option to buy 5,000 shares of GEO stock valued at \$105,360. "Our company has no comment beyond the information it has disclosed through its public filings with the Securities and Exchange Commission," remarked GEO Group spokesperson Pablo E. Perez.

Perzel's financial relationship with GEO has long been controversial. A 2006

bill, clearly inspired by his board membership with the private prison company, would have prohibited legislators from receiving financial compensation when serving on corporate boards. The bill was defeated in the House.

GEO Group does not currently operate a prison in Pennsylvania, though from 1995 until 2008 the firm had an almost \$40 million annual contract to manage the 1,883-bed George W. Hill Correctional Facility in Delaware County. GEO ended that contract one year before it was due to expire, citing "underperformance and frequent litigation." [See: *PLN*, March 2009, p.16].

Perzel, 59, has enjoyed a 30-year career as a state legislator. A former dishwasher and waiter, and the son of a waitress and Linotype operator, he was first elected to the House in 1978. He represented Northeast Philadelphia, a tough blue-collar neighborhood, and had a reputation as a political brawler.

Perzel worked his way up through the GOP leadership and became House Speaker in 2003. He vied with former Pennsylvania state senator Vincent J. "Vince" Fumo for the title of most influential

state lawmaker; Fumo is currently serving a 55-month federal prison sentence on unrelated political corruption charges. In 2007, a Democratic takeover of the House by a single vote relegated Perzel to a back bench, where he toiled in near anonymity until the Bonusgate scandal broke.

On May 27, 2010, a state district court held there was sufficient evidence to take the case against Perzel and the nine other defendants to trial, although some obstruction charges were dropped. A grand jury that investigated corruption in state government concluded that the Pennsylvania legislature was in a "time warp" of corruption," and recommended imposing term limits among other remedies.

Perzel is free on \$100,000 bond pending trial – about the value of the GEO stock he purchased just weeks before he was indicted. He has not resigned his House seat despite the pending criminal charges, and could draw over \$100,000 in annual retirement benefits should he retire. However, he may lose his state pension if convicted. ■

Sources: *Philadelphia Inquirer*; www.pittsburghlive.com

Innocence Project Report on Compensation and Reentry Services for Exonerated Prisoners

by Matt Clarke

The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at New York's Yeshiva University. Since that time the Innocence Project and its partners have been instrumental in securing the release of many of the 258 prisoners exonerated by DNA evidence nationwide – including 17 who spent time on death row.

Exonerees have served an average of 13 years in prison and experience all of the usual difficulties faced by long-term prisoners reentering society, yet are denied even the inadequate social services and financial assistance available to released prisoners. The plight of exonerees has received little attention or study, but a recent Innocence Project report describes the ordeals they suffer and recommends model legislation to ensure fair compensa-

tion for wrongful convictions.

Exonerees who serve lengthy prison terms often have a variety of disabilities, including post-traumatic stress disorder; poor health due to substandard prison medical care; institutionalization; depression; lack of work experience, education and training; and lack of experience with modern technology. Frequently some of their family members have died, their partners found new mates and their children grew up during their incarceration. When exonerees seek housing or jobs, they are often treated like any other released prisoner. Clearly innocent people who have been wrongly convicted deserve compensation, yet almost half never receive any.

There are three ways for exonerees to obtain financial compensation: a civil lawsuit, statutory compensation or a private bill passed by the legislature. Each method

has its problems, but they all suffer from a delay between release from prison and compensation. Such delays average 3.9 years for a lawsuit, 2.8 years for statutory compensation and 1.8 years for a private bill. During the delay, exonerees may suffer homelessness and have no means to pay for needed medical care or even food and clothing. Compensation payments may also vary widely, even within the same state. [See: *PLN*, July 2010, p.24].

All 50 states have passed crime victim compensation legislation. This is not because the state is liable for crimes, but rather because it is the right thing to do. For similar reasons, compensation for exonerated prisoners is proper regardless of whether the state was at fault. Twenty-seven states, the federal government and the District of Columbia have passed compensation statutes but only five states – Texas, Florida, Alabama, Mississippi and North Carolina – meet the federally-recommended level of compensation of at least \$50,000 per year of imprisonment and \$100,000 per year on death row. Four other states do not specify the amount of compensation and could, in some cases, meet the federal recommendations.

Monetary compensation is not the

only support that exonerees need, but the provision of social services is spotty. For example, North Carolina offers job training and tuition expenses. Vermont provides 10 years on the state's health care plan. Montana offers educational aid, but only to DNA exonerees, and does not provide financial compensation. Some states provide less compensation and support to exonerees who pleaded guilty or falsely confessed; Florida restricts compensation to exonerees with no prior criminal record.

In terms of compensation and support, Texas has become a model. With one-sixth of all DNA exonerations, Texas has seen a steady stream of wrongly-convicted prisoners released over the past fifteen years. For Tim Cole, who died due to inadequate medical care while in a Texas prison, his exoneration came too late. Cole's case and the activism of his family and the rape victim he was wrongly convicted of attacking led to the passage of the Tim Cole Act in 2009. [See: *PLN*, Dec. 2009, p.26].

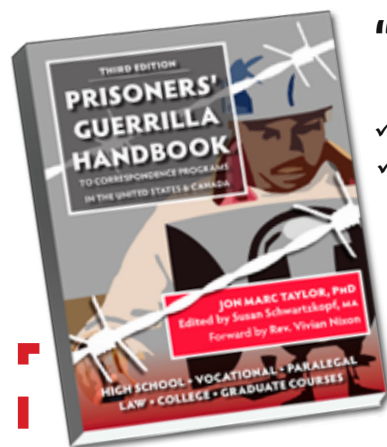
The Act provides for \$80,000 per year of wrongful imprisonment, \$25,000 per year on parole or as a registered sex offender, 120 hours of job training or college tuition, life skills training, vocational

training, immediate assistance for living expenses, assistance for child support payments, assistance in accessing federal entitlement programs, and help with medical and dental care.

According to the Innocence Project report, compensation statutes are the best and most efficient method of compensating exonerees. This is because it is difficult and time consuming to sue government officials, and private bills can lead to large variations in compensation. The Innocence Project recommends that compensation statutes provide a minimum of \$50,000 per year of wrongful incarceration (\$100,000 if on death row), plus payment of attorney fees associated with filing for compensation, provision of immediate social services to assist with housing, transportation, education, health care and finding a job, and issuance of an official document acknowledging a prisoner's exoneration.

Model legislation is appended to the report, which is available on *PLN's* website or at www.innocenceproject.org. ■

Source: "Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation," *Innocence Project* (December 2009)



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Former Oregon Prison Guard, Accused of Contraband Smuggling and Sexual Misconduct, Files Suit Alleging Racism

by Mark Wilson

An ex-Oregon prison guard who resigned in 2007 was hired the following year as a “security technician” at the Oregon State Hospital (OSH). He was fired one month later after being accused of engaging in oral sex with a male co-worker in an OSH vehicle, at a cemetery, while on duty.

William Coleman began working as a guard at the Oregon State Penitentiary (OSP), a maximum-security prison, on January 18, 2005, but resigned in September 2007.

He was subsequently hired by OSH as a mental health security technician; however, he was terminated following a November 24, 2008 incident involving co-worker Gregory Charles. The two men, whose duties included patrolling OSH grounds, drove to an adjacent cemetery and parked. They said they were watching “a suspicious man” riding a bicycle, but the bicyclist, who was the cemetery gatekeeper, reported they were having sex in the vehicle. Police arrived and questioned Charles and Coleman, then called their supervisors.

Coleman was immediately fired. Charles, who had been an OSH employee since November 2006, was placed on leave before being terminated on March 20, 2009. Both flatly denied claims that they were engaging in oral sex.

They filed suit, alleging racial discrimination, defamation and wrongful termination. “Patients at OSH have been overheard to joke that there are job openings in security and there are oral interviews in the back of state vehicles,” Coleman alleged in his lawsuit.

Salem attorney Kevin Lafky, who represents both men, called the alleged sexual tryst in the cemetery ludicrous. “We’ve got evidence that many other employees would go outside the state hospital grounds, including the cemetery when doing their security rounds,” said Lafky. “Yet these gentlemen, who happen to be black, are the ones who are fired for it.”

“I refer to this case as the case of visiting the cemetery while black,” Lafky remarked. “It seems to be the reason these gentlemen got fired.” OSH officials referred inquiries to the Oregon Department of Justice, which declined to comment

citing the pending litigation.

Meanwhile, in June 2009, a grand jury indicted Coleman on a dozen counts of supplying contraband and three counts of receiving bribes when he worked at OSP. Between October 2006 and May 2007, Coleman allegedly smuggled tobacco and creatine, a muscle-building supplement, into the prison in exchange for cash payments made “directly or indirectly” by prisoners, according to Marion County deputy district attorney Bryan Orrio.

Declining to specify a total dollar amount, Orrio estimated that Coleman may have received “less than a hundred grand but more than \$5,000.” He declined to go into detail, explaining, “with prison cases, in my experience, they’re the most susceptible to going down the toilet because the inmates are so good at manipulating witnesses and getting information through the grapevine, so I’m pretty tight-lipped about this case.”

Coleman was arrested, booked into jail and then released on his own recognition. “It’s an interesting coincidence that they charge him with a crime for something that supposedly happened years ago just as he’s suing the state,” Lafky noted.

Coleman’s wrongful termination lawsuit claims his reputation has been smeared. “Since the incident at the cemetery, OSH staff, acting in the course and scope of their employment, have published this false information to other staff members, patients at the hospital, and staff at the Oregon State Penitentiary,” his complaint states.

As a result, Coleman alleged he has suffered emotional distress as well as health problems that include headaches, chest pains, dizziness, fright, grief, shame, humiliation, embarrassment, anger, disappointment and worry. Charles has cited similar injuries, and said his wife divorced him due to the sexual misconduct allegations.

Coleman was found not guilty of the contraband and bribery charges following a state court jury trial in April 2010. His discrimination suit remains pending. Charles was reinstated to his security job at OSH in November 2009; however, he said he “continues to be subjected to taunts and ridicule by coworkers and patients.”

Sources: *Statesman Journal*, www.salem-news.com

Suit Filed for Oregon Jail Pneumonia Death

Holly Jean Casey, a homeless 36-year-old heroin addict, lived a rough life and died an agonizing death on the floor of an Oregon jail cell on January 4, 2008.

The day before she died, Casey was on her way to the hospital when she was arrested in Portland for failing to appear in court on a misdemeanor theft charge. Between coughs, Casey told police she had missed court because she was sick.

When she was booked into the Multnomah County Detention Center (MCDC), Oregon’s largest jail, police told guards at the facility that she had pneumonia. Casey filled out a medical request stating, “I’ve got pneumonia for 3 days. Won’t go away. I have difficulty breathing. It hurts bad. I have no energy.

I have lupus and no spleen.”

A nurse examined Casey and noted her wheezing, labored breathing and racing heart. She was given several puffs from an Albuterol inhaler, which seemed to help, but was not seen by a doctor or given any other treatment.

By the next morning Casey’s condition had worsened. She “begged for help yelling, ‘I can’t breathe, I can’t breathe, please help me,’” according to a federal suit filed by her estate. “For several hours she hit the call light buzzer and she banged on the jail cell door crying for help. In response, deputies yelled at Casey to shut up. A female deputy yelled at Casey to get off the floor.”

Other prisoners heard Casey’s buzzer go off repeatedly. Two prisoners tried to summon help by pushing their own call

buttons but deputies ignored them, the complaint alleges. Guards failed to conduct regular cell checks as required.

Soon after shift change, Deputy Leo Irvan performed his first safety and welfare check at 7:32 a.m. He saw Casey lying on the floor in a semi-fetal position, wearing only underwear and a T-shirt. He asked prisoner Laurie Tucker to check on her. Casey was not breathing; her skin was cold and blue and she was in full rigor mortis, indicating she had been dead for quite some time.

State Medical Examiner Dr. Karen L.

Gunson performed an autopsy later that day and determined the cause of Casey's death was pneumonia, exacerbated by her lack of a spleen, which fights infections.

On December 30, 2009, Casey's estate, representing the interests of her minor son, filed suit in federal court against the county, its contract healthcare provider, Maxim Health Systems LLC, and 24 guards, nurses and other jail staff. The lawsuit, which raises wrongful death and negligence claims, seeks \$1 million in damages for funeral costs and pain and suffering. The case remains pending;

Casey's estate is represented by Portland attorneys Hala J. Gores and Matthew D. Kaplan. See: *Wheeler v. Multnomah County*, U.S.D.C. (D. Ore.), Case No. 3:09-cv-01518-AC. ■

Source: *The Oregonian*

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14 Years of Litigation Fails to Remedy Deficient Jail Medical Care; Herrera Saga Continues in Washington State

by Mark Wilson

In 1996, Tacoma, Washington officials settled a class-action federal lawsuit over unconstitutional conditions and insufficient health care at the Pierce County Jail (PCJ). Fourteen years later, however, prisoners continue to be denied adequate medical and mental health care, according to court filings. At least eight deaths between 2006 and 2008 were linked to deficient medical treatment at the jail.

The class-action suit was filed in 1995 and settled with a consent decree on March 28, 1996. [See: *PLN*, March 1997, p.18; April 1995, p.5]. Pursuant to the consent decree, the district court appointed two monitors to report on compliance with constitutionally-mandated minimal health care at PCJ.

The first monitor was Dr. Steve Shelton, Medical Director for the Oregon Department of Corrections (ODOC), whose hepatitis C policies were the subject of an unrelated federal class-action lawsuit while he served as a court monitor in the PCJ litigation. [See: *PLN*, Feb. 2005, p.14]. He was replaced by Dr. Joseph Goldenson, who oversees jail health services for the San Francisco Department of Public Health.

"Both Court Monitors have repeatedly reported serious deficiencies" at PCJ, class counsel Fred Diamondstone informed the district court, and "Pierce County has repeatedly ignored the conclusions" of the monitors.

Compliance with NCCHC Standards

In a January 26, 2008 court-ordered progress report, Goldenson wrote that Dr. Shelton had previously noted that the defendants "expressed a desire to use the National Commission on Correctional Health Care (NCCHC) Standards as their guidelines and final goalpost for their health care system." Goldenson agreed "that while the standards are not in and of themselves proof of an adequate health care system, they do represent a 'well thought out and systematic approach to the difficulties of providing a quality system of health care in corrections, and have consistently shown a high level of concern for inmate welfare.'" As such, he said he would "follow the outline of the NCCHC

standards and ... comment on progress towards meeting the standards," with the caveat that compliance did not guarantee constitutionally-adequate medical care.

Dr. Goldenson clarified in his second report, issued on August 5, 2008, "that while the NCCHC standards are used as a method of organizing the reports," his findings and recommendations were based on what the Constitution, not the standards, required. He then found, however, that PCJ failed to satisfy 18 of the NCCHC standards related to issues such as adequate staffing, chronic disease management, mental health screenings, suicide prevention and dental care.

Only then did the Pierce County defendants object to the use of the NCCHC standards, arguing that they "should be considered as guidelines," not requirements. Thus, after the defendants had selected the NCCHC standards "as their guidelines and final goalposts," and failed miserably to satisfy these self-imposed minimum standards, they tried to move the goalposts.

Medical Staffing Problems

A major point of contention between the parties, and a recurring deficiency found by the monitors, was medical staffing at PCJ. In his August 5, 2008 report, Dr. Goldenson recommended that the jail hire six additional nurses and two mental health professionals. The defendants disagreed. "Current staffing levels are fully adequate to provide necessary medical services for inmates," said PCJ Health Services Manager Vince Goldsmith.

Class counsel Diamondstone sided with the monitor. In 1996, PCJ's population was 1,264 but "the 2007 Actual Average Daily Population was nearly 20% higher at 1,490," Diamondstone noted, citing PCJ's 2009 preliminary budget. The increase in the jail's population evidenced a need for an increase in medical staff.

As early as December 2001, Dr. Shelton, the first court-appointed monitor, had also found inadequate staffing. In March 2002, a Nursing Consultation Report prepared by Catherine Knox, RN – then the ODOC's Health Services Administrator – proposed a substantial increase in staffing. Dr. Shelton concurred

with Knox's recommendations.

Shelton again found deficient medical staffing in 2005, as did Goldenson in his January 2008 and August 2008 reports. Yet PCJ refused "to increase the health care staff from the minimum number that were present when the jail population was smaller, in violation of the October 31, 1995 Stipulated Order that had been incorporated in the Final Order and Judgment," Diamondstone informed the court. "The parties are at an impasse on the current issue of necessary health staff at the jail."

Mental Health Services

In his August 5, 2008 report, Dr. Goldenson concluded that "the limited number of mental health staff continues to affect the ability of the mental health program to provide an appropriate level of care." He found that mental health employees were "not responding to a significant number of mental health kites," and "the current coverage is not adequate to serve the mental health needs of the ... population. Long delays, up to 30 days, were found during chart reviews and some patients were never seen, even though there were multiple referrals to the psychiatrist."

Dr. Goldenson also wrote that "some patients are released from suicide watch with no follow-up checks from mental health." While "there is no nationally acceptable schedule for follow-up, Lindsay Hayes, a nationally recognized jail suicide prevention expert, recommends daily for 5 days, once a week for 2 weeks, and then once a month until release," Goldenson said. He again recommended an increase of two full-time mental health professionals, but the county again refused.

To illustrate the problem, Dr. Goldenson noted that a prisoner with a history of suicidal thoughts sent a kite to medical staff on June 3, 2008, stating "meds – seizures making it impossible to control emotions – put in several kites." Six days later he sent another kite asking why his kites weren't being answered. "I need help badly," he wrote. As of June 12, 2008, nine days after his initial request for mental health care, he still had not received a response.

Dental Care

"Dental care continues to be available only one day per week," observed Goldenson. As of June 2008, "there were 40 patients on the dental priority list.... Many of these patients had been on the list for over 2 months. In addition, 93 patients were on the waiting list for routine dental care. Many of these patients had been waiting over 4 to 6 months to see the dentist."

One prisoner was placed on the priority list on January 23, 2008 for a dental abscess and another was put on the list March 6, 2008 for a broken tooth, but neither had been seen as of June 12, 2008. "As noted in our prior report, the current schedule is totally insufficient to meet the dental needs of the jail population," Goldenson wrote.

Diamondstone said the court had previously ordered the county to employ a half-time dentist, but "the jail has been providing one day a week dental care for the past several years." Pierce County did not begin to comply with the court's half-time dentist order until January 6, 2009.

Continuation of Outside Medications

"In our first report, we also concluded that the current system for continuing outside medications needed to be reviewed," said Dr. Goldenson. "We were concerned that some patients were not receiving essential medications in a timely manner. Our review of medical records during our recent visit revealed ongoing problems with continuity of medications."

PCJ staff failed to conduct a recommended "quality improvement study to evaluate the timeliness with which patients receive essential medications when they first enter the jail." They also failed to develop a recommended policy to address verification of psychiatric medications that prisoners were taking prior to their incarceration, and to provide those medications during confinement, Goldenson noted.

Chronic Disease Management

PCJ "has not developed a system for identifying and tracking patients with chronic medical problems," Dr. Goldenson found in his August 2008 report. Although the NCCHC chronic care guidelines had been distributed to medical staff

at the jail, a "review of records revealed that in many cases the guidelines are not being followed."

Recent Jail Deaths

Diamondstone suggested in court filings that "eight deaths in 2006-08 all raise questions about access and/or adequacy of health care" at PCJ. He also criticized the jail's new policy of allowing only internal reviews of prisoner deaths. "Historically, Pierce County conducted outside reviews of deaths that occurred in the jail; apparently that practice has ceased and 6 more recent death reviews that have been provided (one death in 2007 and five deaths in 2006) were all conducted internally, by Dr. Balderamma," Diamondstone wrote.

In one of those cases, Dr. Balderamma, the physician at PCJ, claimed "that law enforcement had not provided full information about [a prisoner's] suicide potential at the time of booking." Yet records indicated that the arresting officers wrote "SUICIDE WATCH" across the top of the prisoner's intake form and made other notations that he was at risk of self-harm.

NCCHC standards call for an outside

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review when the jail physician was directly providing care to a prisoner who dies. The county said it would comply with that standard in the future.

Non-Compliance with Court Orders

On March 28, 1996, the district court ordered the county to “establish a Quality Assurance and Improvement Committee” of outside physicians. In October 2008 the county admitted it was not in compliance and “agreed to reinstate a proper committee by December 31, 2008.” However, the defendants failed to meet that deadline.

The 1996 court order also mandated that all prisoners be given at least one hour of outdoor exercise at least three times per week, except when they are housed in disciplinary or administrative segregation for violent behavior. On November 26, 2008, the county informed Diamondstone that “current policy now disallows outdoor exercise to all segregation inmates.”

Further, Dr. Goldenson noted that “access to medical care in special housing units remains problematic.” NCCHC standards requiring medical rounds in segregation units at least 3 times per week were not being met, and “staff reported that access to care is delayed for inmates in segregation,” Goldenson wrote.

Care Terminated for Mentioning Counsel

On April 8, 2008, a prisoner who had been incarcerated “for many, many months” was hospitalized with a blood sugar of “just over 500 at the jail (normal would be 60 to 100). He was held at the hospital for five days and was diagnosed as diabetic.” He returned to the jail on April 13, 2008, and three days later expressed concerns about his diet and not being seen by a doctor. “After more long rants about the type of food, ... [he is] putting a kite under my face with lawyer Fred Diamondstone’s name and phone number written on it,” a nurse wrote in the prisoner’s medical chart. “I took this as a threat and terminated the conversation.”

Diamondstone argued that the incident revealed “concerns about access to adequate medical care and the adequacy of chronic disease follow-up.” He added that “the fact that an inmate’s reference to class counsel is recorded in the chart as a ‘threat’ shows that jail inmates may be dissuaded from presenting complaints to

both health care providers and to counsel for the class.”

Recent Developments

Dr. Goldenson issued his third progress report on February 8, 2009. He noted that “required three-times per week nursing rounds in the segregation units are frequently not [] being done,” and cited other continuing concerns that included delays in providing treatment, staffing vacancies, and insufficient monitoring and care of prisoners at risk of alcohol withdrawal. He also reported improvements in the delivery of mental health care at PCJ.

Pierce County moved to remove the court-appointed monitor on July 9, 2009; the court denied the motion and the county appealed to the Ninth Circuit, but later dismissed its appeal. The defendants also moved to terminate all provisions of the consent decree other than those related to health care. The district court granted the motion on October 23, 2009, leaving only health care-related matters at PCJ subject to the consent decree. The parties were ordered to mediate the remaining contested issues.

Dr. Goldenson’s fourth progress report was issued on November 18, 2009. He noted that nursing staff still was not doing requiring rounds in segregation, and found delays in responses to prisoners’ kites. Goldenson wrote that “in the overwhelming majority of these cases, the inmates were not seen for at least 4 days, often longer, and at times not at all.” All nursing staff positions at PCJ had been filled, but he remained concerned that the jail did “not have sufficient nursing

staff.” Major improvements in mental health care and dental care were cited, and Dr. Goldenson concluded the report by listing ten areas that still needed work – including responses to medical and mental health kites, refusal of care and management of alcohol withdrawal.

The district court removed Dr. Goldenson as the monitor at PCJ on January 11, 2010 and appointed Judith F. Cox, MA, an expert in suicide prevention and mental health care, to submit a report regarding the ten unresolved issues remaining at PCJ.

Cox filed her report on August 10, 2010, finding that four of the ten issues were adequate or could be remedied quickly. She reported that four others still needed improvement – responses to mental health care kites, refusal of care, privacy of nursing patient interviews at intake, and management of alcohol withdrawal. The remaining two issues, the chronic disease program at PCJ and the Continuous Quality Improvement (CQI) process, also needed improvement but did not affect access to care. Cox found the CQI process at PCJ did not meet community standards.

This case remains ongoing, with a trial date scheduled for January 24, 2011 if the remaining health care-related issues at PCJ are not resolved before then. See: *Herrera v. Pierce County*, U.S.D.C. (W.D. Wash.), Case No. 3:95-cv-05025-RJB-JKA. ■

Additional source: www.thenewstribune.com

Registered Sex Offender Remained on City Payroll While Incarcerated

by Michael Brodheim

Dennis J. McLaughlin, a water maintenance worker for Baltimore’s Department of Public Works (DPW), continued to earn his salary from 2007 to 2008 while serving a prison sentence for sexually abusing a 13-year-old girl.

McLaughlin, 37, pleaded guilty to a first-degree sex offense in 2007. Sentenced to 16 months, he was released eight months early in May 2008 according to the Maryland Department of Corrections. Incredibly he then resumed his employment with DPW, which occasionally required him to check water leaks in private residences and schools.

An investigation by Investigative Voice, and later by the city’s Inspector General, found that McLaughlin received \$12,700 in sick leave, vacation and holiday pay during the time he was incarcerated. The investigation further revealed that McLaughlin was able to remain on the city’s payroll by using fraudulent sick leave requests.

All of this came to light only after McLaughlin, a 10-year DPW employee, was arrested again in January 2010, this time for allegedly impersonating a police officer while sexually assaulting a Baltimore County woman. He later pleaded

guilty to those charges.

Professing ignorance, city officials claimed they did not know McLaughlin had served eight months in prison for sexually abusing a minor or how he had managed to stay on the city's payroll while incarcerated – even though he was placed on Maryland's sex offender registry as a

result of his initial conviction.

Three DPW employees received short suspensions, while McLaughlin's mother, Joyce, who worked as a DPW supervisor, retired. DPW director David E. Scott and the head of the agency's Water and Waste-water Bureau were forced to resign.

In May 2010, the mayor of Baltimore

issued new rules requiring city workers to report when they are arrested; the city also filed suit against McLaughlin and his mother, seeking to recover the wages he was paid while in prison. ■

Sources: www.investigativevoice.com, www.foxnews.com

Oregon Politician Visits Prison, Proposes Porn Ban

by Mark Wilson

Oregon state representative Greg Smith is up for reelection, and thus looking for a way to win over voters. So why not drop in on an Oregon Department of Corrections (ODOC) facility and engage in some tough-on-crime prisoner-bashing? That's likely to get some votes, especially from members of the prison guard union.

So Smith paid a visit to the Two Rivers Correctional Institution (TRCI), where staff members apparently regaled him with appalling stories of prisoners receiving sexually explicit magazines such as *Playboy*.

"It took me by surprise," said Smith. "Prisoners should be focused on rehabilitation rather than on personal gratification." Of course he failed to recognize that the type of sexually explicit material allowed in ODOC facilities does not undermine rehabilitation, or that it is hard for prisoners to "focus on rehabilitation" when the ODOC spends only a small part of its budget on rehabilitative programs. He also might not have realized that publications like *Playboy* contain more than smutty pictures.

Still, Rep. Smith left TRCI ready to draft legislation imposing a sweeping ban on all sexual materials in Oregon's prison system, never mind the fact that prison officials have acknowledged that such publications do not cause problems.

"There really hasn't been any situations that you could tie directly to an inmate's possession of sexual content," said Jeanine Hohn, ODOC's Communications Manager. Professor Richard Tewksbury of the University of Louisville, who conducted a survey in Kentucky's prison system, found only about 5 percent of prisoners received publications such as *Playboy*, and concluded that no systemic problems were caused by soft porn. In fact, "there are positive benefits to having this material available," Tewksbury stated. "It can be a stress reliever."

Although the ODOC has not yet seen Rep. Smith's porn ban proposal, which according to a March 16, 2010 press release will be introduced during the 2011 regular legislative session, prison officials warned it may cause more problems than it fixes.


Surprisingly, *The Oregonian's* editorial board quickly criticized Smith's plan. "In our view, legislators should have a keen interest in doing four things: 1) Reducing prison costs; 2) Boosting rehabilitation and thereby reducing recidivism; 3) Keeping the public safe; and 4) Keeping prisoners and prison guards safe," the newspaper wrote. "Whatever legislators can do to help prison managers control a population and a situation fraught with tension, difficulty and danger, legislators should do."

However, lawmakers "should be wary

of micromanaging and meddling. Smith has picked out an area to focus on that actually doesn't need his help," *The Oregonian* noted. "Although prison rules on sexual material stop short of a complete ban, prison managers say the rules are working very well."

"Removing this material from our prison[s] will better enable the Department of Corrections to maintain a safe environment for officers and inmates," Smith countered. Although proposed budget cuts call for the release of almost 1,000 ODOC prisoners and the closure of three state prisons, evidently the most pressing issue for Rep. Smith – and his reelection campaign – is preventing prisoners from receiving *Playboy*. ■

Source: *The Oregonian*



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\$1 Million Award in New York State Prisoner's Death Caused by Medical Malpractice

A New York Court of Claims has awarded \$1,021,915.73 to the estate of a former prisoner who died as the result of a prison nurse and doctor departing from accepted standards of care.

Leonard Pickell arrived at New York's Ulster Correctional Facility (UCF) on July 8, 2005. His medical records indicated he was diabetic, hypertensive and suffered from hepatitis C. In addition to having several herniated discs in his spine, Pickell also had a right drop foot.

Upon reception at UCF, Nurse Cheryllene Towner conducted a health screening and evaluation of Pickell. She wrote he did not have "a current health problem or complaint." She did note, however, that he had a limp and a "[s]ore on foot." Despite being aware that Pickell was diabetic, Towner did not conduct a physical examination or prepare a treatment plan.

Pickell's next interaction with prison medical staff was on September 20, 2005. On that day he saw UCF Health Services Director Dr. Young S. Jun; however, Dr. Jun did not have Pickell's medical records for review.

Not only did those records detail Pickell's medical problems, but they mentioned the sore on his foot, which was a slow-healing ulcer on his right great toe. At trial, Dr. Jun tried to say the ulcer was "dry," but his medical report stated it was "reddish and swelling."

At that time Dr. Jun did not prescribe medication or diabetic foot care for Pickell. Dr. Jeffrey Levine later testified that that failure to provide treatment was a departure from the standards of care.

Redness and swelling in a diabetic foot ulcer presents a danger of rapidly ascending infection that may lead to septic shock, and a diabetic may not display the symptoms of an active infection such as fever and pain. Dr. Levine testified that the applicable standard of care would include establishing a baseline blood sugar level, administering a blood test to determine whether there was a hematological indication of infection, and ordering X-rays to determine whether the bone was implicated in the infection.

When Pickell saw Dr. Jun on October 11, 2005 the ulcer was much worse and exhibited a "purulent odor." Dr. Levine said that was an "alarming situation." Yet

Dr. Jun did nothing but provide Silvadine ointment and order a culture. On October 13, Pickell was in "a life-threatening situation" after he was found unresponsive due to septic shock.

Over the next ten months he remained hospitalized. Pickell's condition was still severe when he was released from prison in August 2006; he remained immobile and underwent numerous medical procedures before dying on June 13, 2007.

His estate filed suit, and the Court of Claims found that Nurse Towner and Dr. Jun had departed from the accepted standards of care, as established by expert testimony. The court further

held that their "deviations from accepted standards of medical care and treatment were a proximate cause of the decedent's injuries and death."

On November 19, 2009, the Court of Claims awarded Pickell's estate \$700,000 for his pain and suffering; \$96,915.73 in medical expenses; \$25,000 to his wife for loss of consortium; and \$30,000 in past loss of parental nurturing and \$70,000 in future loss of parental nurturing to each of his two adult daughters. Pickell's estate was represented by attorney Jonathan C. Reiter. See: *Pickell v. New York*, New York Court of Claims (Saratoga Springs), UID 2009-015-526, Claim No. 113130. ■

Arizona Attempts Prison System Sell-Off

by Brandon Sample

The next lot in our auction is the Arizona prison system. Do I hear \$100,000,000? What, no bidders? None? You, sir, Corrections Corporation of America, you must be interested. No? Okay. How about you, GEO Group? No, not interested either?

Prison privatization is not a new concept but efforts to privatize an entire prison system are rare – having been previously considered in only one state, Tennessee, more than a decade ago. [See: *PLN*, Sept. 1998, p.16]. However, last year Arizona lawmakers attempted to privatize most of that state's prison system as they tried to close a whopping \$4 billion budget deficit.

HB 2010, signed into law by Governor Jan Brewer on September 3, 2009, permitted the unprecedented sale of almost all of Arizona's prisons. Under HB 2010, state prison officials were required to solicit bids for the operation of "one or more prison complexes" by private companies in return for an upfront payment of \$100 million. The state would then lease the prisons back from the companies over a 20-year period, paying them to manage the facilities. The prison complex at Yuma was not subject to the law; it had been exempted at the insistence of a Yuma legislator.

The concept was "such a new idea. The model hasn't been done," said Leonard Gilroy, an official with the Reason Foundation, which champions the priva-

tization of government services and has received funding from the private prison industry. "It's sort of like 'we want you to do an operational contract and loan us \$100 million,'" Gilroy said. "I don't know if there's enough there to sweeten the pot for the private sector."

When asked about taking over Arizona's prison system, Louise Grant, spokesperson for Corrections Corporation of America (CCA), said they were "not focused on that." She noted that CCA was interested in pursuing traditional private prison contracts. GEO Group, the second-largest private prison operator in the U.S., declined to comment on its intentions, as did a third potential bidder, Utah-based Management & Training Corporation (MTC).

Aside from the \$100 million upfront payment being a nonstarter, some lawmakers and state prison officials questioned the wisdom of trying to put Arizona's entire prison system into private hands.

Corrections Director Charles L. Ryan told legislators in a May 2009 hearing that the idea was "very concerning," especially considering that some prison complexes house death row prisoners and other violent offenders. "[The bill] seeks to attempt something never experienced in the nation: Privatizing a state's entire prison system. This is bad public policy," Ryan remarked.

J. "J-Rod" Rodriguez, vice-president of the Arizona Correctional Peace Of-

ficers Association, raised concerns about the loss of jobs for state prison guards. "They're trying to replace us with lower-paid [private] guards to handle sex offenders, murderers, rapists, inmates with volatile connections," he said.

Ultimately, Ryan, Rodriguez and other concerned officials had nothing to fear. Although Arizona tried to sell off its prison system to the private sector, there were no buyers. CCA, GEO Group, MTC and other companies just weren't interested – possibly because HB 2010 required "an annual cost efficiency savings to the state."

The system-wide privatization provision of HB 2010 was quietly repealed when HB 2006 was signed into law in March 2010. Prior to its repeal, the Arizona Department of Corrections had reduced the number of prison complexes that could be privatized from nine to two, excluding facilities that house maximum or close-security prisoners.

However, other aspects of HB 2010 remain in force – including a requirement that the Arizona Department of Corrections (ADOC) "issue a request for proposal to privatize correctional health services, including medical and dental ser-

vices," and "issue a request for proposals and contract for 5,000 private prison beds for either an expansion of current private prisons ... or new locations in this state." Arizona already houses about 20% of its prison population in privately-operated facilities.

Private prison companies were amenable to traditional contracts for 5,000 more beds, and four firms submitted bids in May 2010. The interested companies are CCA, GEO, MTC and Emerald Correctional Management, which is seeking to build several facilities in Arizona including a 1,000-bed prison in Globe. CCA and MTC considered putting prisons in Prescott Valley, but withdrew their proposals due to community opposition and lack of support from the town council.

Arizona's plan to contract for 5,000 more private prison beds hit a snag with the high-profile escape of three prisoners from an MTC-operated facility in Kingman on July 30, 2010. "I believe a big part of our problem is that the very violent inmates, like the three that escaped, ended up getting reclassified [as lower security] quickly and sent to private prisons that were just not up to the job," said Arizona

Attorney General Terry Goddard.

The escape, which sparked a nationwide manhunt and exposed serious security flaws at the MTC prison, will be covered in an upcoming issue of *PLN*. Following the Kingman escape it was revealed that two advisors to Governor Jan Brewer had close lobbying ties to CCA, and that eight CCA executives had donated to Brewer's election campaign. Also, a February 2010 report by the ADOC found it may actually be more expensive to house the state's prisoners in privately-operated facilities. ■

Sources: www.guardian.co.uk, *Associated Press*, www.eacourier.com, *Arizona Republic*, www.azdailysun.com, www.tulsaworld.com, www.silverbelt.com, *Prescott Daily Courier*, www.money.cnn.com

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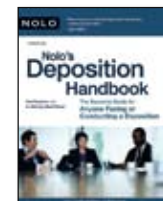
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The New Jim Crow: Mass Incarceration in the Age of Colorblindness, **by Michelle Alexander (N.Y., The New Press, 2010). 290 pages.**

Book Review by Mumia Abu-Jamal

The *New Jim Crow* offers an unflinching look at the US addiction to imprisonment and comes up with a startling diagnosis: American corporate greed, political opportunism and the exploitation of age-old hatred and fears have congealed to create a monstrous explosion in the world's largest prison industrial complex. Further, the author, Michelle Alexander, a law professor at Ohio State University's Moritz College of Law, digs deep into US history, and deeper still into US criminal law and practice, to conclude that the barbarous system of repression and control known commonly as Jim Crow had a rebirth in this era.

That's why she calls it *The New Jim Crow*.

This system of legal discrimination came into being much as the first one did. After the rout of the South in the Civil War, millions of newly-freed Africans exercised their new rights under Reconstruction. Black men became senators and legislators across the South. But this period was short-lived, and as soon as possible states passed harsh laws known as Black Codes, which denied rights and criminalized behavior by Blacks, and exposed them to the repression of southern prisons where convicts were leased out to labor for others. It was the rebirth of slavery by other means.

This present era began at the height of the US civil rights movement, when millions of Blacks fought for their rights denied for more than a century.

Alexander concludes that this new system – this new coalescence of economic and political interests – targeted Blacks, especially those engaged in the drug industry, as the human capital with which to provide massive prison construction, huge prison staffs and the other appendages of the apparatus of state repression.

But perhaps Alexander's most salient point is her finding that America's Black population constitutes a "racial caste" that feeds and perpetuates mass incarceration.

Indeed, every other societal structure supports this superstructure, from broken schools to deindustrialization to population concentration in isolated urban

ghettoes to police violence and to the silence of the Black middle class.

One might argue that such a claim seems unsustainable when we see a Black president, hundreds of Black political figures and those in entertainment and sports. But Alexander explains that every system allows exceptions, for they serve to legitimize the system and mask its ugliness and its gross effects upon the majority of Blacks.

For example, while it's well-known

that apartheid was an overtly racist system, it allowed Asian and even African-American diplomats to live and work in such a regime, through the political expediency of identifying them as "honorary whites" in their official papers.

When comparing both systems, Alexander argues that the US imprisons more Blacks, both in raw numbers and per capita, than were incarcerated in South Africa at the height of apartheid.

The New Jim Crow, indeed! 🐼

Another Way for CCA to Influence Congress

by Matt Clarke

Corrections Corporation of America (CCA), the nation's largest for-profit prison company, already spends a significant amount of money courting federal agencies and members of Congress. CCA employs three lobbying firms in Washington D.C., spent about \$1 million in lobbying on the federal level in 2009, and has its own Political Action Committee. CCA executives and employees have made over \$135,000 in campaign donations to federal political candidates in the 2008 and 2010 election cycles.

Recently, though, Talking Points Memo, a news organization that specializes in reporting on government and political issues, found another way that CCA influences federal officials: Three former and current Congressional staffers with ties to U.S. Rep. Bennie Thompson, chairman of the House Committee on Homeland Security, run an event-planning business that has accepted money from CCA to plan events honoring Thompson.

Dena Graziano, Rep. Thompson's communication director since 2006, co-founded Chic Productions along with Michone Johnson, chief counsel for a House Judiciary subcommittee, and Michelle Persaud, a former House Judiciary Committee staffer. According to Chic's website the company provides "high style events with simple elegance," and congressional events make up about 90 percent of its business.

Lobbyist disclosure statements that reveal these types of arrangements have only been required since 2008, so the prior history of Chic's relationship with Rep. Thompson is unknown. What is known, however, is that Chic has planned at least six events for Thompson other than lobbyist receptions during the past three years. The company also planned Congressional Black Caucus events in 2006, 2007, 2008 and 2009, some of which were hosted by Rep. Thompson or held in his home state of Mississippi.

Over a six-week period in 2008, four companies paid Chic Productions a total of \$22,500 to plan events honoring Thompson. CCA contributed \$10,000, the most of the four firms. Notably, CCA has contracts with the Department of Homeland Security to house ICE detainees, and around 40% of CCA's business comes from federal agencies.

"Any time a member of Congress perhaps directs business to somebody who is a close personal friend or employee, the member's constituents should at the very least ask questions about why this was the case," stated Dave Levinthal, communications director for the Center for Responsive Politics. "If a staffer who receives a taxpayer-funded salary is using that position to further their personal wealth, that could be of concern."

Likewise, a private prison company that pays a firm run by current and former Congressional staffers, with the not-so-

subtle goal of influencing a member of Congress, also should be a matter of concern. But apparently that's just how the game is played in Washington.

In related news, Rep. Thompson has been accused of ethics violations by a former staffer who claims she was fired after

she raised objections to "inappropriate lobbyist requests." Other Homeland Security Committee employees said Thompson held a hearing on new rules for credit card companies in March 2009 just to put the squeeze on Visa and Mastercard for campaign donations. He received \$15,000

in contributions from the credit card industry and its lobbyists within weeks of the hearing. A House ethics panel is investigating the allegations. ■

Sources: www.tpmuckraker.com, *Washington Post*, www.opensecrets.org

California: Last Two of Five Guards Charged in Prisoner's Death Get Prison Time

In January 2010, two former jail guards were sentenced to prison for participating in a brutal assault that resulted in a prisoner's death.

James Moore, 30, was involved in a lengthy struggle with over a dozen guards at the Kern County Detention Center on August 15, 2005 following his arrest on criminal threat charges. He was placed in a "carotid hold" and severely beaten, including when he was shackled to a gurney. Moore died about a week later due to head injuries.

Five jail guards were charged with participating in the beating or failing to stop it. Three took plea bargains, while two, Daniel Lindini and Ralph Contreras, went to trial in October 2009 and

were convicted.

Lindini was sentenced to two years in prison after being convicted of involuntary manslaughter and assault by a public officer. He had worked at the Kern County jail for 26 years.

Contreras was convicted of second-degree murder and assault by a public officer, and sentenced to 15 years to life. The judge in the case, Louis P. Etcheverry, said neither Lindini nor Contreras had tried to stop the assault on Moore. Attorneys for the former guards claimed their clients had been unfairly singled out.

Previously, in February 2006, jail guard Lisa Romero pleaded no contest to a misdemeanor assault charge in connection with Moore's death; she was

sentenced to one day in jail and three years' probation. Former guard Angel Bravo pleaded guilty to a similar charge two months later and was placed on three years' probation. A fifth guard, Roxanne Fowler, pleaded guilty in September 2009 to a misdemeanor charge of assault by a public officer; she was sentenced to time served, three years' probation and a \$375 fine.

In April 2009, Moore's two minor sons obtained a \$6 million settlement in their wrongful death suit against Kern County. [See: *PLN*, Oct. 2009, p.32]. ■

Sources: www.mercurynews.com, www.bakersfield.com, www.bakersfieldnow.com, www.turnto23.com

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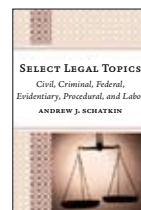
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U.S. Supreme Court Rejects Federal Good Time Challenge

by *Brandon Sample*

On June 7, 2010, the U.S. Supreme Court upheld the Bureau of Prisons' (BOP) method for calculating federal good time credits.

The dispute over the BOP's implementation of the federal good time statute, 18 U.S.C. § 3624(b), began about six years ago. Federal prisoners across the country, including this writer, filed habeas petitions arguing that the BOP was misapplying the good time statute by awarding credits retrospectively instead of prospectively.

Under the BOP's methodology, prisoners can earn 54 days of good time – the maximum allowable by statute – only after physically serving each year in custody (except for the last year of incarceration, when the amount of good time is prorated). A prisoner with a ten-year sentence, for example, can earn a maximum of 470 days of good time on his or her total sentence using the BOP's method.

Conversely, prisoners could earn 540 days of good time on a ten-year sentence if the credits were awarded based on the sentence imposed, which is the method advocated by BOP prisoners and their supporters (10 years x 54 days of good time each year = 540 days total good time).

Every federal Court of Appeals that heard challenges to the BOP's calculation of good time sided with the BOP. Some courts said the statute unambiguously called for the method used by federal prison officials, while others deferred to the BOP's interpretation of the statute after finding its language ambiguous.

Just when it seemed the BOP good time challenge was dead, the U.S. Supreme Court agreed to hear one of the cases. Hope sprung anew; after all, why would the high court agree to take a case when there was no circuit split unless they intended to do something differently? At least that is what many prisoners thought.

The National Association of Criminal Defense Lawyers, National Association of Federal Defenders, Federal Public and Community Defenders in the U.S., Families Against Mandatory Minimums, Prison Fellowship Ministries, Dean Erwin Chemerinsky of the UC Irvine School of Law, the ACLU and others joined amicus briefs in support of the plaintiffs.

Hopes were dashed, however, with the announcement of the Supreme Court's 6-3 opinion in favor of the BOP. Justice Breyer, who authored the decision, said the BOP's method for calculating good time reflected the most natural reading of the statute. The Court also rejected application of the so-called "rule of lenity," which requires that ambiguous penal statutes be construed in a defendant's favor, finding there was no "grievous ambiguity" in the law.

Justices Kennedy, Ginsburg and Stevens, dissenting, said the Court had interpreted the statute "in a manner that disadvantages almost 200,000 federal prisoners." "We should not embrace this harsh result," Kennedy wrote, "where Congress itself has not done so in clear terms." Unfortunately the Supreme Court did embrace the majority's ruling, effectively ending challenges to the BOP's method of calculating good time. See: *Barber v. Thomas*, 130 S.Ct. 2499 (2010). ■

Justice Thomas' Wife Creates "Nonpartisan" Political Organization

by *David M. Reutter*

Members of the judiciary have an ethical obligation to remain impartial. When it comes to the U.S. Supreme Court, such impartiality is crucial given the impact that the Court's rulings have nationwide. For that reason the high court historically has remained nonpartisan and distanced itself from the political arena.

Thus, the recent involvement of Virginia "Ginni" Thomas, whose husband is Justice Clarence Thomas, in the Tea Party movement is raising eyebrows. "I adore all the new citizen patriots who are rising up across this country," Virginia said while speaking on a panel at the Conservative Political Action Committee. "I have felt called to the frontlines with you, with my fellow citizens, to preserve what made America great."

Ordinarily, participation in political advocacy by family members of the judiciary is not a matter for concern. What has tested the norms is that in November 2009, Virginia, an outspoken critic of President Obama, created a 501(c)(4) nonprofit organization called Liberty Central, Inc.

The organization's website, *LibertyCentral.org*, coordinates activism around a set of conservative "core principles." Benefitting from the recent Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), Liberty Central solicits money from various sources such as corporations, which then can be used to advocate for or against political candidates. Justice

Thomas was part of the 5-4 majority in *Citizens United*.

This is not Virginia Thomas' first foray into politics. She previously worked for former Republican Rep. Dick Armey and the Heritage Foundation, a conservative think tank with strong ties to the GOP. As the Supreme Court was hearing *Bush v. Gore*, the case that decided the 2000 presidential election, Virginia was at the Heritage Foundation recruiting staff for George W. Bush's administration.

Since his appointment to the Supreme Court in 1991, Justice Thomas, 61, has been a reliable conservative. "We expect the justice to make decisions uninfluenced by the political or legal preferences of his or her spouse," said New York University law professor Stephen Gillers. However, "[t]here is an opportunity for mischief if a company with a case before the court, or which it wants the court to accept, makes a substantial contribution to Liberty Central in the interim," he noted.

Whether a Supreme Court justice recuses him or herself from hearing a case due to a potential conflict of interest is solely up to that individual justice. Thus, former Chief Justice William Rehnquist declined to recuse himself from an antitrust case against Microsoft even though his son, an attorney, was working on a separate antitrust case involving Microsoft. However, Rehnquist did recuse himself from cases argued by attorney James Brosnahan, who had testified against him at his confirmation hearing.

It remains to be seen whether Justice Thomas will hear cases involving companies that make donations to his wife's political advocacy organization. "Liberty Central has been run past the

Supreme Court ethics office and they found that the organization meets all ethics standards," said Sarah Field, the organization's policy director and general counsel. In 2009, Liberty Central received

two donations totaling \$550,000. The donors were not identified. ■

Sources: *Los Angeles Times*, www.politico.com

New Jersey Prison Guards Fake Electrocution

by Brandon Sample

Three New Jersey guards accused of faking the electrocution of a prisoner at the Adult Diagnostic and Treatment Center in Avenel have been suspended. Sergeants Mark Percoco and Steven Russo received 105-day suspensions without pay following the October 3, 2009 incident, while prison guard Edward Aponte was suspended for 14 days.

Details concerning the faux electrocution were revealed after the *Star-Ledger*, a local newspaper, obtained a copy of a confidential internal affairs report.

According to the report, prisoner Javier Tabora was allegedly told by one of the guards to sit in a chair used to scan prisoners for contraband and pretend that he was being electrocuted. While he was seated, Tabora said he yelled and shook, and pretended "that electricity was coming from the chair." He also put "cream soup" in his mouth and let it ooze out "for added effect."

The charade was reportedly staged to frighten Robert Grant, another prisoner at the facility, which houses sex offenders (including some who are

mentally ill). Grant had apparently been filing grievances complaining about certain aspects of his confinement. He told investigators that he saw a prisoner with "foam coming from his mouth" and then became "upset, nervous and shaking" when the guards placed him in the chair before questioning him about his complaints.

The guards denied wrongdoing, and internal affairs investigators were ultimately unable to substantiate the prisoners' accounts because it came down to their word against the guards' and there were no cameras in the room where the incident occurred.

Nonetheless, Percoco, Russo and Aponte pleaded guilty to workplace infractions of conduct unbecoming and violating safety regulations, and were transferred to other facilities in addition to their suspensions. Local prosecutors declined to pursue criminal charges.

"Respect for internal affairs and prisoners' rights to address grievances is essential to the integrity of prisons and other such institutions," said Deborah

Jacobs, director of the ACLU of New Jersey. "The only way to create a silver lining to this tragic and appalling incident is to use it as a springboard for establishing grievance and oversight systems and training programs to ensure that nothing like it ever happens again." ■

Source: www.starledger.com

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See page 53 for more information.

\$2.9 Million Settlement in Suit against GEO over Suspicionless Strip Searches

by Matt Clarke

On May 20, 2010, a \$2.9 million settlement was reached in a Pennsylvania federal civil rights lawsuit against GEO Group for performing suspicionless strip searches of people arrested for minor, non-violent, non-drug offenses.

Penny Allison inadvertently missed a scheduled court appointment finalizing her probation program in a DUI case, so the court issued a bench warrant for her arrest. Later, she was pulled over for an expired registration sticker and arrested on the bench warrant. She was taken to the George W. Hill Correctional Facility (GWHCF) in Thorton, Pennsylvania, where she was required to strip naked, squat and cough in front of a room full of women as part of the intake process. A male guard walked into the room during the strip search procedure. At that time, Delaware County was paying GEO over \$3 million a month to run GWHCF.

Zoran Hocevar was arrested for inadvertently missing a court appointment on a harassment charge after several other charges related to a domestic disturbance were dropped and he believed the harassment charge had been dropped as well. He was taken to GWHCF where he was strip searched in front of other men as part of the intake process.

Allison and Hocevar filed a class-action civil rights lawsuit pursuant to 42 U.S.C. § 1983 in federal district court alleging that GEO's blanket strip search policy, which applies to all facilities it operates in the U.S., violated their Fourth and Fourteenth Amendment rights by subjecting them to unreasonable searches. GEO filed a motion for judgment on the pleadings after the Eleventh Circuit upheld a Georgia jail's blanket strip search policy. The court denied the motion, noting that nine other federal courts of appeal had ruled opposite of the Eleventh Circuit. GEO then settled the suit.

The settlement applies to any person who was arrested for non-violent crimes that did not involve drugs or weapons,

had no prior history of such crimes and displayed no behavior that would arouse guards' suspicion that they were carrying contraband. Such arrestees who were subjected to blanket policy strip searches at any GEO-operated facility in the U.S., including GWHCF and at least five other jails in Texas, New Mexico and Illinois, may be eligible for settlement awards up to \$400 each. The settlement applies only to strip searches conducted as part of initial arrest and booking.

GWHCF is currently operated by Community Education Centers of West Caldwell, N.J. To qualify for a possible settlement award, GWHCF prisoners must have been strip searched between January 30, 2006 and January 30, 2008, the time period in which GEO operated GWHCF.

"As a direct result of this litigation, GEO has changed its strip-search policies in those prisons it still operates," according to plaintiffs' attorney Joseph G. Sauder of Haverford.

"In our view, there is simply no justification for this kind of invasive body search for those individuals coming to the institution who pose no security risk to the institution," said plaintiffs' attorney David Rudovsky of Philadelphia.

The plaintiffs were also represented by Philadelphia attorneys Daniel E. Levin and Jennifer R. Clarke; Haverford attorney Benjamin F. Johns; and West Chester attorney Christopher G. Hayes. See: *Allison v. GEO Group*, 611 F.Supp.2d 433 (E.D. Penn. 2009).

Source: *Philadelphia Inquirer*

Mississippi Stops Segregating HIV-positive Prisoners

On March 17, 2010, the American Civil Liberties Union announced that the Mississippi Department of Corrections (MDOC) had agreed to stop segregating prisoners with HIV. The policy change followed two decades of efforts by the ACLU, Human Rights Watch (HRW) and other advocacy organizations.

The decision to end the segregation of HIV-positive prisoners was made by MDOC Commissioner Christopher Epps prior to a forthcoming report by the ACLU and HRW detailing the negative effects of such discriminatory policies, which are still in force in Alabama and South Carolina.

"Commissioner Epps deserves a tremendous amount of credit for making this courageous decision to replace a policy based on irrational HIV prejudice with a policy based on science, sound correctional practice, and respect for human rights," stated Margaret Winter, Associate Director of the ACLU's National Prison Project. "The remaining segregation policies in South Carolina and Alabama are a remnant of the early days of the HIV epidemic and continue to stigmatize prisoners and inflict them and their families with a tremendous amount of needless suffering."

Health care experts have long agreed that there is no justifiable medical reason to segregate people with HIV in correctional settings, or to prevent them from participating in educational and vocational programs afforded to other prisoners. In 2004, a federal court ordered Mississippi to allow HIV-positive prisoners to participate in the MDOC's community work centers. [See: *PLN*, Feb. 2005, p.39].

Under the new policy, Mississippi prisoners with HIV will be able to "participate in jobs, training programs, and other services to which they were previously denied access because of their HIV status and which are designed to prepare prisoners for a productive return to society," the ACLU stated.

The desegregation of HIV-positive prisoners will also improve their living conditions, and will help to de-stigmatize them from the rest of the prison population. "Prisoners with HIV were often forced to live in cruel, inhumane and degrading conditions, and we're delighted that Mississippi has changed its policy," said Megan McLemore, a health researcher for HRW.

Source: *ACLU press release*

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New York City Jail Prisoner Awarded \$1.3 Million in Deliberate Indifference to Assault Claim

A New York federal jury awarded \$1 million to Steve Tatum for severe injuries he sustained as a pre-trial detainee when he was assaulted by other prisoners at the Rikers Island jail. The district court also awarded \$321,788.21 in attorney's fees and \$4,023.62 in costs.

Tatum's complaint originally included 13 claims, but only seven made it to trial. The jury found for Tatum on just his deliberate indifference claim against Rikers guard Renee Jackson.

That claim stated Jackson was indifferent to an assault on Tatum by other detainees on April 29, 2005; additional claims alleged she conspired with the prison-

ers and aided and abetted the brutal attack. As a result of the assault, Tatum suffered two fractures in his jawbone and fractures on either side of his upper nasal bones.

Following the jury's July 30, 2009 verdict awarding him \$1 million in compensatory damages, Tatum moved for attorney's fees and costs. Although he lost on most of his claims, the jury award was proof he had succeeded on a significant issue.

Since there was no dispute that Tatum was a prevailing party entitled to attorney's fees, the only question that remained was the amount of the fees. The court found that \$450 an hour was reasonable for attorney Adam Perlmutter

and \$400 was reasonable for attorney Zachary Margulis-Ohnuma. It further found that \$125 an hour was appropriate for paralegal fees.

The district court reduced the requested hours by 5.5 for each attorney for work done on administrative or clerical tasks, calculating that time at the rate for paralegals. It also reduced the total fee by 15% for work on Tatum's unsuccessful municipal liability and negligent hiring claims. The court's order awarding over \$325,800 in fees and costs was entered on January 28, 2010. See: *Tatum v. City of New York*, U.S.D.C. (S.D. NY), Case No. 1:06-cv-04290-PGG-GWG. ■

GEO Group Settles \$47.5 Million Texas Prisoner Wrongful Death Suit

On January 7, 2010, GEO Group settled a lawsuit over the beating death of a prisoner in Willacy County, Texas that had already resulted in a jury verdict of \$47.5 million – one of the largest prisoner wrongful death awards in the nation.

Gregorio de la Rosa, Jr., 33, was incarcerated at a private prison in Willacy County operated by Wackenhut Corrections, now known as GEO Group. He had been honorably discharged from the National Guard and was serving a six-month sentence for possession of cocaine. A few days before he was due to be released, de la Rosa was beaten to death by two other prisoners armed with locks tied to socks; Wackenhut guards stood by and watched the fatal assault while the wardens smirked and laughed.

De la Rosa's family filed a lawsuit against Wackenhut and Warden David Forrest in state court. A jury awarded the family \$47.5 million, and the defendants appealed. The Court of Appeals affirmed in April 2009 but reduced the award to \$42.5 million because one of de la Rosa's family members had died. See: *Wackenhut Corp. v. De la Rosa*, 305 S.W.3d 594 (Tex. App.-Corpus Christi 2009) [PLN, June 2009, p.10; Feb. 2007, p.34].

The Court of Appeals found that the jury's large award of punitive damages was justified by "the horrific facts of the case, including Wackenhut's malicious and grossly negligent conduct, the gruesome

manner in which Gregorio was killed, and Wackenhut's behavior in attempting to cover up its liability" by destroying critical evidence, including video footage of the incident.

The confidential settlement between the parties resulted after the scathing Court of Appeals opinion was released.

"I am pleased to have brought justice to the de la Rosa family and I am honored

to have made a positive contribution to Texas law for the future protection of our people," said Laredo attorney Ron Rodriguez, who represented the family members. See: *De la Rosa v. Wackenhut Corrections Corp.*, 404th Judicial District Court, Willacy County (TX), Case No. 02-110. ■

Source: *Brownsville Herald*

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News in Brief:

Arizona: On July 25, 2010, the troubled Corrections Corporation of America-run Saguaro Correctional Center was placed on lockdown after 30 prisoners from Hawaii were involved in a scuffle over an Xbox. During the melee the prison's "gang intelligence officer" was beaten and suffered a broken nose, broken cheekbones and eye socket damage.

Arkansas: Jessie Lunderby, 21, a detention officer with the Washington County Sheriff's Office, was placed on paid administrative leave in June 2010 after she posed for *Playboy*. Even though she had reportedly informed her superiors and did the photo shoot on her own time, Lunderby was investigated for "conduct unbecoming an officer." She was later fired, with Sheriff Tim Helder saying her "nude modeling hobby" had become a "distraction." It is unlikely that the petite blond bombshell will have difficulty finding another job.

Arkansas: On April 7, 2010, Betsey Wright, 66, a former chief of staff for then-governor Bill Clinton, pleaded guilty to two misdemeanor counts related to attempted contraband smuggling. Wright, an anti-death-penalty activist who served as a volunteer counselor, was on her way to visit a death-row prisoner when prison officials found she had a Swiss Army knife, a box cutter and tweezers hidden inside a pen, plus 48 tattoo needles in a bag of Doritos. [See: *PLN*, April 2010, p.24]. Wright said she had found the Doritos in a vending machine in the prison's entrance building and had grabbed the tweezers by mistake. She pleaded guilty to possession of the Swiss Army knife and box cutter, and received one year on probation and a \$2,200 fine. She was also ordered not to have any further contact with prisoners without prior approval.

California: On August 3, 2010, Peter Felix, 27, a guard at the Los Angeles County jail in Castaic, was sentenced to four years in state prison for possessing 161 grams of heroin, 24 grams of methamphetamine and 51 grams of marijuana while smuggling the drugs into the jail in October, 2008. Felix cooperated with police in the investigation. Terrance Warner, 28, the prisoner who was supposed to receive the drugs, was sentenced to two years in prison. Felix was paid thousands of dollars in bribes for his services.

California: On July 2, 2010, a transport van carrying prisoners from Kings

County to Wasco State Prison collided with a tractor-trailer. Ten prisoners suffered minor injuries, while the drivers of the van and tractor-trailer were not hurt. The van was not equipped with seatbelts for the prisoners. Apparently, the deputy driving the vehicle came to a complete stop in the middle of an intersection as the tractor-trailer was approaching.

District of Columbia: On July 27, 2010, Quincy Hayes, 32, a guard at the Corrections Corporation of America-run Correctional Treatment Facility jail in DC was sentenced to a year and a day in prison for accepting a \$300 bribe from an undercover FBI agent in exchange for smuggling an iPod into the jail. He also admitted smuggling cigarettes into the jail as well.

Florida: On August 13, 2010, Casey Doll, 31, a guard at the Lake County jail, was arrested on charges of bring oxycodone pills into the jail to sell to prisoners. He had 60 oxycodone pills in his possession when he was arrested at the jail.

Florida: On August 17, 2010, Mark Grobmyer, a prisoner at the Sarasota county jail, was charged with calling in bomb threats to the jail, claiming he had placed 350 pounds of explosives at the jail and would detonate it remotely. Police traced the call back to the jail, which records all calls.

Florida: On July 28, 2010, Bradford Daniels, 24, and Matthew Crawford, 23, both guards at the Graceville Correctional Facility, were arrested and charged with smuggling marijuana and cell phones into the prison in exchange for \$1,000 bribes from prisoners. An informant notified the Jackson county sheriff's office of the scheme.

Georgia: On July 27, 2010, Preston Cooper, 44, a prisoner at a halfway house in Atlanta, printed sexually explicit pictures of children, concealed them inside an Easter card and mailed it to a prisoner at the state prison in Telfair where he had finished serving a 15-year sentence. Prison employees discovered the child pornography and reported it to federal law enforcement officials. Cooper was convicted in federal court and sentenced to 15 years in federal prison.

Guatemala: On August 11, 2010, a court issued arrest warrants for former interior minister Carlos Vielmann, prison warden Alejandro Giammattei and former national police director Erwin Sperissen.

The men are charged with murder for allegedly ordering the murder of seven prisoners in 2007 after police regained control of the Pavon prison after a riot, and the execution murder of three prisoners who escaped from another prison in 2005. This represents the first time government officials in Guatemala have ever been charged with a crime despite six decades of genocidal abuse by various US supported regimes. Whether anything comes of the charges remains to be seen.

Iowa: On July 29, 2010, prisoners Martin Dahlke, 29, Richard Martin Jr., 34, Jeremy McIntosh, 27 and Rolland Jacobsen, 31, were charged with second degree murder for allegedly beating Alfred Myre, 44, to death in the yard of the Clarinda Correctional Facility. Prison officials claim the attack was gang related and the defendants are members of a gang called The Peckerwoods.

Kansas: On August 12, 2010, Laurie Rowe, 46, a Wyandotte county prisoner being taken to jail to serve a sentence for methamphetamine and forgery convictions, was killed when the jail van she was riding in was rear ended by another car. The guard driving the van was injured as was the driver of the car that struck the van near Kansas City.

Kazakhstan: On August 2, 2010, 80 prisoners at the Akmola prison protesting poor conditions and torture starting out cutting themselves; when that did not elicit an official response they built barricades and threw rocks at prison employees. Eventually they rioted and seized control of the prison for three days. Army soldiers then stormed the prison using batons and stun grenades. Two prisoners were killed and 80 injured, including a prisoner who died after setting himself on fire and jumping off a balcony in the prison. Kazakh prisons hold over 60,000 prisoners and are known for their squalid conditions and brutality.

Mexico: On August 6, 2010, a fight between rival gangs in the prison in Matamoros left 14 prisoners dead before police and army soldiers regained control of the prison. The prisoners used homemade weapons in the battle.

New York: On August 10, 2010, police charged Robert Howard, 25, his father Craig Howard, 47, and a 16-year-old boy with second degree criminal nuisance and third degree falsely reporting an incident. The charges stem from one of the defen-

dants running through a park near the state prison in Cape Vincent wearing an orange jumpsuit while handcuffed and being chased by the other two. A call to 911 led to a manhunt for an escaped prisoner and a lockdown at the state prison while prison officials tried to determine if an escape had in fact occurred. The three were camping when the hoax occurred.

North Dakota: On August 11, 2010, William Demery, 42, a prisoner at the Burleigh county detention center, was charged with taking another prisoner's eyeglasses

and eating them when he was not allowed to speak to the jail chaplain. He ate both the lenses and the frame. Local media had a field day with puns, with lead-ins about Demery "making a spectacle of himself" and the sheriff promising to "look for" the report.

Texas: On August 5, 2010, Allen Ward, 47, a prison guard in Palestine, was arrested by the Texas attorney general's cyber crimes unit on charges of possessing child pornography.

Texas: On August 7, 2010, Joel De La

Rosa, 18, a prisoner in the Edinburg jail, killed himself by swallowing wet toilet paper three hours after entering the jail on drug possession and evading arrest charges. De La Rosa had previously been jailed at the same facility a month earlier and had tried to hang himself but jail guards rescued him that time. He was not on suicide watch at the time of his death.

Texas: On July 26, 2010, Lt. Steven Gentry, an 18-year employee, was fired by the Dallas county jail because he

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News in Brief (cont.)

was using jail cameras to watch female prisoners shower. Until May 2010, he was the instructor at the sheriff's training academy for a course called "Ethics in a Correctional Setting."

Vermont: In early August 2010, Barry Mulcahy, 49, a 27-year employee of the Vermont Department of Corrections, pleaded guilty to two misdemeanor charges stemming from becoming belligerent with Brandon police during a drunk driving stop during which he was tasered into submission. Mulcahy was fired by the DOC from his job as the agency's top trainer.

Vietnam: On May 30, 2010, 578 prisoners at a Haiphong drug rehabilitation camp overpowered security guards and escaped. The uprising and escape began

when a prisoner called on others to flee while they were having dinner. "We were completely overwhelmed," an official said. "Forty of us were not able to prevent them, many with canes and bricks, from escaping." Vietnam's strict drug laws allow the government to order addicts held for up to two years in rehabilitation centers, many of them boot camp-type facilities that include hard labor and communist ideological education. Several major escapes have been reported following a government order to increase the period of mandatory rehabilitation treatment from one to two years.

Virginia: In late June 2010, Grant R. Sleeper, 54, died at a Richmond hospital due to environmental heat exposure he suffered during two days in the city's jail. The sheriff, C.T. Woody, Jr., admitted that the heat inside the facility likely caused

Sleeper's death. The jail is overcrowded and does not have air conditioning.

Washington: In June 2010, Benton County jail guard Gregory Andre Brown, 38, lost his job; he now faces a misdemeanor charge for allegedly having sexual contact with a 29-year-old female prisoner. The woman, whose name was not released, told sheriff's detectives she was cleaning a rest room during a work crew assignment in January 2009 when Brown stepped into the bathroom and made flattering remarks, culminating in sexual activity. The incident remained unreported until May, when the prisoner revealed details of what had happened in a letter to a friend. The letter was returned and read by jail officials, who discovered the information incriminating Brown. He was placed on leave and then terminated after charges were filed. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

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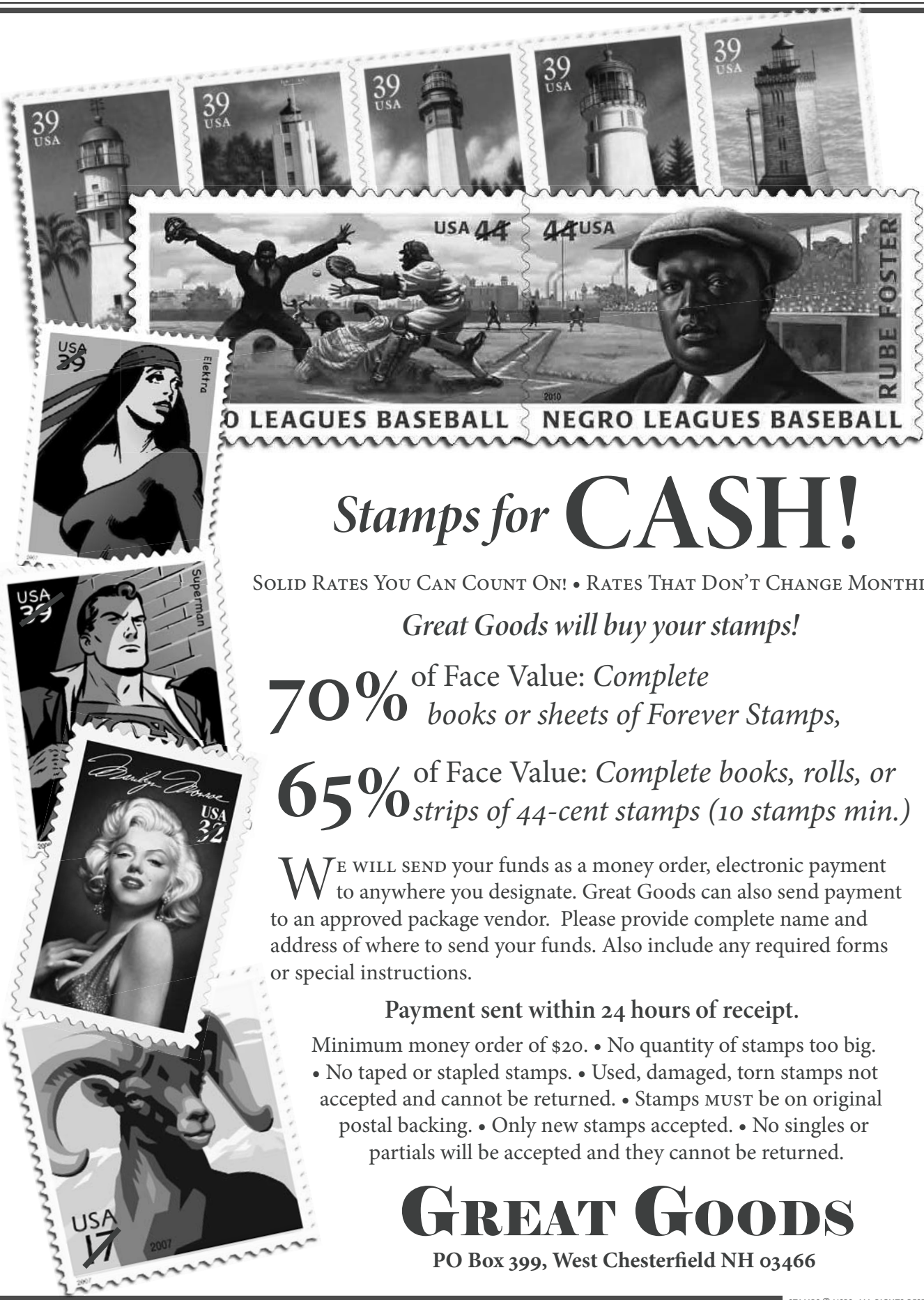
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October 2010

Crime Labs in Crisis: Shoddy Forensics Used to Secure Convictions

by Matt Clarke

To millions of people whose knowledge of crime labs comes from television shows such as *CSI*, *Bones*, *Crossing Jordan* and the venerable *Quincy M.E.*, the forensic experts who work at such labs seem to be infallible scientists who use validated scientific techniques to follow the evidence to the truth, regardless of where it leads. Sadly, that is far from accurate.

"The CSI effect has caused jurors to expect crime lab results far beyond the capacity of forensic science," wrote Jim Fisher, a former FBI agent and retired criminalistics professor who taught forensic science at Edinboro University of Pennsylvania, in his 2008 book titled

Forensics Under Fire: Are Bad Science and Dueling Experts Corrupting Criminal Justice?

Fisher notes that problems in forensics "have kept scientific crime detection from living up to its full potential." His conclusion is that "bad science, misadventures of forensic experts [and] human error" exemplify "the inability of our 21st century judicial system to properly differentiate between valid research and junk science."

Crime lab workers are not necessarily scientists. In fact, sometimes only a high school diploma is required for employment as a forensic technician or arson investigator. Nor are lab examiners and their supervisors always the unbiased investigators portrayed on TV; in fact, many crime labs are run by or affiliated with police departments, which have a vested interest in clearing unsolved crimes and securing convictions.

Police often share their suspicions regarding suspects with lab workers before forensic examinations are performed. This has been shown to prejudice lab personnel in areas as diverse as fingerprint examination and chemical testing for accelerants in arson investigations. Further, some lab examiners feel they are part of the prosecution team, helping the police and prosecutors convict suspects regardless of the results of forensic testing. In such cases, forensic experts and other lab personnel may lie about test results, be misleading about the reliability of their methods, and/or cover up test outcomes when they are beneficial to the defendant.

Some forensic examiners "dry-lab" their tests, writing down results for tests

they never performed. They may be motivated by understaffing and excessive workloads, a belief that tests required by lab protocols are unnecessary, an inability to perform the tests due to a lack of training, education and experience, or even the belief that the police have already arrested the right person, so evidence testing would be superfluous.

Then there are the forensic "experts" who lie about their academic credentials or accreditation, either on their résumés or in perjurious testimony. They initially may have been motivated to pad their résumé to secure employment, but might also seek to discourage defense attorneys from questioning their test results and conclusions by presenting overwhelming evidence of expertise they do not actually possess. This often works. Giving a bite of truth to the old adage that lawyers went to law school because they couldn't do math, few judges, prosecutors or defense attorneys can keep up with complicated developments in the field of forensic science.

These types of problems have led to scandals at dozens of crime labs across the nation, resulting in full or partial closures, reorganizations, investigations or firings at city or county labs in Baltimore; Boston; Chicago; Colorado Springs, Colorado; Dallas; Detroit; Erie County, New York; Houston; Los Angeles; Monroe County, New York; Oklahoma City; San Antonio, Texas; San Diego; San Francisco; San Joaquin County, California; New York City; Nashville, Tennessee; and Tucson, Arizona, as well as at state-run crime labs in Illinois, Montana, Maryland, New Jersey, New York, Oregon, Pennsylvania, Virginia, Washington, North Carolina,

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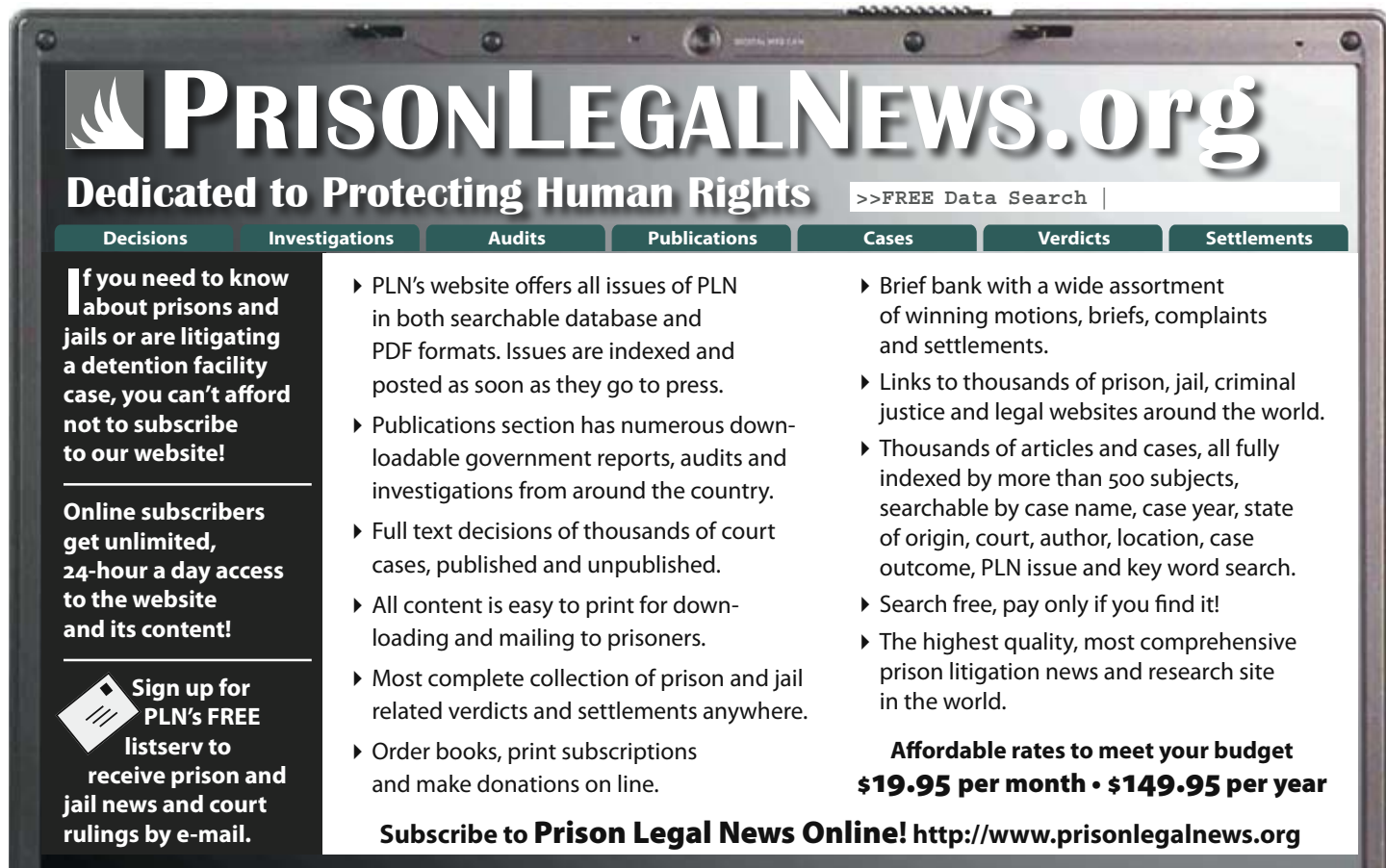
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Crime Labs in Crisis (cont.)

West Virginia and Wisconsin, plus the federally-run FBI and U.S. Army crime labs. Forensic "expert" scandals have also been reported in the United Kingdom.

The origins of such problems include unqualified or incompetent lab workers, personnel using false academic credentials, contamination in labs that cause false test results, employees falsifying test results to "help the prosecution," and lab examiners committing perjury. Contributing to these problems is a lack of qualification standards and industry-wide training requirements for lab workers.

One might think that such scandals are caused by a few bad apples in the crime lab barrel, which is the spin typically adopted by the labs themselves. That problem could be fixed by hiring qualified personnel, training them properly and providing adequate oversight. But at least the forensic science that underpins crime lab testing is sound and valid, right? In many cases, wrong.

A 2009 report by the National Academy of Sciences, the most prestigious scientific organization in the United States, revealed that much of the "science" used in crime labs lacks any form of peer review or validation – fundamental requirements for sound science. Such questionable forensic methods include long-established and accepted techniques such as fingerprint comparison, hair and fiber analysis, and bullet matching.

**National Academy of
Sciences Report**

After a series of crime lab scandals and the FBI's erroneous identification of an American attorney as a terrorist suspect in the 2004 Madrid train bombings, Congress instructed the National Academy of Sciences (NAS) to review the status of forensic techniques used in criminal prosecutions. Following a two-and-a-half year investigation, the NAS's National Research Council (NRC) released the report, titled "Strengthening Forensic Science in the United States: A Path Forward," in February 2009. It exploded among crime labs like a bomb.

The NAS was established by President Abraham Lincoln in 1863 with a mandate to advise the government on issues involving science and technology. The 2009 report identified a number of deficiencies in the forensic sciences and with crime lab

personnel who use and testify about such evidentiary methods in court.

"In a nutshell, these people aren't scientists," stated NAS member Jay A. Siegel. "They don't know what validation is. They don't know what it means to validate a test."

This criticism applies to virtually all disciplines of forensic testing with the sole exception of DNA analysis, which was first developed in academic biology laboratories and then later adopted for forensic science applications. One example of a commonly-used forensic testing method is bullet matching, in which a lab technician examines two spent bullets under a microscope to compare striations caused by the grooves in the gun's barrel. If the bullets show similar striations, a "match" is declared. If one bullet came from a known gun, the other bullet is "matched" to that firearm and the technician will testify the bullet must have been fired by that gun.

"It is not possible to state with any scientific certainty that this bullet came from any weapon in the world," said Siegel, who chairs the Department of Chemistry and Chemical Biology and is the director of the Forensic and Investigative Services Program at Indiana University-Purdue University Indianapolis.

The NAS report noted that the techniques used to connect a person with a crime scene often lack any type of scientific validation. This includes frequently-used forensic methods such as handwriting analysis and comparison of hairs, fibers, tool marks, tire treads, shoe prints and even fingerprints.

To validate these techniques, controlled studies would have to be performed such as blind testing (where the answer is known to the evaluators but not to the persons performing the forensic analysis) and statistical testing (in which a large number of samples are compared to see how often a random "match" occurs). Further, issues of investigator bias, unknown error rates, lack of crime lab independence, underfunding, poor training, lack of lab personnel qualifications, low academic requirements, and lab personnel making exaggerated claims about the accuracy of forensic techniques were noted in the NAS report.

Crime lab officials reacted with predictable outrage, claiming that the report says fingerprint and other identification techniques should be discarded, and blaming the slew of crime lab scandals on a few bad employees.

Crime Labs in Crisis (cont.)

"If somebody drives and drinks and kills somebody, that's horrible," stated Ron Fazio of Integrated Forensic Laboratories in Euless, Texas. "But that doesn't mean that all driving is bad. The person who made the mistake needs to be dealt with, but that doesn't mean we should outlaw driving."

Fazio also argued that some studies have validated bullet comparison methods. Siegel, who reviewed the research referred to by Fazio, said they contained no scientific criteria for the basis of the identification and no validation for the quality of the match. He also noted that such studies were conducted by firearms examiners and published in forensic journals that, unlike scientific journals, are not peer reviewed.

NRC member Karen Kafadar, a professor of statistics and physics with Indiana University at Bloomington, said the committee members who authored the report spent over two years analyzing research and data submitted by forensic professionals and found no studies that met basic scientific criteria. For example, most of the studies were not "blind" in that the participants were aware of the outcome and merely showed how the results were obtained. Other research

studies used sample sizes that were too small or had other structural flaws. Kafadar doesn't believe there are any other relevant studies.

"If experts in Texas believe there was research [that] we failed to acknowledge ... they would have had every opportunity to get it to the committee before our work was done. They had 2½ years to get it in," she said.

Additionally, the NAS report did not recommend that all forensic methods except DNA testing be abandoned; rather, it said that such methods should be given stringent scientific scrutiny to ensure they are valid.

"One of the confusions that occurred from the report is that since these tests haven't been validated, they shouldn't be used. We're not saying that they are invalid and shouldn't be used," said Siegel. "What we said in the report is that the jury is still out there until this scientific testing is done."

Kafadar believes that forensic evidence presented in court – upon which a defendant's freedom or even life may depend – should be the result of rigorously-validated, scientifically-proven techniques. The alternative is to allow people to be convicted based on junk or "voodoo" science.

"Voodoo" Science

If the NAS report raises doubts about generally-accepted forensic methods such as fingerprint identification and bullet, hair and fiber comparisons, what does that mean for less-accepted methods? The truth of the matter is that if a prosecutor can convince a judge to allow evidence into court it will be used, no matter how absurd its "scientific" basis might be. And judges are not known for their scientific acumen; according to Siegel, judges "just don't understand a thing about it. That's the sad fact."

In a 2001 national survey of 400

state court judges, the vast majority said they firmly believed in their gatekeeping role – deciding whether scientific evidence should be admitted in court, e.g. under the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) – but only 4% had a clear understanding of the scientific concepts of probability and error rate.

Those concepts are key to determining whether scientific evidence is useful or meaningless. As Dave Wymore, former director of the Colorado public defender's office put it in 1999, when he achieved exclusion of the FBI's since-discredited comparison bullet lead analysis (CBLA), "Sure, you have this wiz-bang, whipper-dipper machine that looks at all the elements of the universe, but it doesn't mean anything."

"The partisan adversarial system used in the courts to determine the admissibility of forensic science evidence is often inadequate to the task," noted Harry T. Edwards, a judge on the U.S. Court of Appeals for the D.C. Circuit who co-chaired the NRC report committee. "And because the judicial system embodies a case-by-case adjudicatory approach, the courts are not well-suited to address the systemic problems in many of the forensic science disciplines."

Defense attorneys have no better understanding of science either, said Siegel. One hundred years of unscientific evidence being accepted in the courts proves that point, and faulty forensic methods have been shown to contribute to wrongful convictions.

"Too often lawyers don't do their homework enough so they can properly cross-examine these people," observed former president of the American Academy of Forensic Sciences and retired McHenry County, Illinois judge Haskell Pitluck. "They come in and say, 'I'm an expert.' And some lawyers simply roll over."

"If lawyers could do science, they'd be



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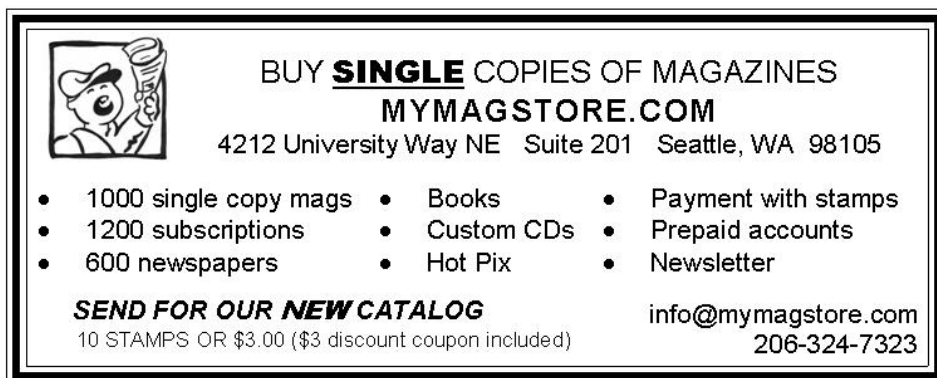
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doctors,” said Pitluck, noting that while his forensic acumen exceeds that of most jurists he does not “feel qualified to make many of these calls.”

Now that previously-accepted forensic techniques have been questioned by the NAS, can they be challenged in court? Maybe, but it will be difficult unless defendants can afford to hire a forensic expert to testify on their behalf. For the many defendants who are indigent that is highly unlikely because, whereas the U.S. Supreme Court has recognized a constitutional right to legal counsel in criminal cases, it has made no finding of a right to forensic experts. Additionally, the courts’ deference to precedent works against new challenges even if a defendant can afford an expert.

“The habit of judges to defer to prior decisions disinclines appellate courts to revisit possible or actual errors by trial courts in any given case, and it leads trial judges to submit species of evidence that appellate courts had approved in the past, regardless of how flawed that type of evidence can be shown to be with current knowledge,” wrote Arizona State University law and psychology professor Michael J. Saks and David L. Faigman, a University of California Hastings College of the Law professor, in *The Annual Review of Law and Social Science*.

This essentially means that once a

forensic method has been accepted by one trial court, it has a good chance of becoming an acceptable technique elsewhere. This leads to the acceptance of methods that have no basis in science or fact – junk science.

“The art of junk science is to brush away just enough detail to reach desired conclusions, while preserving enough to maintain an aura of authoritative science,” according to “Criminal Law Forensics: Century of Acceptance May Be Over,” an article in the January 8, 2009 issue of the *New York Law Journal*. That description certainly applies to the FBI’s infamous CBLA forensic technique.

Comparison Bullet Lead Analysis

A 2004 NAS report led the FBI to abandon comparison (or comparative) bullet lead analysis, known as CBLA. CBLA used a nuclear reactor located in the basement of the FBI’s headquarters in Quantico, Virginia to perform a highly accurate analysis of trace elements found in the lead of a bullet. The report found that the scientific basis of the bullet lead analysis was sound. However, what was not sound was the underlying premise that bullets with similar chemical makeups must have come from the same box of ammunition. The NAS report showed that millions of bullets have the same chemical composition, rendering CBLA useless as

a forensic tool.

FBI technicians gave expert testimony about this impressive but ultimately worthless investigative method in more than 2,500 criminal prosecutions nationwide, including capital cases such as that of Kentucky prisoner Ronnie Lee Bowling, who remains on death row.

The CBLA debacle was neither the first nor the latest FBI crime lab scandal. Dr. Frederic Whitehurst, a chemist

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Crime Labs in Crisis (cont.)

formerly employed by the FBI, became a whistleblower who revealed shoddy work and lack of validation in the explosives section of the FBI's crime lab after the 1993 World Trade Center bombing. Since 2005, Whitehurst has directed the nonpartisan Forensic Justice Project (www.whistleblowers.org), which has tried to force the FBI to release a list of its CBLA cases.

"The new revelations about bullet-lead analysis are just the latest examples of the Department's inadequate efforts to ensure that sound forensic testing is utilized to the maximum extent to find the guilty rather than merely obtain a conviction. Punishing the innocent is wrong and allows the guilty to go free," said U.S. Senator Patrick J. Leahy, chairman of the Senate Judiciary Committee, in 2007.

So what did the FBI do when it discovered the CBLA testing it had used since the 1980s was bogus? It discontinued the use of CBLA in September 2005 and sent letters to prosecutors stating that while the basic science was sound, CBLA was being abandoned due to costs and other considerations. Senator Leahy criticized the letters for giving

"the false impression that these discredited tests had continuing reliability."

"I'm also troubled that many cases affected by such analysis still need review, and that numerous cases involving possibly innocent defendants serving long jail terms have not been examined," Leahy added.

As of January 2010 the FBI was still reviewing CBLA cases, and had found 187 in which FBI experts testified. It sent another letter to the prosecutors in those cases stating that CBLA "exceeds the limits of science and cannot be supported by the FBI." No notification was given to defense attorneys, though, and nothing is being done in cases where defendants were coerced into pleading guilty by prosecutors who threatened them with presumably damning CBLA evidence.

Several convictions that involved CBLA have since been overturned. In one published opinion, the New Jersey Court of Appeals, upon reversing the conviction of Michael S. Behn, who was found guilty of murdering a coin dealer, held that CBLA was unproven and unreliable. "The integrity of the criminal justice system is ill-served by allowing a conviction based on evidence of this quality, whether described as false, unproven or unreliable, to stand," the court

wrote. See: *State v. Behn*, 868 A.2d 329 (N.J.Super.A.D. 2005), *appeal denied*.

At Behn's trial, a prosecutor had told the jury there was a 99.9987% likelihood that bullets found at Behn's home "came from the same lot" as the bullet used to kill the victim. Behn was retried in 2006 and reconvicted based on other evidence.

In 1997, Tom Kennedy was found guilty of a double homicide in Colorado. Citing discredited CBLA evidence, a judge overturned his conviction in April 2009. Prosecutors are appealing the reversal.

Phillip Scott Cannon was freed in December 2009 after serving more than 10 years for a triple homicide in Oregon; CBLA evidence had been introduced during his trial. Prosecutors said he would not be retried because the exhibits used in the original trial have been destroyed.

In Florida, Jimmy Ates served 10 years of a life sentence for the 1991 murder of his wife. He was released in December 2008 with the agreement of the state attorney's office due to the use of CBLA evidence in his case. Prosecutors are still pursuing the charges, though, with a retrial set for January 2011.

Procedural problems have hampered CBLA challenges in other cases. In February 2010, the Texas Court of Criminal Appeals rejected a challenge to a 2003 murder conviction based on CBLA evidence. The appellate court acknowledged that CBLA had been discredited, but found that claims raising new evidence not contained in the trial court record were not generally considered on direct appeal and should instead be raised in post-conviction proceedings.

"To ensure that only 'good' science is admitted and 'bad' science is excluded in our criminal trials, the parties must shoulder the responsibility of providing and explaining the appropriate educational materials for judges to make that determination," one of the appellate judges remarked in a concurring opinion. See: *Gonzales v. State*, Texas Court of Criminal Appeals, Case No. PD 1661-09 (February 24, 2010).

Dog Scent Evidence

According to a September 2009 report by the Innocence Project of Texas, "The use of 'junk science' by police and prosecutors in Texas is an ongoing injustice. Nowhere is this more obvious than in the government's use of 'scent lineups' – a practice that is happening today throughout the state."

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Fort Bend County Deputy Sheriff Keith A. Pikett and his team of dogs, which he named Quincy, Columbo, James Bond and Clue, are well known throughout South Texas. Since the 1990s Pikett has performed thousands of "dog scent lineups," in which a suspect is rubbed with a swatch of cloth and the cloth is placed with similar swatches containing other people's scents. The dog then sniffs a cloth swatch containing a scent from a crime scene and tries to "match" it with one of the swatches in the lineup.

The FBI has warned against using results from this method as primary evidence, saying it should only be used to corroborate other evidence. Robert Coote, who formerly led a police canine unit in the United Kingdom, viewed a video of one of Pikett's scent lineups.

"This is the most primitive evidential police procedure I have ever witnessed," he said. "If it was not for the fact that this is a serious matter, I could have been watching a comedy." The problem is that Pikett and his followers are true believers despite the fact that several suspects identified by dog scent lineups have been exonerated.

Jeff Blackburn, chief counsel for the Innocence Project of Texas, referred to scent lineups as "junk science injustice" and said Pikett merely gives police the match they were already looking for to confirm their suspicions.

Lawrence J. Meyers, associate professor of animal behavior at the Alburn University College of Veterinary Medicine, has another explanation. He thinks that Pikett believes in scent lineups because he either inadvertently allows the

dogs to pick up on a subtle or unconscious signal from the handler or detectives, or allows the swatch samples to become contaminated. Despite its dubious nature, dog scent lineup evidence has been admitted in courts in Alaska, Florida, New York and Texas, according to Meyers.

In Victoria, Texas, a Pikett dog scent lineup led to the arrests of Curvis Bickham and Cedric Johnson for a triple homicide. Bickham served 8 months in jail and Johnson served 16 months before another man confessed to the killings. While incarcerated, Bickham lost his home and cars and developed psychological problems.

Retired Victoria County Sheriff's Department Captain Michael Buchanek was publicly named a "person of interest" in a rape-murder after a Pikett hound "led" police along a convoluted 5-1/2-mile trail that ended in his neighborhood. Based on the scent trail, police obtained a search warrant for Buchanek's home and car and began a harassment campaign against him. Another man later confessed to the crimes and pleaded guilty.

"A gypsy reading tea leaves and chicken bones is probably as reliable as a dog doing a scent lineup," said Victoria County district attorney Stephen B. Tyler, who noted that because dogs can't be cross-examined, reliable testimony from their handlers is of utmost importance. "A dog might be great, but if a dog handler is not good or not credible, it's only as strong as their weakest link," he observed.

Buchanek and Bickham have filed separate federal civil rights suits against various law enforcement officials, includ-

ing Pikett. In March 2010 the district court denied Pikett's motion for summary judgment on qualified immunity grounds in Buchanek's case. See: *Buchanek v. City of Victoria*, U.S.D.C. (S.D. Texas), Case No. 6:08-cv-00008. That same month, the court denied the defendants' motions to dismiss in Bickham's lawsuit. See: *Curtis v. McStravick*, U.S.D.C. (S.D. Texas), Case No. 4:09-cv-03569. Both cases remain pending.

Another wrongly accused defendant, Calvin Lee Miller, was arrested in March 2009 and charged with raping a woman and robbing another based on a Pikett dog scent lineup. DNA evidence eventually cleared him after he spent two months in jail. He has filed a civil rights suit against Pikett and Fort Bend County law enforcement officials, too. See: *Miller v. City of Yoakum, Texas*, U.S.D.C. (S.D. Texas), Case No. 6:09-cv-00035.

In Florida, Bill Dillon was exonerated by DNA evidence and released in November 2008 after spending 26 years in prison. He had been convicted in part due to fraudulent dog scent evidence. John Preston, a retired Pennsylvania state trooper, claimed that his German Shepard, "Harass II," had found Dillon's scent despite the fact that the scent trail was eight days old and a hurricane had swept through the area during that time. In hundreds of cases, Preston convinced juries of his canine's miraculous abilities, even claiming the dog could track a scent underwater and could follow a scent trail that was six months to a year old.

Brevard County, Florida judge Gil-



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Crime Labs in Crisis (cont.)

bert Goshorn put Preston to the test in 1984 and exposed him as a fraud. Two attorneys jogged down separate paths, and the next morning "Harass II" was provided with a sweat-soaked shirt from one of the lawyers. The dog was unable to follow the trail. Given a chance to try again, Preston instead left town.

"It is my belief that the only way Preston could achieve the results he achieved in numerous other cases was having obtained information about the case prior to the scent tracking so that Preston could lead the dog to the suspect or evidence in question. I believe that Preston was regularly retained to confirm the state's preconceived notions about a case," Goshorn stated.

By 1987, Preston had been completely discredited. He was labeled a "total fraud" by a former prosecutor and a "charlatan" by the Arizona Supreme Court. See: *State v. Roscoe*, 184 Ariz. 484, 910 P.2d 635 (Ariz. 1996).

Unfortunately, Florida prosecutors never notified the many people who were convicted based on Preston's dog scent testimony. It was 2006 before Dillon learned that Preston had been exposed as a fraud; he then contacted the Florida Innocence Project, which arranged for the DNA testing that led to his exoneration. Two other defendants convicted in part due to Preston's testimony have been proven innocent, including Wilton Dedge, who served 22 years before DNA evidence set him free in 2004. He received a \$2 million settlement from the state. [See: *PLN*, March 2006, p.17].

Preston was never prosecuted for his outrageous testimony that sent many defendants to prison; he died in 2008. While

now retired, Pikett still has a following of law enforcement officials who praise his work, even though he reportedly lied about his academic credentials, falsely claiming he had BS and MS degrees in chemistry.

"He's been accused 20 different ways of cheating," said Fort Bend County assistant county attorney Randall W. Morse, who is defending Pikett in several lawsuits. "Critics are trying to throw up a smoke screen to get defendants off."

Victoria County Sheriff T. Michael O'Connor referred to dog-scent lineups as a "vital tool in working toward a determination of a case," and said he would use them again. "I feel they're credible. I've watched those dogs," he stated. "I looked on in absolute amazement. We believe in this stuff."

Like many proponents of questionable forensic methods, O'Connor considers an obvious failure to be a success. "We did the right thing, and the wrong person was not convicted," he said, referring to the Michael Buchanek case. But it was another person's confession, not Pikett's dogs, that got an innocent man off the hook, and it was dog scent evidence that had falsely implicated Buchanek in the first place.

The Innocence Project estimates that between 15 and 20 people "are in prison right now based on virtually nothing but Pikett's testimony."

In Florida, Seminole and Brevard Counties have agreed to review 15 to 17 cases from the 1980s in which people remain incarcerated after Preston's dog scent evidence was used during their prosecutions. Preston also testified in other states and counties and in federal court.

Another form of scent evidence was misused by Michigan dog handler Sandra Marie Anderson, who claimed her cadaver dog, Eagle, could detect human remains. Her expert testimony was used in numerous criminal cases; in one, she said Eagle had "no unsuccessful hits." However, Anderson was charged in 2003 with planting body parts and other evidence for her dog to "discover," apparently to boost her credibility. In one case, Eagle found a bloody saw in a murder suspect's basement; it was later determined the blood was Anderson's.

Anderson eventually admitted that she had planted evidence in seven criminal investigations, including blood, bones and a toe. She was indicted on ten counts of obstruction, evidence tampering and

lying to federal officials, pleaded guilty, and was sentenced in September 2004 to 21 months in prison.

"There are no national standards" for dog scent evidence, admitted Steve Nicely, a professional dog trainer in Austin, Texas who has trained police dogs. "Our standards are so lacking, it's pathetic. We should be ashamed of ourselves."

Lie Detection

Almost everyone knows that polygraph examinations, commonly but inaccurately referred to as "lie detectors," aren't admissible in court. The reason is because polygraphs and related methods of distinguishing the truth lack reliability – despite what is often portrayed on TV, such as in the Fox series *Lie to Me*.

Of course this doesn't stop the government from using lie detectors to screen people applying for certain jobs or to monitor sex offenders on parole. [See: *PLN*, Dec. 2008, p.1]. It also doesn't prevent people from trying to come up with new ways of "detecting" lies. One such method, the voice-stress analyzer, is even less reliable than the polygraph, with an accuracy rate about the same as flipping a coin.

John Sullivan, a CIA polygraph examiner for 31 years, screened employees for security purposes. His own security clearance was temporarily revoked due to what he claims was an abusive polygraph exam.

"The irony of my situation certainly did not escape me," said Sullivan. CIA polygraph operators are not routinely screened. Sullivan got special attention after he published a book titled *Gatekeepers: Memoirs of a CIA Polygraph Examiner*, which he described as "a window to the often acrimonious and sometimes alarming internal politics of the CIA."

Despite alleging an abusive polygraph exam in his own case, Sullivan does not believe CIA polygraph examiners should be asked whether they ever misused a test, because "it would open a can of worms." He filed suit against the CIA in 2007 due to the revocation of his security clearance, which he claimed was retaliatory. The lawsuit was resolved under undisclosed terms in July 2009. See: *Sullivan v. CIA*, U.S.D.C. (D. DC), Case No. 1:07-cv-00685-JR.

The latest method to be held up as the long-sought-after lie detector is functional magnetic resonance imaging (fMRI), which is being pushed by two private companies, No Lie MRI and Cephos

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Corp. The technique uses MRI scans and blood oxygen levels to display which parts of the brain are being used and to what degree they are used when people respond to questions.

About 20 peer-reviewed scientific studies have shown that certain parts of the brain become more active when a person is telling a lie. The studies used healthy subjects who lied about simple things, such as which card they were looking at. Whether the technique works for more complicated lies, for people with mental or physical health problems, for people who face serious consequences if they are caught lying, or for those who falsely believe they are telling the truth has not been researched.

Nonetheless, Cephos Corp. claims it has the ability to detect a lie 79 to 97 percent of the time, while No Lie MRI claims at least a 93 percent lie detection rate. No court has allowed fMRI to be admitted as evidence in a criminal case, and the technique has been criticized – including in an article titled “Playing Devil’s Advocate: The case against fMRI lie detection,” published in the February 2008 issue of *Legal and Criminological Psychology*.

In May 2010, a Tennessee federal court heard testimony as to whether fMRI evidence from Cephos should be introduced in the criminal prosecution of Lorne Semrau, a psychologist accused of Medicare fraud. The court rejected the fMRI evidence, noting that “While it is unclear from the testimony what the error rates are or how valid they may be in the laboratory setting, there are no known error rates for fMRI-based lie detection outside the laboratory setting, i.e. in the ‘real-world’ or ‘real-life’ setting.”

Yet the district court also stated that “should fMRI-based lie detection undergo further testing, development, and peer review, improve upon standards controlling the technique’s operation, and gain acceptance by the scientific community for use in the real world, this methodology may be found to be admissible even if the error rate is not able to be quantified in a real world setting.” See: *United States v. Semrau*, U.S.D.C. (W.D. Tenn.), Case No. 1:07-cr-10074-JPM-tmp.

That might take awhile. In one amusing 2008 study, neuroscientist Craig Bennett took an Atlantic salmon to a lab at Dartmouth University and used fMRI to study it while it was shown a series of

photographs. The fMRI data indicated activity in the area of the fish’s brain, despite the fact that the salmon was “not alive at the time of scanning.” Bennett used the unexpected test results to warn against false positives. “We could set our [test result] threshold so high that we have no false positives, but we have no legitimate results,” he observed.

Such a fishy outcome should make one wonder about the validity of fMRI for lie detection purposes. Indeed, in a 2009 article in *Perspectives on Psychological Science*, MIT post-graduate student Ed Vul, a statistician, concluded that “a disturbingly large, and quite prominent, segment of fMRI research on emotion, personality, and social cognition is using seriously defective research methods and producing a profusion of numbers that should not be believed.”

Regardless, Cephos Corp. CEO Steven Laken stated, “We’re not going to stop doing what we’re doing.” Referring to the Semrau prosecution in which fMRI evidence was rejected, he said, “The judge in this case is just one person.”

In India, a woman was convicted of murdering her former fiancé based on a Brain Electrical Oscillations Signature

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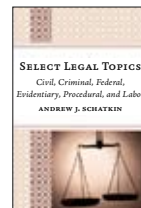
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(BEOS) profile. Proponents claim BEOS tests can detect lies, but there have been no BEOS studies published in peer-reviewed scientific journals. With BEOS, supporters claim to be able to tell if a person has a memory or “experiential knowledge” of committing a crime. This is achieved by showing the person a photo of the crime scene while observing the BEOS data. However, neuroimaging studies have found that imagining events triggers similar brain activity to experiencing those events, and there is no scientific evidence that BEOS can differentiate between the two. No U.S. court has addressed the admissibility of BEOS testing.

In the case in India, although Aditi Sharma and her husband, Pravin Khandelwal, were convicted of murder in June 2008 and received life sentences, the Bombay High Court suspended Pravin's sentence and released him on bail because there was no actual evidence tying him to the crime as a conspirator. Aditi also was released on bail, due to a lack of sufficient evidence. BEOS was not mentioned in the court's ruling. In September 2008, India's National Institute of Mental Health and Neuro Sciences declared that brain scans were unreliable in criminal cases.

Hank Greely, a professor at Stanford Law School, has received a \$10 million grant to study the legal and ethical implications of neuroscientific practices. “We worry a lot that juries and judges are going to be way too impressed by fancy pictures of brain scans,” he said. “But these are not photographs: they are computer-generated images of radio-wave information taken at a certain time and configured or manipulated in certain ways. Studies already show that people are more likely to give credence to a statement about the brain if it includes a picture of a brain scan, no matter how spurious it is.”

Bite Marks, Ear Prints, Lip Prints

Prosecutors have introduced evidence of bite marks, lip prints and even ear prints to win convictions in a number of jurisdictions. The problem with this type of evidence is that – just as with other kinds of forensic techniques – there have been no systematic, scientific studies to demonstrate the accuracy of such methods.

Lavelle L. Davis was convicted of murder in 1997 and sentenced to 45 years after an Illinois State Police crime lab

examiner testified that lip prints found on a roll of duct tape near the murder scene “matched” Davis' lips. The Illinois Appellate Court upheld the murder conviction, noting that the state's expert witnesses had testified that lip prints were accepted by the FBI as “a means of positive identification,” and that they “did not know of any dissent inside the forensic community” regarding the validity of lip print comparison. See: *People v. Davis*, 710 N.E.2d 1251 (Ill.App. 2 Dist. 1999).

Except the experts weren't telling the truth. According to FBI crime lab spokeswoman Ann Todd, who was quoted in a 2004 news report, the FBI “to this day hasn't validated lip print comparisons.” In fact, the Davis prosecution is the only known case where such evidence was used.

According to several of the jurors at Davis' trial, the lip print evidence was the reason they convicted him because the prosecution had otherwise put on a very weak case using an eyewitness who was an admitted liar. Also, Davis' lawyer had attempted to understand the science behind lip print comparisons and cross-examine the state's experts without help from an expert of his own.

“You can't rely on your own cross-examination of the state's witnesses,” said Kim Campbell, Davis' appellate attorney. “You have to have your own expert to say why this kind of science is unreliable. And there was nobody saying that at his trial.”

Campbell filed a post-conviction petition and submitted an affidavit by Andre Moenssens, author of the book *Scientific Evidence in Civil and Criminal Cases* and law professor emeritus at the University of Missouri-Kansas City. The affidavit stated that “making the quantum leap ... to the ultimate notion of identifying an individual by the visible imprint of his or her lips is a journey fueled by two elements: pure speculation and unadulterated conjecture.”

The Circuit Court granted Davis' post-conviction petition in 2006 and ordered another trial, heeding new expert testimony that lip print comparison evidence is not accepted science. The court also found the eyewitness testimony was “wrought with contradictions and lies and inconsistencies,” and cited prosecutorial misconduct and ineffective assistance of counsel as contributing factors. The trial court was affirmed on appeal and prosecutors dropped the charges against Davis in April 2009. See: *People v. Davis*, 879 N.E.2d 996 (Ill.App. 2 Dist. 2007).

As odd as it sounds, ear prints have been used in several criminal cases, too. On November 10, 1999, the Washington Court of Appeals reversed the aggravated murder conviction of David Wayne Kunze “because the trial court had improperly admitted ear-print identification evidence” that did not meet the *Frye* test. [*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)]. The ear print evidence had been introduced even though a supervisor at the Washington State Crime Laboratory “thought that earprint identification was ‘out of the expertise of the [crime lab's] latent unit.’”

During the retrial prosecutors moved to dismiss the charges, saying they could not prove Kunze's guilt beyond a reasonable doubt. See: *State v. Kunze*, 97 Wash. App. 832, 988 P.2d 977 (1999), *review denied*.

In the United Kingdom, Mark Dallagher was convicted of murder in 1998 and sentenced to life after Dutch ear expert Cornelis Van der Lugt testified that a latent ear print on a window at the home of the victim was “a unique match” to Dallagher. The conviction was reversed on appeal, DNA evidence later implicated another suspect, and Dallagher was exonerated and freed in 2004. See: *R. v. Mark Anthony Dallagher*, In the Supreme Court of Judicature, Court of Appeal (Criminal Division), No. (2002) EWCA Crim. 1903.

Another U.K. conviction, of Mark Kempster, was based on an ear print left at the scene of a burglary and resulted in a 10-year sentence in March 2001. Kempster's conviction was overturned on appeal in 2008 due to insufficiency of the ear print evidence, though he remained in prison on unrelated charges.

“At this stage in the game, you can put ear prints and lip prints and nose prints and elbow prints all in the same category – unverified and unvalidated,” noted Ronald Singer, president of the American Academy of Forensic Sciences and crime lab director for the Tarrant County medical examiner's office in Fort Worth, Texas.

Bite mark comparisons suffer from the same problems as ear and lip prints – a lack of scientific validation. Nonetheless, Mississippi state pathologist Dr. Stephen Hayne and odontologist Michael West have testified that individuals can be identified by bite marks. Such evidence came under scrutiny after two men who were sent to death row on the basis of

bite mark testimony were exonerated by DNA evidence.

One of those cases involved Ray Krone, who was convicted in 1991 of murdering a Phoenix, Arizona cocktail waitress and sentenced to death. The evidence against him included a bite mark on the victim's breast that matched Krone's teeth, according to an expert for the prosecution, even though another expert had previously determined there was no match. Krone was exonerated by DNA a decade later and released in 2002.

Krone's attorney, Christopher Plourd, was outraged that dubious bite mark evidence had led to his client's conviction, twice – Krone had been convicted at a retrial in which bite mark testimony was again introduced. Plourd decided to test the proficiency of bite mark experts. He hired a private investigator who contacted Dr. West and sent him photos from the victim in Krone's case, telling him they were from an unsolved murder in a different case. The investigator also provided a dental mold of his own teeth, which he told Dr. West were from the prime suspect. Two months later West presented detailed results of his research – that the dental mold was a match to the bite marks in the

photos, a clear impossibility.

In addition to his questionable bite mark testimony, Dr. Hayne also has been criticized for performing between 1,500 and 1,800 autopsies a year, over four times the recommended standard. Another medical examiner who reviewed one of Hayne's autopsies called it "near complete malpractice." [Note: An article on problems involving medical examiners will appear in an upcoming issue of *PLN*].

"There is no question in my mind that there are innocent people doing time at Parchman Penitentiary due to the testimony of Dr. Hayne," said former Columbus, Mississippi Police Chief J.D. Sanders, who tried for years to have Hayne's work scrutinized. "There may even be some on death row," he added.

Arson Investigations

For many years arson investigators testified that the presence of glass with spider-web-like cracks at the scene of a fire indicated the presence of an accelerant, proving arson. It is now known that such "crazed glass" can be caused by water – e.g., from fire hoses – quickly cooling heated glass.

In February 2004, Texas prisoner

Cameron Todd Willingham was executed for the arson-murder of his three young daughters. Key to Willingham's conviction was the testimony of Corsicana Fire Department arson investigators who found crazed glass, "puddle" and V-shaped burn patterns, and a melted aluminum door threshold, which, they concluded, indicated the presence of an accelerant and thus arson.

The Willingham case has recently generated a great deal of controversy in Texas after separate investigations indicated the finding of arson was simply wrong. Reports by two highly-regarded fire science experts, Dr. Craig Beyler, chairman of the International Association for Fire Safety, and Dr. Gerald Hurst, a chemist hired by Willingham's attorney to review the case, faulted the original investigation.

Beyler found that the arson determination "could not be sustained," and said the fire investigators who testified at Willingham's trial "had poor understanding of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators." Hurst said the original investigation contained "major errors" and compared the methodology used by investigators to an

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“old wives tale.”

Beyond the crazed glass, Dr. Hurst noted that no accelerant was needed to melt aluminum or cause charring under an aluminum threshold, since wood fires alone can reach temperatures of more than one thousand degrees. Further, puddle burn patterns on the floor and V-shaped patterns on walls form naturally after a flashover event, when a fire ignites all combustible material in an enclosed space. Based on witness descriptions, it was likely that a flashover had occurred in the Willingham fire. Hurst found that other presumed indicators of arson were likewise discredited.

The Texas Forensic Science Commission scheduled a hearing on Willingham's case in October 2009, but two days before the hearing Governor Rick Perry – who had declined to stay Willingham's execution – replaced the commission's chairman and two other members. The hearing was postponed, and although an interim report in July 2010 found the original arson investigation had relied on “flawed science,” the commission held the investigators were not negligent or guilty of misconduct. The final results of the commission's report have not yet been released. [See related article in this issue of *PLN*, “Texas Controversy: Governor Guts Forensic Science Commission”].

Edward Cheever, a deputy state fire marshal who was involved in the original arson investigation, acknowledged that errors were made but defended the findings. “At the time of the Corsicana fire, we were still testifying to things that aren't accurate today,” he said. “They were true then, but they aren't now.”

Of course, an investigator's findings cannot be true one day and not true the next. Investigatory methods may change, but the truth does not. Further, other arson experts found that the theories used in the original Willingham investigation were included in a 1960s arson textbook that has long since been debunked.

In 1997, the International Association of Arson Investigators filed a brief arguing that the requirements for scientific evidence set forth by the Supreme Court in *Daubert* should not apply to arson investigators, as their methods are “less scientific.”

Even when the methodology is accurate, the results can still be wrong if arson

investigators lie about them. In February 1993, Joe Castorena, Assistant Chief Toxicologist for the Bexar County Forensic Science Center in San Antonio, Texas, testified that a class II accelerant had been used to set a deadly fire. The analysis had actually shown that no accelerant was present. Castorena also testified, falsely, that he had performed the test himself. The defendant was found guilty.

Another arson case under examination involves George Souliotes, who was convicted of setting a 1997 California house fire that killed a woman and two children. He was sentenced to life without parole. Souliotes' conviction was based on arson investigation techniques that have since been discredited. For example, investigators testified that medium petroleum distillates (MPDs), a class of flammable substances, were found both on Souliotes' shoes and on a carpet at the burned house. More modern tests revealed that the MPDs on the shoes and carpet were from different substances.

Testimony from a witness who placed Souliotes at the scene of the crime has also been questioned. The Ninth Circuit is presently considering Souliotes' habeas appeal. See: *Souliotes v. Hedgpeth*, U.S.D.C. (E.D. Cal.), Case No. 1:06-cv-0667-OWW-WMW.

On May 7, 2010, ABC's “20/20” aired an investigative report on criminal cases involving fires that may have been incorrectly blamed on arson due to “bad fire science.” In one case, a defendant was convicted of arson because investigators found multiple points of origins for the fire. However, other experts noted that aerosol cans present at the scene could have exploded and spread flames to other areas, creating multiple points of origin that mimicked arson – a theory confirmed by testing by the Bureau of Alcohol, Tobacco and Firearms.

Tarnishing the DNA Gold Standard

The 2009 National Academy of Sciences report held out DNA testing as the gold standard of forensic techniques, but even the gold standard is a little tarnished.

In 2001, Kathryn Troyer, an Arizona crime lab analyst, was running a test on the state's DNA database when she happened across two entries that matched at 9 of the 13 locations on chromosomes (loci) that are commonly used to identify a person.

Since the odds of a random 9-loci match between two unrelated people were estimated by the FBI as 1 in 113 billion, she assumed it was a duplicate entry. That belief was dispelled when she discovered that one person was black and the other white. Troyer then found dozens of similar 9-loci matches in Arizona's 65,493-profile DNA database.

While labs in the U.S. try to match 13 loci, DNA recovered from crime scenes may be degraded or damaged; thus, sometimes fewer than 13 loci are used for DNA matches. In the United Kingdom only 10 loci are required for a match. Thus, Troyer's findings were a matter of significant concern. “It surprised a lot of people,” said William C. Thompson, professor of Criminology, Law, and Society and Psychology and Social Behavior at the University of California-Irvine. “It had been common for experts to testify that a nine-locus match is tantamount to a unique identification.”

When word of Troyer's discovery got out, questions were raised about the accuracy of DNA match statistics. The FBI moved to prevent her findings from being distributed and attempted to block similar research elsewhere, even when court-ordered. Dismissing the “Arizona searches” as misleading and meaningless, the FBI suggested that states could be expelled from the national DNA database (CODIS) if they “tie up the database” with Arizona-type match searches.

FBI experts persuaded judges to block searches in some states. Regardless, “Arizona searches” were performed in two other states pursuant to court orders. The searches of DNA databases in Illinois and Maryland turned up almost 1,000 additional matches with at least 9 loci. In the 220,000-profile Illinois DNA database, 903 nine-loci matches were found. See: *People v. Wright*, 2010 WL 1194903 (Ill.App. 1 Dist. 2010) (reversing conviction based on a 9-loci DNA match where the trial judge had refused to allow an Arizona-type search of the state's DNA database).

Only 32 nine-loci matches were found in Maryland's 30,000-profile database, but three of those matched at 13 loci. The odds of that occurring randomly are quadrillions to one unless the profiles are duplicates or belong to identical twins or siblings. Maryland officials did not conduct follow-up research to analyze the 13-loci matches.

A subsequent search of Arizona's DNA database found 122 nine-loci matches, 20 ten-loci matches, 1 eleven-loci match

and 1 twelve-loci match. The latter two belonged to people who were related to each other.

At the very least, the results of the “Arizona searches” should spur experts to investigate whether the statistical basis of DNA testing used by crime labs – and often cited by prosecutors – is flawed. Admittedly, searching a database for any matches is quite different from comparing a single sample to the entire database, or comparing two samples to each other. Regardless, the existence of so many potential matches in DNA databases should call into question some of the basic premises of DNA statistics.

More than 40 researchers, forensic scientists, statisticians and academics urged the FBI to provide them with access to the 8.6 million DNA profiles in the nationwide CODIS database, after removing identifying information, so they could test statistical assumptions related to DNA matches. The FBI declined, citing privacy concerns.

PLN previously reported a similar issue regarding DNA comparisons in cold cases. When a DNA sample is run against a database, the statistical odds of an erroneous match increase in accordance with the size of the database. In some cases,

the odds of an incorrect match may be as high as 1 in 3. But DNA experts frequently cite much lower odds as if the size of the database was not involved, which greatly exaggerates the ability of DNA databases to identify a single unique individual as a perpetrator in cold cases. [See: *PLN*, Jan. 2009, p.24].

“Fingerprinting and other forensic disciplines have now accepted that subjectivity and context may affect their judgment and decisions,” said Itiel Dror, a neuroscientist at University College London. “It is now time that DNA analysts accept that under certain conditions, subjectivity and even bias may affect their work.”

Dr. Dror and a colleague at Boise State University in Idaho conducted an experiment in which they independently provided a mixed DNA sample from the victim, the defendant and other suspects in a real criminal case to 17 analysts. The result? One examiner said the defendant “could not be excluded” based on the DNA evidence. Four reported the results were inconclusive, while 12 said the defendant *could* be excluded. In the actual case, two prosecution experts testified that the defendant, Kerry Robinson, charged in connection with a gang rape in Georgia, could not be excluded based on the DNA

evidence. He was convicted.

Additionally, even when the accuracy of DNA testing is not at issue, the correct identification of the person whose DNA is being tested is equally important. In several cases labs have mixed up or improperly labeled DNA samples, then used the test results to implicate the wrong person.

In California, for example, a lab called Cellmark Diagnostics switched the labels on DNA samples from the victim and the suspect in a 1995 sexual assault case, then reported there was a match even though the victim’s sample actually contained no DNA from the suspect. A Cellmark employee caught the error at trial. See: *State v. Kocak*, Superior Court of San Diego (CA), Case No. SCD110465.

In a similar 1999 case in Philadelphia involving defendant Joseph McNeil, the initial test results found that McNeil was the source of DNA left on the victim’s panties with a 99.99% exclusion rate for other potential suspects. However, McNeil’s sample had been switched with that of the victim. Revised test results excluded him as a suspect – though at the time the error was discovered, McNeil’s attorney had reportedly convinced him to take a plea bargain due to the apparently damning DNA evidence.



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Another case that involved transposed DNA samples occurred in Nevada in 2001. Lazaro Sotolusson, a prisoner at the North Las Vegas Detention Center, was accused of raping his cellmate. DNA samples were taken from both men. The samples were swapped when they were entered into a lab computer, and a match was returned after they were compared to evidence in unsolved sex crimes. Because the samples had been switched, Sotolusson rather than the other prisoner was prosecuted for those crimes – which involved the sexual assaults of two juveniles at gunpoint. He spent a year in jail before the mistake was discovered in April 2002 by an expert retained by the public defender's office, a month before he was scheduled to go to trial.

Prior to the error being found, authorities had said the odds that someone other than Sotolusson had committed the crimes were 1 in 600 billion, based on the presumed DNA match. "Despite the credibility commonly afforded to these [DNA] test results, this demonstrates there is always the possibility of human error," said Public Defender Marcus Cooper.

Ominously, in August 2009 it was reported that scientists in Israel were able to fabricate DNA evidence, including blood and saliva samples. They claimed that if they could access a particular DNA profile in a database, they could make an artificial sample that would match it. "You can just engineer a crime scene," said Dr. Dan Frumkin, the lead author of an article on fabricating DNA evidence published in the February 2010 issue of *Forensic Science International: Genetics*. "Any biology undergraduate could perform this," he added.

Fingerprints: The Old Gold Standard

Prior to the advent of DNA testing in the mid-1980s, fingerprint comparison was considered the gold standard of forensic techniques. Unfortunately, validation problems aside, fingerprint analysis – which has been used as evidence in criminal cases for over 100 years – suffers from a large error rate that is rarely mentioned in the courtroom.

The problems with fingerprint comparison recently gained international notoriety when three FBI fingerprint experts falsely identified, "with 100% certainty," an Oregon attorney as a ter-

rorism suspect in the 2004 train bombings in Madrid, Spain. This might not have come as such a surprise had the error rate in fingerprint identification been more widely known.

Since fingerprint lab units are usually run by police departments, the examiners almost always know the outcome desired by police investigators. Furthermore, the standard method of matching fingerprints is for an examiner to be given prints taken from a crime scene and a set of a suspect's prints, and compare them. Thus, the examiner already knows that the set being reviewed for a match is from a person the police suspect of committing the crime, potentially biasing the results.

Researchers in the U.K., including Dr. Itiel Dror, asked five crime lab fingerprint examiners to compare sets of prints after falsely telling them they were the mistakenly-identified fingerprints from the Madrid train bombing case – "thus creating an extraneous context that the prints were a non-match." Three analysts agreed that the prints were not a match and one was unsure. Unbeknownst to the examiners, they had reviewed the exact same prints and declared them to be a match five years earlier. The study, published in *Forensic Science International* in 2005, indicated that an 80% error rate can be induced when examiners are informed in advance of the desired outcome.

A November 2009 audit of the Houston Police Department crime lab's fingerprint unit revealed "irregularities" in over half of the 548 cases that were reviewed.

It was reported in October 2008 that a Latent Print Unit analyst at the Los Angeles Police Department crime lab was fired, two supervisors replaced and three other employees suspended after revelations surfaced that the lab had misidentified fingerprints in two burglary cases. One of the misidentified suspects was extradited from Alabama before the error was discovered by an independent expert hired by a court-appointed defense attorney.

"As a former prosecutor I know that we rely on fingerprint evidence without question," said Los Angeles councilman Jack Weiss, chair of the city's public safety committee. "Given the kind of conduct indicated in this report, it's reasonable to assume that these problems aren't isolated."

The *Journal of Forensic Sciences* published a study in 1995 that revealed a false positive rate (erroneous match) of 2% for

fingerprint comparisons, with 25% of U.S. crime labs reporting false positives.

A 2006 study by the University of Southampton in the U.K. showed that the false positive rate doubled when examiners were told about the circumstances of a case before making fingerprint comparisons.

Further, a proficiency test administered to 156 fingerprint analysts by the Collaborative Testing Service in 1995 resulted in only 44% of the examiners correctly classifying all of the latent samples. "Errors of this magnitude within a discipline singularly admired and respected for its touted absolute certainty as an identification process have produced chilling and mind-numbing realities," said David Grieve, editor of the *Journal of Forensic Identification*.

These studies are well known among fingerprint examiners, yet a top FBI expert has testified that fingerprint comparisons have a "zero error rate."

"I'll preach fingerprints till I die. They're infallible," said John Massey, one of the FBI fingerprint examiners who falsely matched Oregon attorney Brandon Mayfield to the Madrid train bombings. When asked about that incorrect fingerprint match, he said, "We just did our job and made a mistake. That's how I like to think of it – an honest mistake. I still consider myself one of the best in the world."

But even honest mistakes by top-notch examiners mean that fingerprint comparisons are not infallible as Massey claims them to be. And therein lies one of the biggest problems in forensics – the inability or unwillingness of experts, analysts and lab personnel to admit fallibility in their methodology or themselves, even in the face of obvious errors.

Brandon Mayfield filed suit against federal officials for his arrest and two-week detention as a result of the FBI's faulty fingerprint identification, and received a formal apology and a \$2 million settlement in November 2006.

There are also problems with how some fingerprint comparisons are made. In a 1995 case in Massachusetts, a defendant was convicted of murder and armed robbery based on a collective fingerprint match. That is, while none of the individual latent prints at the crime scene were sufficient for a match, investigators used multiple prints, which were presumed to have come from the same person, to obtain a match as a group.

The Supreme Court of Massachusetts held that this technique, based on the examination of “simultaneous impressions” of latent prints, did not meet the necessary reliability standard. “[A] fingerprint examiner’s opinion regarding the individualization of simultaneous impressions is less bounded by objective factors,” the court wrote. See: *Commonwealth v. Patterson*, 445 Mass. 626, 840 N.E.2d 12 (Mass. 2005).

In another Massachusetts case, Stephan Cowans was accused of shooting a police officer in a May 30, 1997 incident. After the shooting the assailant entered a nearby residence and drank a glass of water; two experts with the Boston Police Department later testified that a fingerprint on the glass matched Cowans. A defense expert agreed, and Cowans was also identified by two eyewitnesses, including the injured officer. He was convicted and sentenced to 30 to 45 years in prison.

DNA testing was performed in May 2003 on saliva from the glass and on a cap and sweatshirt discarded by the assailant. The DNA on the glass, the cap and the sweatshirt all matched, but not to Cowans. The fingerprint evidence was

reexamined and Suffolk Assistant District Attorney David E. Meier admitted that the “purported [fingerprint] match was a mistake.” Cowans was exonerated in February 2004.

Crime Lab Scandals Nationwide

Former Douglas County, Nebraska CSI commander Dave Kofoed was sentenced on June 1, 2010 to 20 to 48 months in prison after he was convicted of planting blood evidence in a double homicide investigation. Kofoed reportedly planted the victim’s blood in a car linked to two suspects who were later determined to be innocent. He has professed his own innocence.

In March and April 2010, San Francisco prosecutors dismissed around 700 criminal cases after it became known that Deborah Madden, a 27-year crime lab employee, had been skimming cocaine that was booked as evidence. Public defenders had estimated that up to 40,000 cases may need to be reviewed. Madden admitted she stole cocaine from the lab for her own use, and retired on March 1, 2010. The drug analysis section of the SFPD crime lab was closed following the scandal.

“There is no doubt this lab is a mess.

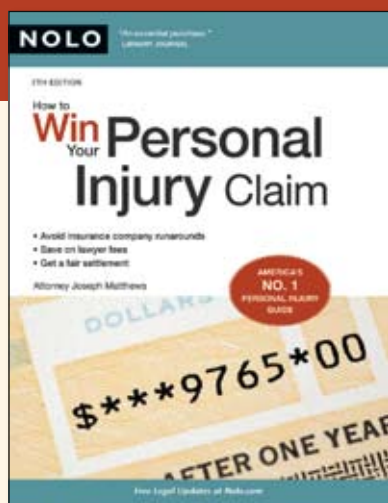
... I know there are issues in the lab,” said Assistant Police Chief Jeff Godown. Madden was later charged with cocaine possession and an unrelated gun charge. It was subsequently learned that she had been convicted of domestic violence in 2008, a fact known to her supervisor but not disclosed to defense attorneys who could have used it to impeach her in criminal cases.

“It was kind of like a ‘don’t ask, don’t tell’ policy,” said Jeff Adachi, San Francisco’s chief public defender. “The police weren’t telling and the district attorney wasn’t asking.”

In April 2010 another scandal hit a crime lab in Ripon, California that serves San Joaquin and four other counties, which led to the examination of almost 2,000 cases in one county alone. Methamphetamine samples handled by Hermon Brown, an examiner at the lab, ended up weighing less than initially reported. Brown was charged with five felony drug and theft-related offenses on September 9, 2010.

Sacramento County, California criminalist Jeffrey Herbert testified in one case that a defendant’s DNA sample matched just one in 95,000 people, despite the fact

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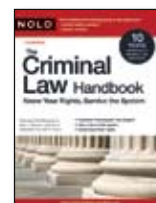
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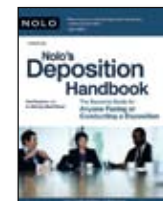
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Crime Labs in Crisis (cont.)

that a supervisor had told him the odds were closer to 1 out of 47 people. A subsequent review determined that Herbert had “an insufficient understanding” of how to analyze mixed DNA samples. A technical reviewer at the Sacramento County crime lab, Mark Eastman, resigned after problems with his work were found in May 2006. He had entered a DNA sample into a law enforcement database even though the sample did not meet minimum standards, and failed to recheck his results in other cases.

In December 2009, the New York State Inspector General issued a 119-page report blasting the New York State Police crime lab. A private accrediting organization had discovered a lab worker with 30 years’ experience in trace evidence analysis had so little training that he could not even operate a microscope. Garry Veeder was the lab’s only fiber evidence expert. A check of his work showed that he often dry-labbed results; that is, he didn’t perform the tests he claimed he did.

Veeder admitted in an internal investigation to “bypassing an analysis required by forensic center protocols and then creating data to give the appearance of having conducted an analysis not actually performed.” He committed suicide in May 2008, two days after he was asked to attend another interview regarding his work at the lab.

Another New York State Inspector General’s report on crime labs in Monroe and Erie Counties, also released in December 2009, revealed problems with workers dry-labbing, misreporting weights and failing to perform vital steps in tests.

A chemist at the Erie County lab, Kelly McHugh, was fired after falsifying a report. Although she said she had conducted a certain test on a cocaine sample, the chain of custody record indicated the cocaine was in the evidence room at the time McHugh claimed she performed the test. She pleaded guilty to misdemeanor attempted tampering with public records and received a conditional discharge with no judicial punishment in January 2010.

The crime lab in Colorado Springs, Colorado reported in December 2009 that it had performed hundreds of faulty blood-alcohol tests that showed incorrect higher alcohol levels due to testing errors by a chemist who was later fired. At least nine defendants were wrongly convicted;

the lab was unable to explain how the errors occurred.

Dirk Janssen, the chemistry supervisor at Wisconsin’s state crime lab, was reprimanded in August 2009 for failing to obtain peer reviews in 27 toxicology cases involving drug evidence. Following a review by the lab director, only five of the cases were found to meet required standards; of the others, half needed corrections.

In July 2009, a Texas man won a \$5 million federal jury award against the Houston police department’s crime lab after the lab fabricated evidence that led to his conviction for a 1987 rape and kidnapping of a child. DNA testing freed George Rodriguez after he served 18 years in prison. The jury found that the city “had an official policy of inadequate supervision or training of its Crime Lab personnel” [See: *PLN*, Jan. 2010, p.32].

Rodriguez is one of four men who have been exonerated after they were convicted based on false evidence from the Houston crime lab. An auditor who reviewed 850 serology cases processed by the lab between 1980 and 1992 found problems in 599 of those cases.

DNA expert Dr. Elizabeth A. Johnson, a vocal critic of Houston’s crime lab, said there were systemic problems at the lab in regard to forensic testing, including with DNA evidence. “They can’t do a sperm sample separation to save their lives,” Dr. Johnson contended in a 2003 article. “If you put a gun to their heads and said you have to do this or you will die, you’d just have to kill them.”

On January 10, 2008, Vanessa G. Nelson, head of the Houston crime lab’s DNA division, was forced to resign after she was caught helping two DNA technicians cheat on proficiency exams. The DNA division was closed. This was the second time the division had been temporarily shut down. Following a November 2002 scandal revealed by local news media, the lab’s DNA division was suspended from December 2002 until July 2006.

Two months after she resigned, Nelson was hired by the Texas Department of Public Safety (DPS) to supervise the agency’s McAllen Division DNA lab. DPS officials said they were aware of the circumstances of her resignation from the Houston crime lab but her supervisor had described her as an outstanding employee.

In March 2009, Wayne County, Michigan prosecutor Kym Worthy admitted that 147 cases in which people were sent to

prison would have to be investigated due to failings at the firearms unit in the Detroit police crime lab, which was closed in late 2008. The lab also conducted testing on fingerprints, DNA and drug evidence.

A preliminary audit of the Detroit lab found there was a 10% error rate in ballistics testing, evidence may have been contaminated, lab workers were not given competency tests, it could not be determined if testing equipment was routinely maintained or calibrated to ensure accuracy, and lab findings were hard to validate because notes, photos and other documentation were “almost nonexistent in the case file records.”

“If we have even one person in prison on evidence that was improperly done, that’s a huge problem,” said Worthy. “As prosecutors, we completely rely on the findings of police crime lab experts every day in court and we present this information to juries. And when there are failures of this magnitude, there is a ... betrayal of trust.”

A defense attorney uncovered the problems in Detroit’s crime lab when he had an independent expert examine evidence in a case involving firearms. Prosecutors intend to retest evidence from all cases less than five years old. A Michigan State Police report blamed an inadequate budget and lack of qualifications, training and equipment for the errors. Sixty-eight lab employees were reassigned. None were fired. There are plans to create a new Detroit crime lab staffed by the State Police.

In April 2008, 30-year veteran Nashville, Tennessee police officer Michael Pyburn resigned after he was accused of falsifying records to cover up a botched ballistics test. He had worked in the Nashville Metro Police crime lab for over a decade. The lab’s ballistics unit was shut down, and two other officers who worked in the unit were found to be unqualified and reassigned.

Arnold Melnikoff, formerly the manager of Montana’s state crime lab, testified in a 1987 trial that hair comparisons indicated there was less than one chance in 10,000 that Jimmy Ray Bromgard was not the man who raped an 8-year-old girl. By the time DNA tests exonerated Bromgard almost 15 years later, Melnikoff had moved on to become a chemist at the Washington State Patrol’s lab.

A peer review committee of forensic scientists referred to Melnikoff’s testimony in the Bromgard case as containing “egregious misstatements not only of the science of forensic hair examinations

but also of genetics and statistics. These statements reveal a fundamental lack of understanding of what can be said about human hair comparisons and about the difference between casework and empirical research. His testimony is completely contrary to generally accepted scientific principles."

Two other Montana men convicted due to Melnikoff's dubious testimony have been exonerated by DNA testing. Washington officials fired Melnikoff in 2004 after an audit revealed problems with his lab procedures; he was also accused of exaggerating his testimony to assist prosecutors. [See: *PLN*, March 2006, p.28; Nov. 2004, p.12; Feb. 2003, p.10].

Barry Logan, director of the Washington State Patrol crime lab, resigned in March 2008 amid a scandal in which toxicology lab manager Ann Marie Gordon was accused of falsely claiming she had verified solutions used in breath-alcohol testing. Also, firearms and tool mark examiner Evan Thompson was accused in 2006 of shoddy work resulting in serious errors. Gordon's fabrications invalidated the results of hundreds of breath tests in DUI cases. The effect of Thompson's incompetence in the more

than 1,000 criminal cases he worked on remains unclear. In an initial review of 13 of Thompson's most complex cases, mistakes were found in all 13. [See: *PLN*, Oct. 2008, p.8].

Another Washington State Patrol crime lab examiner, Charles Vaughan, who formerly worked for the Oregon State Police crime lab, provided questionable testimony concerning gunpowder residue that sent two Oregon men to prison for life. They were later exonerated and released. [See: *PLN*, March 2006, p.28].

Two employees of the New York City Police Department crime lab were discovered lying about drug evidence in 2007. The employees dry-labbed, writing reports on tests they never performed. The head of the lab was transferred to another post.

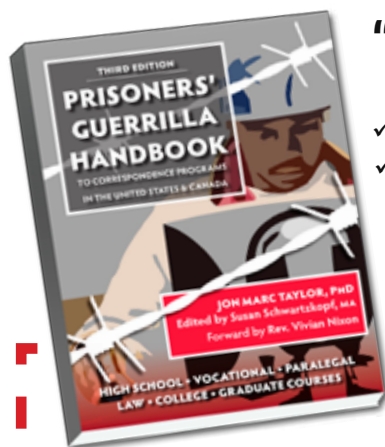
In 2006, the U.S. Army crime lab at Fort Gillem, Georgia admitted that civilian employee Phillip R. Mills had falsified results in as many as 479 DNA tests. Mills had a history of shoddy work, including allowing contamination during testing. He had been suspended in 2004 and re-trained, then suspended again in 2005.

Former FBI analyst Jacqueline Blake pleaded guilty in May 2004 to making

false statements about following protocol in around 100 DNA analyses. She reportedly failed to compare DNA evidence with control samples, and resigned from the FBI in 2002. According to a report by the Inspector General's office, she also "falsified her laboratory documentation" to conceal her misconduct. She was sentenced to two years' probation and community service.

Oklahoma City Police Department crime lab employee Joyce Gilchrist was terminated in September 2001 after being accused of questionable hair and fiber analysis, destroying or withholding exculpatory evidence, overstating results and contributing to several wrongful convictions, including one that sent an innocent man to death row. [See: *PLN*, Dec. 2009, p.44]. Gilchrist was nicknamed "Black Magic" for her apparent ability to find DNA matches that other examiners could not. The FBI recommended a review of all of her cases.

From 1967 until her retirement in 1991, Janice Roadcap was a chemist for the Pennsylvania State Police crime lab. She provided bogus testimony such as explaining why semen from a rape-murder victim did not match the blood type of



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Crime Labs in Crisis (cont.)

the defendant by claiming that antibiotics taken by the victim may have changed the semen's blood type. The defendant, Barry Laughman, was convicted and, after spending 16 years in prison, exonerated by DNA evidence.

In a 1970 murder case, Roadcap claimed that a palm print had been made in the victim's blood when, in fact, there were indications the blood had splattered across an already-present palm print. The accidental discovery of Roadcap's original notes in 2001 was used by defense attorneys to win a retrial. Prosecutors then dropped the charges. By that time the defendant, Steven Crawford, had spent 28 years in prison.

Nor are such forensic mistakes relegated to the distant past. In the Ohio case of Derris Lewis, who was prosecuted for the murder of his twin brother in 2008, experts testified that Lewis' palm print had been made in his brother's blood on a wall at his mother's home, where the homicide occurred. After a jury deadlocked on the murder charge and a retrial was scheduled, it was discovered the palm print had not, in fact, been made in the blood. Lewis, who spent 18 months in jail, received a \$950,000 settlement from the City of Columbus in February 2010. [See: *PLN*, Sept. 2010, p.23].

Fred Zain, a former state trooper, was a serologist for the West Virginia State Police crime lab for 10 years and later worked as chief serologist for the Bexar County Forensic Science Center in San Antonio, Texas until he was fired in 1993. Zain was popular among prosecutors and police because the evidence he produced led to numerous convictions.

It was later learned that he testified about tests he didn't do and for which the crime lab did not even have the equipment to perform. He also falsified his credentials. This was one of the earliest major crime lab scandals, which came to light in 1993 after the West Virginia Supreme Court released a damning report on Zain's misconduct. See: *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (W.Va. 1993) [*PLN*, March 1998, p.24; Oct. 1994, p.5].

The report, by the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors, found "multiple incidents of misconduct on the

part of former State Police serologist Fred Zain" that "may have resulted in serious miscarriages of justice in cases in which he was involved." The report also found "evidence that Mr. Zain's supervisors may have ignored or concealed complaints of his misconduct."

The scandal came to light after DNA evidence exonerated Glendale Woodall, who had been convicted of a West Virginia rape in 1987 based on falsified serological tests. Zain had told the jury that the assailant's blood types "were identical" to Woodall's, and that only 6 in 10,000 West Virginia men had similar blood characteristics. Zain presented evidence in over 130 cases in West Virginia, and the state's Supreme Court held that "[a]ny testimony or documentary evidence offered by Zain, at any time, in any criminal prosecution, should be deemed invalid, unreliable and inadmissible."

It is interesting to note how the two states handled this incident. West Virginia compiled a list of the cases in which Zain testified, ordered court clerks to preserve the evidence in those cases, and retested blood samples. Texas, however, said defendants would have to challenge each case individually through the post-conviction process – without an appointed attorney in most cases – and those who had pleaded guilty under the threat of the false forensic evidence could not obtain any relief.

Zain was indicted on perjury charges in Texas but the charges were dismissed due to the statute of limitations. A West Virginia jury deadlocked on charges that Zain had obtained money (his salary) under false pretenses, and he died of colon cancer in 2002 before the case was retried.

At least nine defendants in West Virginia were exonerated following an investigation into Zain's misconduct, and the state has paid \$6.5 million in damages for wrongful convictions that resulted due to his fraudulent testimony. Woodall, who was exonerated in 1992, received a \$1 million settlement.

Most recently, in March 2010, North Carolina's State Bureau of Investigation (SBI) was accused of manipulating bloodstain evidence. The Attorney General's office ordered an audit of the SBI blood analysis unit, including the work of Duane Deaver, a bloodstain expert and forensic trainer for 22 years who was suspected of tailoring test results to please prosecutors. Bloodstain analysis at the SBI lab was suspended in July 2010.

The previous year, a federal court held that Deaver gave "misleading testimony" that "falsely portrayed" he had found blood on a defendant's boot in a capital murder case. The defendant, George E. Goode, Jr., had his death sentence reduced to life because his attorney had failed to challenge Deaver's inaccurate testimony. See: *Goode v. Branker*, U.S.D.C. (E.D. NC), Case No. 5:07-hc-02192-H.

The audit of the SBI blood analysis unit ordered by the Attorney General, conducted by two former FBI officials, was released in August 2010. It found that lab examiners had overstated, excluded or falsely represented blood evidence in dozens of criminal cases, including three that resulted in executions.

The report called for a review of 190 cases, noting that "information that may have been material and even favorable to the defense of an accused defendant was withheld or misrepresented." The deficiencies were blamed on "poorly crafted policy, inattention to reporting methods which permitted too much analyst subjectivity; and ineffective management and oversight." In at least 40 cases, lab examiners reported there were indications of blood and no additional tests were performed; however, handwritten lab notes indicated that follow-up tests were negative or inconclusive.

"The documented policies and practices of our state lab support the long-held concern that North Carolina's lab is the prosecution's lab, not the justice system's lab," said Christine Mumma, director of the North Carolina Center on Actual Innocence.

The SBI's crime lab director is being replaced and additional audits of the lab's DNA and firearm and tool mark units have been requested. State lawmakers criticized ASCLD-LAB, the organization that accredited the SBI lab during the time the blood analysis unit was withholding or falsifying evidence. ASCLD-LAB, which is managed by three former SBI officials, accredits most forensic crime labs in the U.S. "Accreditation truly is the final check against this stuff, and it didn't happen here," said North Carolina state Representative Rick Glazier.

The above are just several examples of crime lab scandals and lab employees who intentionally or through incompetence presented false or misleading evidence in criminal cases under the guise of their scientific expertise. There have been many more such incidents, some of which are

discussed in *The Elephant in the Crime Lab*, an article by Sheila Berry and Larry Ytuarte that appeared in the Spring 2009 issue of *The Forensic Examiner*.

Based upon the failings of crime labs, there is a strong argument for oversight by independent organizations. On June 3, 2010, though, the California Crime Lab Task Force, which had been formed by the state legislature three years earlier, voted to disband itself. The Task Force issued a report in 2009 that made 41 recommendations for improving forensic techniques, including improved training and increased staffing.

Consider that even if only a small number of forensic examiners are incompetent or corrupt, due to the large caseloads that crime labs handle they may produce faulty test results in hundreds or thousands of cases before their errors are caught.

But at least one organization, *Crime Lab Report*, which seeks "to properly frame the issues for those who require access to accurate information about forensic science," believes that crime labs have been given a bad rap. In a July 16, 2008 study titled *The Wrongful Conviction of Forensic Science*, which critiques a report by the Innocence Project, *Crime Lab Report* editors John M. Collins and Jay Jarvis argue that "false eyewitness identifications exacerbated by bad lawyering, and in some cases, government misconduct" is responsible for most wrongful convictions, not forensic failures.

They suggest that the "Innocence Project needs attention and money to drive its public policy agenda. ...[and] taking on crime laboratories will turn heads more quickly than esoteric procedural debates among litigators," and claim "[t]he overall statistical weight that can be honestly assigned to faulty forensic science is very small."

That does not, however, explain the many well-documented examples of crime lab scandals and fraudulent or incompetent forensic experts such as those mentioned above and in the section below. Nor does it take into account the influence of junk science in wrongful conviction cases that do not involve DNA, which is the province of the Innocence Project.

Credentials? What Credentials?

Joseph Kopera, who had a 21-year career as a forensic expert, first as a firearms examiner for the Baltimore police department's crime lab and then as head of the Maryland State Police fingerprint unit, perjured himself for decades in thousands of criminal cases by claiming he held degrees and certificates he was never awarded. He even tried to present a forged college diploma and falsely claimed that he taught courses at local universities to back up his claims. When defense attorneys confronted Kopera with the truth that he had not received any kind of college degree, he resigned and then committed suicide on March 1, 2007.

Dr. Saami Shaibani, a Wisconsin

physicist, frequently testified for the prosecution in high-profile murder cases across the country, from South Dakota to Washington, D.C., on "injury mechanism analysis" – an amalgam of physics, trauma medicine and engineering. He falsely claimed to be a clinical associate professor at Temple University until a defense attorney discovered that was a lie. "He's a fraud. Basically, he was trying to create himself as an expert so he could run around the country and testify in these cases," said Wisconsin defense counsel Stephen Willett.

In one case, Douglas Plude claimed that his wife had tried to commit suicide by taking pills and died with her head in a vomit-filled toilet. Shaibani testified that that scenario was impossible after positioning volunteers about the same size as the victim over a toilet and studying their movements. He said Plude must have forced his wife's head into the toilet to drown her.

"[Shaibani] had women sticking their heads in toilets," said Willett. "That's just not science. How do you peer review that? How do you test his conclusions?"

Plude was found guilty of murder but his conviction was overturned in

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June 2008 by the Wisconsin Supreme Court, which cited Shaibani's fraudulent testimony about his credentials and called his conduct "egregious." Prosecutors are retrying Plude on the murder charges. See: *State v. Plude*, 310 Wis.2d 28, 750 N.W.2d 42 (Wis. 2008).

In May 2007, James Earl Edmiston pleaded guilty to two counts of perjury in California. He was the state's expert witness on computers in two cases involving child pornography. Edmiston falsely claimed to have degrees from CalTech, UNLV and UCLA, and had often been used as an expert in both state and federal cases. He received a 21-month federal sentence.

In the United Kingdom, Gene Morrison of Greater Manchester was revealed as a fraudulent forensic expert in 2007. Police called him a "complete charlatan." Then four underage girls came forward accusing Morrison of sexual abuse. They said he used his prestigious position as a forensics expert to convince them that no one would believe them if they told anyone. Morrison was convicted of the sex abuse charges and sentenced in December 2009 to an indeterminate prison term with a minimum of 7-1/2 years; he had previously received a 5-year sentence for the forensics fraud. Police officials said they would re-investigate 700 cases in which Morrison participated. He had no academic credentials other than the ones he had purchased through mail-order.

Another U.K. case involved Trevor "Jim" Bates, who was found guilty of four counts of making a false written witness statement for claiming he had a degree in electronic engineering. A former TV repair man, he had been a top prosecution information technology witness in cases involving child pornography; his lack of credentials was unveiled after he appeared as a defense witness in a high-profile case. Bates received a two-year suspended sentence and was ordered to pay court costs of £1,000 (approx. \$1,500) in April 2008.

And San Diego prosecutors were faced with the possibility of having thousands of DUI cases overturned in 2006. The reason? Prosecution expert witness Ray Cole, who said he had a degree in premedical studies and was an expert on the effects of alcohol and driving, had lied under oath. His degree was in political sci-

ence. Nonetheless, he had testified as an expert for more than three decades.

What About Eyewitnesses?

If there are so many problems with crime labs and forensic experts, can we at least trust eyewitness testimony in criminal cases? No, according to eminent memory researcher and University of California-Irvine psychology professor Elizabeth F. Loftus. Memory is not recalled as a whole, but is pieced together anew each time, "more akin to putting puzzle pieces together than retrieving a video recording," said Dr. Loftus. This allows errors to become incorporated into memories, corrupting them. Yet a person with a corrupted memory believes with total sincerity that the memory is an accurate account.

How can memory become compromised in a criminal investigation? One way is poor or suggestive police procedures. For example, if the police ask "Is this the man who committed the crime?" while showing the witness a man in handcuffs, such questioning is considered suggestive. Likewise, using multiple photographic lineups that share a single common photo – that of the person the police want the witness to identify – corrupts the integrity of the lineup process. Both of these methods are common, though, and witnesses frequently are allowed to testify regarding their identification of a suspect despite the suggestiveness of the identification procedure used by police.

There also have been studies that indicate cross-racial or ethnic identifications, e.g., when the victim and suspect are of different races, are especially prone to error. Additionally, when witnesses are not told that the guilty party might not be in a lineup or photo array, they may feel that they have to pick one of the suspects.

Dr. Loftus has found that stress at the crime scene or during the identification process, the presence of a weapon during the crime, the use of a disguise by the perpetrator, brief viewing times during the identification procedure and a lack of extreme characteristics in the suspect can all reduce the accuracy of eyewitness identification.

Another issue concerning eyewitness testimony is the practice of "recovering" repressed memories of events that may have never occurred, using suggestive and manipulative questioning by examiners. Repressed memories have been used in a number of cases, usually involving sexual

abuse, though the accuracy of that method is unknown and likely unknowable. Dr. Loftus has expressed concerns about manufacturing false memories, and wrote that "it might be virtually impossible to tell reliably if a particular memory is true or false without independent corroboration."

According to a 2009 Innocence Project report, of the first 239 DNA exoneration, 75% involved eyewitness misidentification. In 38% of those cases there were two or more eyewitnesses, such as in the prosecution of Stephan Cowans. Further, studies show that highly confident eyewitnesses are only slightly more accurate than less confident eyewitnesses. Thus, eyewitness testimony cannot be relied upon to correct or contradict errors that result from shoddy forensic work.

Improving Crime Labs

The Innocence Project estimates that about 50% of defendants exonerated by DNA evidence were convicted in part due to "unvalidated or improper forensic science." Considering that DNA is only an issue in 5 to 10% of criminal cases, it is likely that bad science has resulted in numerous other wrongful convictions that have gone unreported. Also, even when the science may be sound, examiners often obfuscate their testimony by saying forensic results "are consistent with" or "cannot exclude" a suspect, when such language is at best vague and at worst intentionally misleading.

As one example, when Alejandro Dominguez was tried for rape in Illinois in 1990, a forensic serologist testified that blood typing on semen found on the victim could not exclude Dominguez as the rapist. The serologist did not tell the jury that 67% of men in the U.S. also could not be excluded, as the sample was a mixture from both the victim and the rapist and they shared the same blood group markers, which meant the victim's sample could be masking the perpetrator's sample. Dominguez served four years of a 9-year sentence and was exonerated by DNA evidence in 2002.

In April 2010, the Scientific Working Group on DNA Analysis Methods released new guidelines for U.S. labs that perform DNA testing, including recommendations to develop stricter criteria for analyzing samples containing mixed DNA. However, the guidelines are not mandatory and "not intended to be applied retroactively."

The National Academy of Sciences and other experts on forensic science have made a myriad of suggestions for improving the competence of crime labs and the testing techniques they employ. Those suggestions include:

1) Make crime labs independent of law enforcement agencies such as police departments and district attorneys' offices.

2) Create a strong and independent national crime lab oversight authority that can set standards for certification of labs and employees, employee qualifications, continuing education, training and methodologies.

3) Require crime labs to comply with those standards.

4) Submit forensic methods to rigorous scientific validation that includes determining error rates and realistic probability statistics.

5) Give crime labs as little information as possible when conducting forensic tests, so as not to influence the results. This may require the use of an intermediate office to strip investigatory information from evidence samples and replace that information with coded identification numbers.

6) Mandate that the crime lab employee who actually performs a forensic test be the person who testifies about that test in court. This was recently addressed by the U.S. Supreme Court in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) [*PLN*, Oct. 2009, p.8], in which the 2009 NAS report was cited by the Court as one reason for making this a requirement. In *Melendez-Diaz*, the admission of notarized certificates regarding forensic drug testing was held to violate the defendant's Sixth Amendment right to confront witnesses.

7) End the practice of allowing foren-

sic examiners to make exaggerated claims, and require them to acknowledge any uncertainties in or limits to their findings.

8) Sufficiently fund crime labs to permit the hiring of qualified personnel, continuing training and education, and the elimination of backlogs.

9) Subject lab results to random testing by other forensic labs. Just the knowledge that such testing may occur has been shown to dramatically reduce error rates in crime labs.

10) Provide court-appointed attorneys with forensic experts when the case involves forensic evidence and defense counsel requests an expert.

These reforms would go a long way toward ensuring that crime labs realize their full potential to help identify the guilty while protecting the innocent. However, reaction to the 2009 NAS report appears to indicate that most of the people and organizations involved in the forensic sciences are merely gearing up to protect their own turf rather than helping to reform the field of forensic investigation in general.

If that proves to be the response to the report, then any reforms will be piecemeal at best, crime lab scandals will continue to proliferate, and little will be done to ensure that junk science does not lead to the innocent going to prison or the guilty going free.

"I have no problem with forensic science. I have a problem with the impression that's being given that those disciplines ... can make an absolute identification of someone, and that's not the case," said Terrence Kiely, a law professor at DePaul University and author of *Forensic Evidence: Science*

and the Criminal Law.

"It's the white coat-and-résumé problem," Kiely continued. "[Forensics experts] are very, very believable people. And sometimes the jurors will take [their testimony] as a 'yes,' where the science can only say it's a 'maybe.'"

Or, in some cases, when the science in fact says it's a definite "no." ■

Ed. Note: This 15,000-word article merely scratches the surface of questionable forensic techniques and crime lab scandals. Problems with junk science, unreliable evidence and misconduct among lab workers are apparently endemic in the forensics field. Numerous law and academic journal articles have been written on these topics, and this *PLN* cover story easily could have been more extensive.

For more information, over 100 forensic misconduct cases are archived on the following website: www.corpusdelicti.com/forensic_fraud.html. Also, an extensive list of forensic and crime lab scandals are available here: www.truthinjustice.org/junk.htm. The 2009 NAS report is available at: www.nap.edu/catalog.php?record_id=12589. A list of cases involving forensic evidence that resulted in 116 wrongful convictions can be found here: www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf.

Sources: *NAS press release, Arizona Daily Star, Associated Press, Baltimore Sun, Brownsville Herald, Chicago Tribune, Detroit Free Press, Detroit News, Durango Herald, Fort Worth*

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Crime Labs in Crisis (cont.)

Star-Telegram, Virginian-Pilot, Houston Chronicle, Houston Press, Los Angeles Times, Michigan Lawyers Weekly, New York Daily News, New York Law Journal, New York Times, San Francisco Chronicle, Seattle Times, USA Today, Washington Post, Enterprise Security, Forbes, Scientific American, www.ablee.us, www.gritsforbreakfast.blogspot.com, www.kentucky.com, www.miller-mccune.com, www.journal-star.com, www.omahasheriff.org, www.cass-news.com, www.kget.com, www.signonsandi-

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From the Editor

by Paul Wright

This month's cover story looks at the ongoing scandal at the nation's crime labs. The problem is so pervasive – *PLN* has reported on it extensively over the years – that several books could easily be written on the topic. Yet just as wrongful convictions tend to be the exclusive province of the poor, crime lab “mistakes” and “errors” tend to only benefit the police and prosecutors. The reality is that crime labs are as relative to science as the military is to music. The purpose of crime labs is to provide the dramatic props that prosecutors need to convince juries to convict criminal defendants. Nothing more and nothing less.

Tellingly, there is no effort afoot to make crime labs either independent of police and prosecutors or to ensure they have any type of independent oversight. In a truly equal system this would be of little consequence because defendants accused of a crime would simply retain their own experts who would review the evidence and “scientific” conclusions of the prosecution-run crime labs and issue their own reports. After all, science is immutable. Yet the reality is that most defendants are too poor to afford their own counsel much less their own experts, and court-appointed lawyers are left to do little more than cross-examine the professional witnesses from the crime labs with no evidence of their own. This is another component of a criminal justice system designed to control and imprison the poor.

The lack of counsel and legal resources is nowhere more evident than it is for prisoners. By definition, prisoners tend to have a major legal problem which is their confinement, and in many cases it is the conditions in which they are confined as well. While prisoners nominally retain a right to court access, the reality is that substantive barriers prevent most prisoners from gaining meaningful access to the courts in order to present their claims. *PLN* has recognized this reality since our inception in 1990 and we have long championed self-reliance by prisoners for the simple reason that there is usually no other option.

Thus, I am very pleased to announce that the 4th edition of the *Prisoners' Self-Help Litigation Manual* is now available from *PLN* for only \$39.95 plus \$6 shipping

for orders under \$50. This book has long been referred to as the bible of jailhouse lawyers and provides a concise means by which to learn what rights prisoners actually have and, more importantly, how to go about vindicating them in the court system. My review of the book is in this issue of *PLN*. Ads for the *PSHLM* will be in the next issue of *PLN*, but given the anticipation that has been awaiting this book, readers should know it is available for shipping immediately.

I am also pleased to announce that the second book by Prison Legal News Publishing will be available at the end of October 2010. *The Habeas Citebook: Ineffective Assistance of Counsel*, by *PLN* contributing writer Brandon Sample, is a detailed compilation of federal court cases where the courts actually granted habeas relief based on ineffective assistance of counsel claims. It includes pleadings from a successful habeas case and a detailed explanation of federal habeas corpus procedure. The book is being printed as this issue of *PLN* goes to press. For habeas litigants who had ineffective assistance of counsel, *The Habeas Citebook* will save hundreds of hours of research as it jump-starts habeas petitioners with the winning cases they need.

Subscribers will soon be receiving *PLN*'s annual fundraiser request. This year marks *PLN*'s 20th anniversary, and if you have not yet donated to *PLN*, please do so. Your donations help make our work above and beyond publishing the magazine possible.

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New York Prisons Avoid Budget Axe

by David M. Reutter

With the State of New York having 5,000 empty prison beds and a large budget deficit, it would seem the logical decision would be to save taxpayer dollars by closing some prisons. That, however, is not the choice of New York's elected officials.

Rather than shut down four facilities, state authorities spent \$34 million to keep them operating. The rationale for this apparently foolhardy approach is rooted in political clout and the need to continue propping up failed rural economies that have come to rely on the prisons for jobs and revenue.

Three facilities in northern New York near the Canadian border exemplify the waste of public tax dollars. In a population count taken on December 31, 2009, a prison in Lyon Mountain had 91 employees and 135 prisoners; the Ogdensburg Correctional Facility (OCF) had 287 employees and 474 prisoners; and the Red Creek minimum security complex had 67 employees and 71 prisoners.

Since 1999, New York's crime rate has declined and nonviolent offenders are spending less time in prison. The state's prisons hold 13,000 fewer prisoners than they did a decade ago, and it is expected that the population will decrease by another thousand by 2011. New York's prison population is currently about 28,240.

Before he was forced to resign

in March 2008 due to a prostitution scandal, former Governor Eliot Spitzer planned to close four state prisons. That proposal was scuttled when he stepped down, resulting in legislators coughing up \$34 million to keep the facilities open.

Until recently, New York prisoners have been counted as residents of local communities when legislative maps are drawn; thus, they have been unwilling pawns in helping politicians protect their legislative districts. Prisons have also been the steam engine that drives rural economies by providing thousands of jobs.

State Senator Darrell J. Aubertine intends to protect this political prison turf, and does not want Governor David A. Paterson to close any of the four prisons. One of those facilities, OCF, is located within Senator Aubertine's district.

"The devastating negative economic impact to these communities will outweigh any proposed savings," Aubertine said of the proposed closures.

Should the prisons close, local towns would lose employees whose

families go to local schools, pay local taxes and otherwise spend money at local business, but few if any prison employees would actually lose their jobs. They would simply transfer to positions at other facilities that become available through attrition.

With 547 employees overseeing 851 prisoners at the four facilities originally slated for closure – a staffing ratio of 1 to 1.5 – budgetary realities may ultimately outweigh the prison system's clout.

For now, though, the four New York prisons remain open, and Governor Paterson and two gubernatorial candidates have pledged not to close them in the immediate future. As of August 30, 2010, the prisoner population at OCF had dwindled to 313. "We have vacancies all over the state," acknowledged Linda M. Foglia, a Department of Correctional Services spokesperson.

Apparently, however, there are no vacancies among politically opportunistic New York elected officials. ■

Sources: *New York Times*, www.watertowndailytimes.com

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Are Doctors Complicit in Prison Torture? The Maine Medical Community Looks at Solitary Confinement

by Lance Tapley

In the past few years an outcry has arisen over the involvement of military and CIA medical professionals and psychologists in torture, including psychologically destructive solitary confinement of “war on terror” detainees at the Guantánamo prison camp. Some critics have even suggested criminal prosecution of the medical staff involved or, at least, revocation of their professional licenses.

In Maine’s prison system, too, prisoners — many of them mentally ill — are kept in isolation for months or years in the state prison’s 132-cell Special Management Unit, its “supermax,” in Warren. Some Maine doctors are now looking closely at the state’s supermax, saying that solitary confinement constitutes torture, and asking if the medical professionals and psychologists involved with the facility are complicit in torture.

“I do believe they should look at the big picture,” says Janis Petzel, of Hallowell, president of the Maine Association of Psychiatric Physicians, talking specifically about doctors who do “peer reviews,” a type of quality review, of Maine’s prisoner psychiatric care. “Twenty years ahead I don’t want to look back and say we were like the Nazi doctors.” When physicians encounter solitary confinement, she says, they “have a duty to speak out.”

In the recent legislative debate over LD 1611, a bill to restrict prison solitary

confinement, Petzel and other supporters spoke out — loudly and clearly. She told legislators at the bill’s public hearing that “by international definition” solitary confinement “is a form of torture.” Sheila Comerford, director of the Maine affiliate of the American Psychological Association, which represents psychologists, told the Criminal Justice Committee that “isolation was included in the American Psychological Association definition of torture in 2007. Members are forbidden from taking part in interrogations which included isolation at U.S. military prisons.”

A number of mental-health experts testified about overwhelming medical evidence that extended solitary confinement both creates and worsens mental illness. The Maine Civil Liberties Union, the National Religious Campaign Against Torture, and other groups also called prisoner isolation a form of torture.

The Department of Corrections has a tidy answer to the question of medical-personnel complicity in solitary-confinement torture. “We don’t utilize solitary confinement in Maine,” says Joseph Fitzpatrick, the psychologist who is clinical director of the prison system. While supermax prisoners are kept in isolation cells for 23 to 24 hours a day, with meals delivered through slots in steel doors, they have interaction with staff, so they are not in solitary, he maintains. At

LD 1611’s hearing, corrections officials told of several-times-a-week showers, occasional visits by a chaplain (who generally talks with a prisoner through the cell door), and other contacts that break up isolation. Fitzpatrick admits that if solitary confinement did take place, it might be destructive to prisoners.

But Stuart Grassian, a Massachusetts psychiatrist who is one of the country’s leading authorities on the effects of solitary confinement, says such deniers “don’t know what they’re talking about.” The scientific and legal literature, he says, “totally” would find that Maine supermax conditions constitute solitary confinement. Grassian testified in favor of LD 1611 at the hearing, where he was joined by other experts, legal as well as medical, in describing how Maine supermax conditions rank as classic solitary confinement.

According to Fitzpatrick, the state’s two adult prisons — the other is the medium-security Maine Correctional Center in Windham, where there are 22 solitary-confinement cells — have around 20 mental-health employees covering 1,500 prisoners, including a psychiatrist and two psychologists at each facility. Most of the employees work for Correctional Medical Services, a for-profit corporation that has figured in a number of prisoner-abuse scandals across the country.

Repeated requests by the *Phoenix* to interview psychologist Maureen Rubano, the state prison’s mental-health director — a state employee — have long gone unanswered.

Maine Medical Association Complicity?

Grassian also has a problem with the peer reviewers — teams of doctors from the Maine Medical Association who regularly monitor the medical and psychiatric care provided in the state’s prisons — if they ignore the effects of solitary confinement on prisoners.

Gordon Smith, the lawyer who’s the MMA’s executive vice-president, says that while there’s “no doubt” solitary confinement causes mental illness, he couldn’t recall solitary confinement ever being mentioned as a factor in an MMA-

‘Physicians must oppose and must not participate in torture’

“Torture refers to the deliberate, systematic, or wanton administration of cruel, inhumane, and degrading treatments or punishments during imprisonment or detainment. Physicians must oppose and must not participate in torture for any reason. Participation in torture includes, but is not limited to, providing or withholding any services, substances, or knowledge to facilitate the practice of torture. Physicians must not be present when torture is used or threatened. Physicians may treat prisoners or detainees if doing so is in their best interest, but physicians should not treat individuals to verify their health so that torture can begin or continue. Physicians who treat torture victims should not be persecuted. Physicians should help provide support for victims of torture and, whenever possible, strive to change situations in which torture is practiced or the potential for torture is great.” —American Medical Association Policy on Torture, issued December 1999

reviewed case of prisoner mental illness, and he reads each confidential review. Smith says his group is “not contracted” to look at the effects of isolation. The doctors who go to the prison and inspect the patient charts at random, he says, may not even know if the patient is kept in solitary. Prison officials admit that the supermax is where many mentally ill prisoners wind up, and that more than half of supermax prisoners are seriously mentally ill.

In a peer review there are usually three doctors on a team who for \$100 an hour look at about 30 to 40 charts, Smith says. In recent years teams have examined prison adult psychiatric care and adolescent psychiatric care — the latter at the state’s two juvenile prisons. Reviewers talk with the caregivers and medical director of the prison unit involved, but “in 25 years of peer reviews around the state I don’t recall a single instance where a reviewer asked to speak to a patient,” Smith says, although the contract with Corrections allows this. Smith wouldn’t reveal reviewers’ names. The MMA has been doing prison-care review for 10 years.

Despite what appear to be extremely narrow reviews, the MMA’s \$20,000 annual contract with Corrections obligates it to provide “reviews of psychiatric and other medical care at the MDOC facilities to ensure the highest quality of care for the prisoners and residents.” Grassian finds absurd any refusal by medical personnel to acknowledge the effects of isolation on prisoners, particularly on the mentally ill: “You just can’t be a doctor and not look at living conditions.”

By many accounts psychiatric patients often go back and forth between the supermax’s more relaxed 32-cell psychiatric-care “pod,” where some prisoners get considerable time outside their single-person cells, and its regular solitary-

confinement cells. “You don’t have to be a genius” to understand what’s going on in this kind of cycle, Grassian says. Solitary confinement makes the prisoners sick. “It’s ethically so repugnant” for a doctor to ignore the effects of solitary confinement, he adds. Among some Maine doctors, however, a consciousness is dawning that their colleagues may not be seeing the elephant in the room.

Petzel, the Maine Association of Psychiatric Physicians president, notes that “First, do no harm” is a fundamental principle of medicine. “Turning a blind eye to what’s going on is doing harm,” she says.

A doctor who in March stood with Petzel at a press conference in support of LD 1611, Jacob Gerritsen, a retired internist from Camden and a former MMA president, concurs, but emphasizes, “Let’s face it. Before the bill [LD 1611] no one was paying attention” to this issue. “When you’re in the trenches you don’t see these things.”

Petzel, an MMA member, says she is considering introducing a resolution at the MMA’s annual meeting — the next is in September — challenging the way the organization reviews prison medical practices. Gerritsen says he’d support such a resolution, though he suspects a “very uncomfortable” debate would ensue over it. The MMA took a “neither for nor against” stance on LD 1611, Gerritsen says, because of opposition from doctors he describes as conservative.

The chief doctors’ organization in the state, with 2,000 members out of 3,500 active doctors in Maine, the MMA is affiliated with the American Medical Association, which has a strict policy prohibiting physicians from even being present “when torture is used or threatened.”

At LD 1611’s public hearing, Smith,

the MMA executive, acknowledged the “grave concern” some physicians have with solitary confinement, but presented his organization’s involvement in peer reviews at the prison as a kind of conflict of interest that prevents it from taking sides on prisoner treatment.

The torture inherent in solitary confinement is one of many supermax-related issues the Corrections Department has recently had to deal with. Former chaplain Stan Moody and others associated with the prison have reported guard and health-worker callousness toward sick or injured prisoners, prisoner beatings, and widespread tolerance of prisoner abuse. Much of the mental-health therapy, they report, occurs infrequently and with the mental-health worker often separated from the prisoner by the cell door, which is a violation of medical ethics since there’s no patient confidentiality.

The state police are investigating two cases in which supermax prisoners died after allegedly receiving inadequate medical care or having care deliberately withheld. Although the MMA’s contract with the department allows it to review such an “adverse event,” Smith says the department has never asked it to do so.

Before the legislature recently adjourned, it passed a watered-down LD 1611, requiring a study of solitary confinement to be undertaken by the department, the state Board of Corrections, and the Criminal Justice Committee. Backers vow to monitor the study and say they will push the next legislature to pass a bill with teeth in it. Governor John Baldacci, an opponent of the original LD 1611, signed the measure on April 15. ■

This article originally appeared in The Portland Phoenix on April 21, 2010, and is reprinted with permission of the author.

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\$13 Million Settlement in DC Mass Arrest of Protestors

by David M. Reutter

The District of Columbia agreed to pay \$13,302,500 to settle a class-action lawsuit related to the illegal arrest of 680 people. Those people were arrested on April 15, 2000 in connection with the protest against the Prison Industrial Complex during the International Monetary Fund-World Bank demonstrations.

The arrestees were engaged in a “fluid” and “fragmented” “snake march” that took place over the course of hours through ten blocks and ended in a major urban thoroughfare during rush hour. A police line stopped the march at approximately 20th and K Streets, NW and another police line was placed behind a segment of the march at approximately 20th and I Streets, NW.

Persons were not allowed to leave the area within the police lines and were arrested. Those arrested included demonstrators, bystanders, tourists, journalists, legal observers and parents and their minor children.

The lead plaintiff, Benjamin Becker, was 16. He came with his father, Brian Becker, to protest “against the broad, neoliberal, globalization agenda.” Brian Becker, an organizer of the protest, was left in a stress position of having his right hand tied with a flex cuff to his left foot. He refused to pay a fine and was the only demonstrator arrested that day who went to trial. He was acquitted of disorderly conduct and failure to obey.

In recommending summary judgment be granted to the class, the magistrate judge said it was “nothing short of ludicrous” to suggest there was particularized probable cause that each of the cordoned off arrestees were among those demonstrators observed by Metropolitan Police Department (MPD) Lt. Jeffrey Herold to have committed wrongs.

The 14 class protestors will each receive \$50,000 under the settlement. The fund for the remaining class members is \$9,180,000. It is to be distributed among the class, limiting the total award to \$18,000. An administration fund of \$150,000 is to be established, and the attorneys will receive \$3,272,500 for over eight years of work.

The settlement also requires training for MPD officers in handling First

Amendment assemblies and mass demonstrations. It also requires an order to expunge all arrest records of the class, allowing them to claim they were never arrested in the incident.

The lawsuit also involved claims of eight other individual plaintiffs related to arrests at different times/locations of

the mass arrest. *PLN* will report any settlement on those claims. The settlement for the class was reached on January 8, 2010. See: *Becker v. District of Columbia*, USDC, (D. Columbia), Case No. 01-cv-00811. ■

Additional source: *Associated Press*

State Auditor Issues Report on Washington Department of Corrections

On December 7, 2009, the Washington State Auditor’s Office released a report on an audit of the Department of Corrections (DOC) that covered the time period from July 1, 2008 through June 30, 2009.

The report examined cash handling, payroll, credit cards, local funds and the status of recommendations from previous annual audits. Two new problem areas were found: inadequate policies or internal controls over Voyager fuel cards, and inadequate internal controls over cash handling in prison mailrooms.

The Voyager cards were intended to allow fueling of DOC vehicles, and were limited to purchasing regular unleaded or diesel fuel, up to six car washes annually, and emergency purchases of oil, wiper blades or vehicle lights. As of May 2009, the DOC had issued 1,152 fuel cards—852 assigned to fleet vehicles, 279 assigned to prisons or offices and 21 to individuals. Only 785 of the cards were used during the audit period.

Fuel card purchases are supposed to be reviewed by a regional office. However, in practice the State Auditor found that supporting documents were not reviewed and fuel card activity was not tracked. Some reviewers did not understand what purchases were allowed, and card users did not consistently obtain receipts. Receipts and bills were not reconciled. Reviewers failed to ask for justifications for “emergency” purchases, and the number of car washes was not tracked.

Auditors reviewed 120 questionable transactions totaling \$3,712.77 where supporting documents and/or mileage logs were missing. Seventy of the purchases were for disallowed items such as unauthorized types of fuel or nonemergency oil changes. Eighteen could not be deter-

mined to have been for DOC business. The total amount of the disallowable purchases was \$2,900.84, or about 8% of the total fuel card bill of \$36,406.93 during the audit period.

The State Auditor recommended that the DOC establish and enforce policies to prevent the misuse of fuel cards, train card users on allowable use and documentation requirements, refuse to pay fuel bills without supporting documentation, and regularly eliminate fuel cards that are not being used. The DOC agreed to those suggestions.

Auditors also discovered inadequate controls over cash handling in prison mailrooms after reviewing procedures at the Washington Correctional Center for Women (WCCW), McNeil Island Correctional Center (MICC), Monroe Correctional Center and Airway Heights Correctional Center (AHCC), all of which used the same receipting system to log cash received in mailrooms.

At all of the reviewed facilities, mail could be opened with only one person present, money orders were left unsecured on a table before being logged, no signature was required when money orders were transferred to the business office, and the receipting system allowed permanent record deletions that left no audit trail.

At WCCW and MICC, a common logon was used although individual logons were possible, and checks and money orders returned to the sender were not logged at all. Bank deposits and money order logs were not reconciled at WCCW. At AHCC, a single employee picked up mail from the post office and money orders with attached receipts were left in an unsecured bin in the mailroom awaiting transfer to the business office.

The State Auditor recommended

requiring two people to be present when mail is picked up or opened, reporting money orders and other payments immediately, and establishing a cash-receipting and tracking system that records all transactions and does not allow permanent record deletions. The DOC responded that it did not have resources to replace the current cash-tracking system, but would assign individual logons and passwords and improve controls for opening mail.

Previous audits had revealed inadequate internal controls over local funds, including misappropriation of money from the MICC Offender Welfare and Betterment Fund in 2008. [See: *PLN*, Oct. 2008, p.45]. Auditors found that the theft at MICC had been adequately prosecuted and some control weaknesses addressed.

However, other control weaknesses remained, as there was still inadequate segregation of duties in the MICC Trust Accounting System that could result in misappropriation of funds. ■

Source: *Washington State Auditor's Office Accountability Audit Report, Department of Corrections, Report No. 1002601*

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Settlement Allows North Carolina Prisoners to Receive Compensation for Writings

by David M. Reutter

North Carolina's Department of Corrections (NCDOC) has entered into a settlement agreement that allows prisoners to prepare for publication and receive compensation for manuscripts so long as the prisoner "authorizes a family member to handle all issues and correspondence related to the business aspect of publishing for compensation."

The settlement came in a lawsuit filed by the American Civil Liberties Union of North Carolina on behalf of prisoner Victor L. Martin, a critically acclaimed author who has published a series of books in an emerging and popular literary genre known as "urban fiction."

Prior to November 30, 2006, Martin had written and published four novels through three publishing companies without adverse action from prison officials, who not only were aware of these activities, but who praised him for "doing something positive."

Captain Fredrick S. O'Neal, an Internal Affairs officer at Central Prison, was not enthused with Martin's writings, which contain "the language of the streets, with plenty of slang and four-letter words." O'Neal, along with several other guards, searched Martin's cell and seized materials related to his urban fiction writing and his publication efforts.

From that time on, Martin was regularly written disciplinary infractions and placed in segregation for his writing activities violating prison rules against conducting a business. ACLU-NCLF's legal director, Katherine Lewis Parker, and cooperating attorney W. Swain Wood, began intervening on Martin's behalf. Ultimately, they filed a civil rights complaint on his behalf in federal court in February 2008. The complaint alleged the adverse actions taken against Martin were "specifically because of the content of [his] writings." It further claimed O'Neal had unlawfully seized and destroyed the only copy of a 310-page, handwritten urban fiction manuscript.

The March 8, 2010 settlement overturned ten disciplinary infractions given to Martin as a result of his writing and

a \$10,000 payment for damages and attorney fees. Most significantly, NCDOC must change its policy to allow prisoners to prepare a manuscript for publication, for outside typing, for copyrighting or for private use so long as the prisoner does not receive direct compensation. The policy covers fiction, non-fiction, poetry, music lyrics, drawings, cartoons, and other writings of a similar nature.

It also sets guidelines for handling a confiscated manuscript, assuring it will not be destroyed without notice to the prisoner. Finally, there is a provision that

allows the prisoner to give power of attorney to handle the business aspect of publishing.

"I hope that my fellow inmates will understand that positive actions bring positive results," said Martin in giving credit to the ACLU-NCLF and Wood for the policy change. "I will continue to write within the guidelines of this new policy, and I also wish to thank all my supporters." See: *Martin v. Keller*, USDC, (E.D. North Carolina), Case No. 5:09-CV-0044. The settlement and complaint are available on PLN's website. ■

Prisoners of the Census in New York: Democracy on the March!

by Eric Lotke

New York is the most recent state to pass new rules about how people in prison are counted in the U.S. Census. The law (A11597/S8415), passed by the New York Senate on August 3, 2010, provides that for purposes of political redistricting, incarcerated persons count as residents of their places of residence prior to incarceration, not as residents at their place of incarceration.

Maryland passed a similar rule in April. Delaware passed one in June. If other states move in this direction, it will become a trend that the Census Bureau cannot ignore. The Bureau's job, after all, is to take the Census. Three states representing 8.5 percent of the U.S. population think something is wrong. As the votes of no confidence continue, the Census may need to change its practice.

First, some history. The Census Bureau's general rule is to count people at their "usual residence," the place where they live and sleep most of the time. People's usual residence need not be the same as their legal or voting address—but still, determining the usual residence for most people is as easy as filling out a form. Special categories present special challenges, however. Sailors in the merchant marine, children in joint custody and long-term commuters all require different rules, and these rules have evolved over time. People

in prison are in a category called "group quarters" which includes nursing homes, college dormitories, military installations and other places where unrelated persons live together. As a rule, people in group quarters are counted where the group quarters are located. For people in prison, that's the prison. In cases like college dormitories, individuals are given forms and invited to fill them out, generally choosing either the college or their family home.

Applying the simple usual residence rule to people in prison might once have been reasonable—but no more. Nowadays 2.4 million people are in prison or jail in America. More people live in prison and jail than in our three least populous states combined. Organized differently, they would have six votes in the United States Senate, almost enough votes to move from majority to cloture. The Census Bureau's residence rule no longer makes sense.

Demographics make it worse. White men are imprisoned at a rate of 770 per 100,000; black men at six times that rate, closer to 4,600 per 100,000. Regardless of crime, justice or just desserts, the Census Bureau gives this disparity new operational significance. People in prison generally lose the right to vote, but their bodies still count for purposes of political apportionment. The Census Bureau thus

counts people out of the urban centers that they usually consider home and to which they will return long before the next census; it counts them instead in rural communities where they have little common interest, and will leave as soon as they are able.

Even more insidious, this population is counted in the rural area with the prison but not in the similar adjacent rural area without the prison, which enhances the prison region's clout compared to its neighbors. Researchers (and I have long been one of them) call it "prison-based gerrymandering."

In New York State one out of every three people who moved to upstate New York in the 1990s actually "moved" into a prison. Most of them (66%) are New York City residents, but the vast majority (91%) are counted by the Census as residents of upstate prison towns. The new bill, which was signed by the governor on August 11, changes that.

In Maryland, which changed its rule in April, 18 percent of the population credited to the Maryland House of Delegates District 2B (near Hagerstown) is actually incarcerated people shipped in from other parts of the state. In Somerset

County, 64 percent of the population in the First Commission District is in prison, giving each resident in that district nearly three times as much influence as residents in other districts.

An especially charming example comes from Anamosa, Iowa. One City Council member was elected with only two votes, his neighbor and his wife. Everyone else who makes up his district is in a nearby prison. Peter Wagner of the Prison Policy Initiative tells this story in a movie about prison-based gerrymandering due out in the fall.

Yes, there is a solution. For the 2010 census, the Bureau has agreed to release micro-data early enough that jurisdictions which choose can try to correct the problem manually. It's hard work but it's a step in the right direction. For 2020, the Census Bureau should simply give people in prison a form to fill out, just like they do for the rest of the population. Prisons are highly controlled environments where mail, food, uniforms and work orders are distributed daily. Passing out the Census forms would present little problem. As a back-up, official data for address at time of arrest or for supervision upon

release are generally available in institutional files.

The Census Bureau has ten years before another census is conducted. Three states have already sent the signal. Changing the residence rule would be a victory for democracy over bureaucracy. 📧

Eric Lotke is the Research Director at the Campaign for America's Future and author of "2044: The Problem isn't Big Brother; it's Big Brother, Inc." This article originally appeared on www.dailykos.com and is reprinted with permission.



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Ex-Cons Face Tougher Job Market in Great Recession

by David M. Reutter

Those who have the black mark of a felony conviction face prejudice in the job market even when the economic picture is rosy. In these times of the Great Recession, that black mark has the ex-con jobless rate six times higher than those without a felony record. Experts in the field say the situation for many ex-cons leads to desperation to make ends meet, which increases the likelihood they will reoffend.

With about 700,000 people being released from state and federal prisons yearly, there is a large pool of people needing work. Budget crunches nationwide have officials looking to release prisoners to save money, and whether those released find employment will often determine if they become statistics of recidivism.

"If people get drawn back into the real world, get a job and make a living, studies show they'll be less likely to go back to prison," said Howard Husock, vice president of policy research at the Manhattan Institute for Policy Research. "With early release now on the menu for so many states, it makes the matter more pressing."

The national unemployment rate has been hovering at around ten percent since late 2009. This pits former prisoners against those who have never served time for jobs in a tight market. The unemployment rate for ex-cons is not tracked by the U.S. Department of Labor, but experts estimate the jobless rate for them is 40 to 60 percent.

"A lot of people are hitting a very poor economy," said Carol Peebles, reentry coordinator for the Colorado Criminal Justice Reform Coalition in Denver. Even in good times this results in "over half [going] back to jail in three years. The lack of employment plays a big part in this."

It is essential that ex-cons find a job earning at least minimum wage within two months of release to avoid returning to jail within the first year, says Nancy La Vigne, director of the Justice Policy Center at the Urban Institute in Washington.

The Great Recession has lengthened the line of job seekers. "Our folks are always at the back of the line when it comes to employment, and that line has gotten longer," said Glenn Martin, director of the Fortune Society, a New York based prisoner re-entry non-profit.

To prevent a repeat of the 1980s, which saw prison releases to save money

in recessionary times and high recidivist rates, some prison officials and advocates are focusing on job training and prisoner re-entry programs.

Chicago's Sheridan prison focuses on programs that not only train prisoners for jobs, but which aim to lead prisoners to recognizing criminal behavioral patterns within themselves. Once released, prisoners are provided a support system to help them successfully transition into society.

Traditional prisons are not places that prepare one for employment, and advocates hope to instill skills that enable success. "Not everyone is ready for the workforce," said Ingrid Johnson of the Prisoner Re-entry Initiative in Newark, New Jersey. "They need to be trained not only in job skills, but basic employability issues." ■

Source: *MSNBC*

Expanded Eligibility for New York Medical Parole Has Little Effect

by Matt Clarke

In April 2009, New York passed a statutory amendment that expanded the state's compassionate release program for terminally ill prisoners. The amendment permitted medical parole for prisoners convicted of certain violent crimes who were physically or cognitively unable to present a threat to society, if they had served at least half their sentence. The new guidelines resulted in an increase in the number of medical parole applications, from 66 in 2008 to 202 in 2009. However, the number of prisoners actually released on medical parole has not gone up.

Eddie Jones, an 89-year-old Harlem loan shark convicted of shooting a man twenty years ago, was slated to become the first prisoner released under the expanded medical parole guidelines. Instead, he died in prison on February 1, 2010, nine days before his scheduled parole hearing. He suffered from heart disease and was suspected of having cancer.

Mr. Jones' fate was not unusual. Since 2005, at least 17 New York prisoners have died while awaiting processing of their medical parole applications. Also known as compassionate release, medical parole has been a hot topic in detention facility circles nationwide over the past several years. The idea is to release selected prisoners who are incapable of being a threat to society, which saves the prison system the cost of their medical care. After release, their treatment is often covered by Medicare or Medicaid.

New York officials estimate medical care for a seriously ill prisoner costs the state \$150,809 a year. Therefore, especially

in these times of scarce budget resources, medical parole makes sense. That is why New York became one of a dozen states to expand or streamline their compassionate release guidelines in the past two years.

Forty-one states allow medical paroles, but they often have little impact on the number of prisoners who are released. For example, federal judges have ordered the California prison system to reduce its population by 40,000 prisoners, yet only two prisoners were released on medical parole in 2009. Current state law restricts medical parole to prisoners who are "permanently unable to perform activities of basic daily living," and such releases must be approved by a judge. A bill was introduced in March 2010 to broaden California's medical parole program.

Alabama is struggling with prisons that hold double their population capacity, but the state released only four prisoners on medical parole in 2009 while 35 prisoners died awaiting the processing of their applications. New York, which enacted medical parole legislation in 1992 during the AIDS crisis, has medically paroled only 364 prisoners since that time. Seven were released in 2009.

In the federal prison system, the U.S. Sentencing Commission issued a new policy statement in November 2007 which held that the compassionate release provision of 18 U.S.C. § 3582(c)(1)(A) should include both medical and non-medical conditions. However, a motion for compassionate release must be initiated by the Bureau of Prisons, not the prisoner, and federal prison officials typically make such

motions only when a prisoner is "suffering from a serious medical condition that is generally terminal, with a determinate life expectancy." See: *United States v. Traynor*, 2009 WL 368927 (E.D.N.Y. 2009).

Texas, on the other hand, has medically paroled around 1,000 prisoners over the past decade, although that represents only about 25% of the prisoners recommended for such releases by prison doctors. Since 2008, Michigan has released more than 100 prisoners who are elderly or infirm. "It gives the prisoner an opportunity to be in the community during that end-stage period," said Michigan DOC spokesman John Cordell.

The reasons why few prisoners are released on medical parole include lingering concerns that even terminally ill prisoners may commit more crimes, plus the ever-present politician's fear of appearing "soft on crime." According to Texas parole board chairman Rissie L. Owens, "You can be sick, have an illness or a disease, and still be a threat."

Prisoner advocates view these fears as overblown. During the 18 years that New York's medical parole program has been in effect, only 3 of the 364 parolees have returned to prison – none of them for a violent

offense. However, so long as compassionate release policies are decided on the basis of emotions and politics, few prisoners can expect to obtain medical parole regardless of the humanitarian and financial benefits.

"These are totally incapacitated inmates, terminally ill inmates, inmates on respirators, who are not paroled at a huge expense to the state and hardship to the inmate's family because of the nature of a crime they may have committed 20 or 30 years ago," said Texas state senator John Whitmire. "I think it's largely for political reasons."

An estimated 74,100 prisoners nationwide are age 55 or older, an increase of 79% over the past decade. Elderly prisoners are more likely to have serious health conditions. Last year, in addition to New York, the prison systems in Maine and Wisconsin expanded their medical parole guidelines. And on the federal level, Congress included a two-year trial project for the early release of elderly, non-violent prisoners, called the Elderly Offender Home Detention Pilot Program, when it enacted the Second Chance Act in 2008.

In March 2010, the *New York Post* reported that the first prisoner to be released under New York's expanded medical

parole law would be Don Juan Britt, 37, who had served 15 years of a 20-year sentence for attempted murder. Britt was left partially paralyzed by a brain aneurysm; he had previously obtained a \$325,000 settlement in a lawsuit against the state, claiming that prison officials had failed to protect him from attacks by other prisoners. [See: *PLN*, Feb. 2008, p.33].

Sources: *New York Times*, www.modern-healthcare.com, www.texastribune.org, www.nyfederalcriminalpractice.com, *New York Post*

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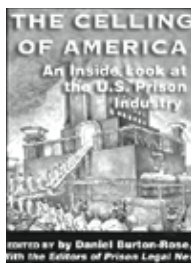
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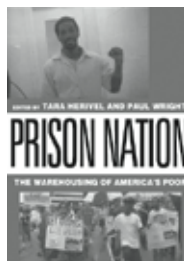
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Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear,

by Jonathan Simon (Oxford University Press 2007), 344 pages

Review by Ian Head

This past spring, a 12-year-old student in Queens, New York was arrested, handcuffed and taken to a local precinct for doodling on her desk during class. Paraded out of the building in tears by police, this was just the latest in a string of horrific incidents that led the New York Civil Liberties Union to file a class-action lawsuit regarding police in schools.

But it would probably not surprise author and professor Jonathan Simon. In his book *Governing Through Crime*, he writes that schools are one of many parts of American society governed through the idea, and fear, of crime – in this case, the “crime” of damaging school property. Discussing the “zero tolerance” policies that have been increasingly put in place in schools across the country, Simon writes, “The right to go to school in a safe environment has been transformed from a set of expectations for administrators to a zero-sum game between aggressors who are criminals or criminals in the making, and their victims – a shifting group consisting of everyone not stigmatized already as a criminal.”

Simon shows that this “zero-sum game” where “criminals” are opposed to a shifting group of “victims” is pervasive in American society beyond just schools. He begins the book reminding us that “since all legal authority ultimately rests on the threat of lawful violence within the criminal law, all governance is ‘through’ the implied threat of making resistance at some stage a ‘crime.’” In other words, ideas of crime and violence have always been part of the American legal system. Recognizing that, Simon attempts to demonstrate that when President Lyndon Johnson took the lead in the 1960s with his “war on crime,” and specifically the “Safe Streets Act,” our society began moving to ramp up crime as the priority in how we are governed today.

Simon shows that, more and more, Americans see much of their life through a “criminal” lens. What gained traction first through the legal system has crept into all dynamics of how we interact in our everyday lives, whether it be at work, in our relationships with loved

ones or how news is presented to us on television.

He begins with his own analysis of the courts. Noting that “from the mid-1970s, [courts] have turned out a broad body of law favoring the government’s power to punish,” he believes the power of judges within the legal system has been decreased and replaced by the “valorization of prosecutors, police and victims.” While he makes several interesting points about the ability of prosecutors to hold judges “in check,” it still seems hard to sympathize with most judges, no matter what political pressures they may face. However, Simon’s points about the significance of “crime victims” are incredibly prescient. He writes:

[The] crime victim [is] the central figure to which the government must respond ... governing agents in the executive and legislative modes have forged pathways by which to route their own power and knowledge to and through the victim. Governors in many states can use their power to slow or stop parole of violent criminals. Legislatures can enact reams of new laws, lengthen prison sentences, and strip convicted criminals of more aspects of their dignity or well-being.

Simon sees the late 1960s as the jump-off point of this criminal-versus-victim dynamic in governance. He writes that “to be for the people, legislators must be for victims and law enforcement, and ... never be for criminals or prisoners as individuals or as a class.” This dynamic is used throughout the book, both abstractly and specifically in all kinds of situations. Simon’s point isn’t that the federal government suddenly created a massive new system of penalties or expansion of the prison system, but that the “representational system the [Safe Streets Act] modeled” has led to these kinds of systems being put into place.

Simon then points to the Violent Crime Control and Law Enforcement Act of 1994 as the next major step in furthering criminal governance. He notes that “with crime the most visible and measurable phenomenon around, it becomes possible to legislate on ever more detailed aspects of it, even in the absence

of a convincing strategy of control.” He goes on to show how politicians were so obsessed with “victims” that they created a maze of hypocritical situations, where people could be designated as criminals on one hand because of their immigrant status, but then protected as a victim due to a domestic dispute. It further shows how amorphous the idea of who the government is “protecting” really is.

Simon notes that both these laws were passed by so-called liberals and endorsed by both Democrats and Republicans, each of which got to look “tough on crime” through different sets of measures, whether it be the death penalty or increasing the police force. Additionally, he touches on the interwoven issues of race and class, and how each is talked about – usually through coded language – by both policy makers and the law itself.

Simon has packed his book with analysis and examples – most chapters include at least one “case study” to showcase not only one specific argument, but how multiple points intertwine with each other. He is especially good at breaking down what seem like simple statements or ideas. For example, he spends a few pages discussing each word used in Lyndon Johnson’s one-sentence signing statement. Juxtaposing the phrases “local neighborhood” and “city streets,” Simon gives a glimpse into how politicians use simple language to convey ideas about class, race and crime – what is the difference between “local neighborhoods” and “city streets?” Who lives on each? What are the pre-supposed assumptions of what takes place on each?

Occasionally, Simon’s writing drifts into a kind of academics-only landscape, with run-on sentences that don’t completely make sense. Some of his examples are stronger than others, and parts of the book might have been streamlined a bit. For example, his use of the “war on cancer” in comparison to other policy “wars” (such as the “war on crime” or the “war on poverty”) didn’t really hold much weight. However, his use of cancer as a metaphor in talking about the pervasiveness of the “war on crime” worked well.

Ultimately, the book is more focused on analyzing how American society is “governed through crime” than proposing much of a remedy for it. Simon’s brief conclusion, written sometime around late 2005, offers hopeful prospects that read depressingly today, such as “the awakening of American journalism and social science” to issues of mass imprisonment, or the “success” of the 9-11 Commission.

But rather than focus on his conclusions, the strength of the book is how it speaks to a framework of crime in our society. While many may know, often firsthand, how we are governed through crime, it is sometimes hard to exactly articulate. His focus on the “zero sum game” of victims and criminals isn’t about making light of the violence and problems within our society, but about seriously examining the ways the power structure frames how we talk and judge each other and the damage it is doing to everyone. In the passage below, while discussing both the 1968 and

1994 Acts that much of the book focuses on, Simon sums up this idea well:

These laws are also important for the real impetus they provide for more people to partake of the powerful public confirmation that awaits their taking up and affirming the identity as crime victim. These mechanisms are state-sponsored ways to reproduce a certain kind of victim voice that has been promoted by the victim’s rights movement, one of extremity, anger and vengeance. This has important representational consequences within the larger logic of the victim as idealized political subject. To the extent that activist victims define the victim subject position more generally, lawmaking will systematically favor vengeance and ritualized rage over crime prevention and fear reduction.

The fact that 12-year-olds are being arrested for wielding Magic Markers on their desks shows how necessary it is to change the way we govern in this society. Simon’s book gives us a way to talk about it and ideas of where to start. ■

New York Prison Chaplain Accused of Smuggling Weapons

Zul Qarnain Abdu-Shahid, 58, a Muslim chaplain for the New York City Department of Corrections (NYDOC), was arrested on February 3, 2010 for attempting to introduce contraband into the Manhattan Detention Complex; he was temporarily held on \$50,000 bond after his arraignment. Abdu-Shahid allegedly had a pair of scissors and three box cutter-type blades in his duffle bag when he entered the facility.

As a result of an investigation surrounding the contraband smuggling allegations, it was discovered that Abdu-Shahid had been convicted of a 1976 murder that occurred during a Harlem supermarket robbery. At that time he was known as Paul Pitts, and he served almost 14 years in prison for homicide.

An ecclesiastical endorsement is the only civil service qualification for hiring a prison chaplain, according to NYDOC spokesman Stephen J. Morello. Abdu-Shahid had the required endorsement from the Majlis Ash-Shura of New York. The NYDOC has around 50 chaplaincy positions, and applicants are required to submit fingerprints for a

background check and self-disclose their criminal history. However, a prior felony conviction does not disqualify them. Abdu-Shahid was hired by the NYDOC in 2007, six years after he completed his parole term.

“I think all of the policies, involving allowing certain imams access to our prisoners, have been an example of political correctness run amok,” said Peter F. Vallone, Jr., chairman of the City Council’s Committee on Public Safety. “Clearly, some of these people should never have been allowed access to prisoners.”

Abdu-Shahid maintained his innocence, saying he was unaware he had the scissors and blades in his bag. NYDOC Commissioner Dora B. Schriro suspended him following his arrest and called for a review of the agency’s vetting process for chaplains. Abdu-Shahid was fired in June 2010, though a grand jury dismissed the criminal charges on June 29. *PLN* has reported extensively on the persecution of Muslim clergy in New York and federal prisons and jails. ■

Sources: *New York Times*, www.huffingtonpost.com, NYDOC press release

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Former President of Florida Sheriff's Association Enters Plea in Kickback Scheme

by David Reutter

In February 2010, former Okaloosa County, Florida sheriff Charlie Morris pleaded no contest to state racketeering and money laundering charges related to an employee bonus kickback scheme that netted him thousands of dollars.

To enter the plea, Morris was transported from federal prison where he was serving a 71-month sentence after pleading guilty in August 2009 to fraud, money laundering and conspiracy charges. He was also ordered to pay \$212,537.53 in restitution and forfeit \$194,000 in property as part of his federal conviction, and U.S. District Court Judge Lacey Collier admonished him for "tarnish[ing] the badge of every law enforcement officer in this entire area." [See: *PLN*, Dec. 2009, p.22].

"It's time to move on," said Morris, who previously served as president of the Florida Sheriff's Association, as he appeared in court in a jail jumpsuit and handcuffs to plead to the state charges. "I don't want to see my family go through another trial. I've done enough harm."

Morris will not be sentenced on the state charges until after the trials of his co-defendants, whom he agreed to testify against. Five other sheriff's office employees have been charged in connection with the kickback scheme.

Morris' former director of administration, Teresa Y. Adams, pleaded guilty to federal charges and was sentenced on Sept. 18, 2009 to 36 months in prison, three years' supervised release and joint repayment of the restitution ordered in Morris' case.

In January 2010, Sabra Thornton, Morris' chief of staff and mistress, was found guilty following a state court trial. Also facing state racketeering charges are Chief Deputy Michael Coup, Finance Director Sandra Norris and Information Technology Specialist David Yacks.

When Morris was arrested in Las Vegas in February 2009, he was found with \$35,000 in cash. Investigators traced the money to a scheme in which certain sheriff's office employees received bonuses and then paid a portion of the bonuses to Morris in cash. The money came from Homeland Security and Justice Training grants, and Morris spent some of the

kickbacks on gambling.

"This is a very sad, sad situation for all parties involved. It involved crimes that extended over [a] long period of time, [and] involved many people that worked for him," said State Attorney Bill Eddins.

Morris' mistress, Sabra Thornton, was sentenced in April 2010 to 25 months in prison and five years' probation on state

theft charges. She was further ordered to pay \$67,912 in restitution to the sheriff's office and approximately \$4,000 in fees. She was released on bail pending an appeal.

Coup, Norris and Yacks are scheduled to go to trial in October 2010. ■

Sources: *WACA*, www.thedestinlog.com, www.wjhg.com

Prisoners' Self-Help Litigation Manual, 4th Edition, by John Boston and Daniel Manville, Oxford University Press, 960 Pages, \$39.95

Reviewed by Paul Wright

The *Prisoners' Self-Help Litigation Manual* (PSHLM) by Dan Manville first appeared in 1983. It was designed to give prisoners an overview of the legal system, a basic overview of what their rights are and guidance on how to actually litigate a suit in federal court. The book went on to become enormously popular with jailhouse lawyers and in many court access cases it became a required part of prison law library collections. The second edition came out in 1986, the third edition in 1995. As the years passed the book became dated in that the law pertaining to prisoners' rights was rapidly changing, moreso with the passage of the Prison Litigation Reform Act and several key Supreme Court cases that severely diminished prisoners' rights. Now, fifteen years later, the fourth edition is finally available.

This is the third *PSHLM* that I have owned, and I still have the second and third editions sitting on my bookshelf. Unlike many other books and products, each edition of the *PSHLM* is better than the last. The authors clearly respond to feedback and strive to improve what is already a fantastic resource. The *PSHLM* is divided into sections. The section on prisoners' substantive rights discusses the relevant case law pertaining to all aspects of prison life: beatings, sanitation, food, clothing, medical care, censorship, disciplinary hearings, personal safety, use of force, segregation, access to the courts,

religious freedom, visitation, searches, property and much more.

If you are a prisoner, even if you don't plan to file a lawsuit yourself, reading this book will be a valuable experience. If you don't know what your rights are you can't seek help to enforce them. More importantly, the *PSHLM* explains the difference between the rights prisoners have and what court (state or federal) is the appropriate forum to hear a particular claim. All too often many prisoner lawsuits are dismissed as "legally frivolous" not because there is no actionable harm being claimed, but because the lawsuit was filed in the inappropriate court.

Most books dealing with prisoners' rights merely state what those rights are and leave it up to the reader to figure out how to enforce them. This is where the real value of the *PSHLM* comes in. This book gives an explanation of the legal system, different types of actions (e.g., civil rights, tort, habeas corpus, workers compensation, etc.), suing the right defendants, choosing a remedy, class action suits, and defenses prison officials are likely to raise. Then it gets down to the nitty gritty: how to actually file a suit in court and litigate it step-by-step all the way through the court system. It also contains a section on writing legal documents and conducting legal research. Any litigant who reads and masters the *PSHLM* will be a formidable courtroom opponent. The book is clearly written in plain English.

If you want to know how to enforce your rights this is the book for you. While the focus of the *PSHLM* is on prisoners and their rights, I would strongly recommend this book to any non-attorney who is seeking an explanation of what all those fancy legal terms, procedures and such mean. If you are a free citizen too poor to afford counsel, this book will give you the basic information you need to research, file and litigate a lawsuit on your own. It has dozens of example forms, briefs and motions. Attorneys, especially those with clients in jails or prisons, will find this book to be an invaluable quick reference, especially when an imprisoned client asks that age-old question, "can they do this to me?"

I went to prison in 1987 and shortly thereafter realized I needed to know what my rights were and how to enforce them. I bought my first copy of the *PSHLM* in early 1988 for \$16.00. I definitely got my money's worth. The next edition was sent to me as a review copy by the publisher, and I still have that as well. When I was

being bounced around the Washington prison system I was only allowed to bring one book with me on the chain bus. This is the book I brought. If you can only afford to buy one legal book this should be it. Every prisoner should have a copy of this book, to go along with their *PLN* subscription. The *PSHLM* also lists publications of interest to prisoners, a prisoners' assistance directory and recommended collections for prison law libraries.

The *PSHLM* is 960 pages in length; it is extensively footnoted and well organized. Previous editions had an index that was difficult to use, which has been corrected. It is exceptionally well-written, organized and designed to be used by real-world litigators. Prisoners should urge their law libraries to purchase the latest edition for their collection. Highly recommended. The *PSHLM* costs \$39.95 plus \$6 shipping for orders under \$50. To order, contact: Prison Legal News, P.O. Box 2420, West Brattleboro, VT 05303, 802-257-1342 or www.prisonlegalnews.org. 📖

\$3.125 Million in Settlements in Oregon Prisoner's Beating Death

On July 2, 2009, the estate and family of a mentally ill Oregon man who died in police custody settled claims against Multnomah County, a former deputy sheriff and jail nurses for \$925,000. The case remained pending against the City of Portland, American Medical Response (AMR) ambulance service and numerous individual defendants.

In September 2006, 42-year-old James P. Chasse, Jr., who suffered from schizophrenia, was chased by police officers who believed he was urinating on the sidewalk. An officer who outweighed James by more than 100 pounds tackled and landed on top of him. Sixteen of Chasse's ribs were fractured and his left lung was punctured.

AMR paramedics examined Chasse at the scene and released him to police for transport to the Multnomah County Detention Center. While in a holding cell, Chasse appeared to suffer a seizure and lost consciousness. A nurse viewed Chasse through a cell door window and told officers he was too ill to be booked into the jail.

Portland police transported Chasse to a hospital by patrol car but he died en route. The cause of death was listed

as broad-based blunt force trauma to the chest. [See: *PLN*, Jan. 2008, p.12].

Chasse's estate and family brought suit in federal court against AMR and various city and county defendants. The district court denied in part the defendants' motion to dismiss on June 3, 2009 and scheduled the case for trial. About a month later the county defendants settled for \$925,000. The remaining defendants moved for a change of venue, arguing that the extensive media coverage of Chasse's death made it impossible for them to receive a fair trial. Their motion was denied. AMR settled in December 2009 for a reported \$600,000.

On May 10, 2010, a month before trial, the City of Portland agreed to a \$1.6 million settlement to resolve the lawsuit. The city also agreed to release internal police reports into Chasse's death which had been sealed while the lawsuit was pending. The city had previously insisted on keeping the police reports secret, and claimed the Chasse family had "declined reasonable efforts to settle." See *Chasse v. Humphreys*, U.S.D.C. (D. Ore.), Case No. 3:2007-cv-00189-KI. 📖

Additional sources: *The Oregonian*, www.portlandmercury.com



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Tennessee Judge Facing Misconduct Charges Tries to Depose Disciplinary Counsel

by Matt Clarke

Clocke County, Tennessee General Sessions Judge John A. Bell, while facing a judicial misconduct complaint, sought to depose Joseph S. Daniel, disciplinary counsel for the Tennessee Court of the Judiciary, in February 2010. Bell also asked to review all complaints filed against Tennessee judges due to delayed rulings since 2003.

Daniel filed a motion to quash the requests for a deposition and the records as well as a separate subpoena filed by Bell.

Daniel was prosecuting a complaint against Judge Bell that stemmed from a civil case involving a car accident. David Pleau had accused Bell of misconduct in the civil case, including a lengthy delay in issuing a judgment. Bell then allegedly asked his attorney, Thomas V. Testerman, to convince Pleau to drop the ethics complaint.

Judge Bell initially refused to answer Daniel's questions, asserting his Fifth Amendment right against self-incrimination and attorney-client privilege in his communications with Testerman.

Previously, in 2008, Bell faced disciplinary charges of funneling probationers to a company operated by his brother-in-law and improperly accepting payment for a speech he gave at a local church. In that case he cut a deal with the Court of the Judiciary by agreeing to stop doing business with his brother-in-law's firm, East Tennessee Probation, Inc. He was further disciplined by the Court of the Judiciary earlier in his 12-year career as a judge, which resulted in a private reprimand.

In the most recent misconduct complaint filed by Pleau, the Court denied Bell's request to depose Daniel. Judge Bell was found guilty of misconduct following a two-day trial in June 2010, including a lengthy delay in rendering a judgment in Pleau's case and improperly trying to influence Pleau to drop his ethics complaint.

Judge Bell was suspended for 90 days. He was also ordered to pay the costs of the trial, amounting to \$3,107.45, and to take additional ethics training at his own expense.

Although Daniel tried to have Bell suspended without pay, or to have him pay

for the cost of a replacement judge during his absence from the bench, those requests were denied by the Court of the Judiciary on September 1, 2010. As Tennessee's constitution does not allow a judge's pay to be diminished while he is in office, Judge Bell's 90-day suspension amounts

to little more than a paid vacation. See: *In Re: The Honorable John A. Bell*, Tennessee Court of the Judiciary, Docket No. M2009-02115-CJ-CJ-CJ. ■

Sources: www.knoxnews.com, www.tsc.state.tn.us, www.newportplaintalk.com

Pennsylvania Prisoner Awarded \$185,000 in Civil Rights Claim; Harassment Continues

by David M. Reutter

A Pennsylvania federal jury has awarded \$185,000 to a prisoner in a civil rights action alleging conspiracy, retaliation, obstruction of access to the courts and defamation of character.

Pennsylvania state prisoner Andre Jacobs prosecuted the lawsuit pro se. His complaint involved events that occurred at SCI-Western in the Long Term Segregation Unit. Jacobs' problems began on September 15, 2003 when guard Frank Cherico confiscated 151 pages of Jacobs' legal documents from prisoner Eric Lyons.

The documents were seized on the grounds that prisoners are prohibited from assisting one another in legal cases unless recognized as a "legal aide." Guard Gregory Giddens responded to Jacobs' grievance challenging the seizure by saying he was a "fabricator" because only two pages had been seized.

Jacobs, however, had also written to prison guard Thomas McConnell, who acknowledged the seizure and implied the pages would be returned. Giddens, McConnell and Cherico then destroyed documentation regarding the seizure to make it appear that it never occurred. The conspiracy was enhanced by prison employee Carol A. Scire appointing Giddens as the grievance officer overseeing Jacobs' complaint.

The confiscated legal papers concerned a lawsuit Jacob planned to file against Giddens, Scire and other prison officials. Those documents and others were needed to prove claims in two other lawsuits, which Jacobs lost as a result of the destruction of his documentary evidence.

In November 2008, Jacobs proceeded to trial on his claims. The jury exonerated ten prison officials but found in Jacobs' favor on claims against Giddens, McConnell and Scire. It found against Giddens and McConnell on Jacobs' access to court claim; against Giddens, McConnell and Scire on the conspiracy and retaliation claims; and against Giddens on the defamation claim. The jury awarded a total of \$185,000 in damages.

On September 21, 2009, however, the district court entered judgment as a matter of law on the access claim for McConnell and Giddens and on the conspiracy claim for McConnell and Scire. This resulted in the following modified awards: conspiracy – Giddens, \$10,000 each for mental harm, property damage and punitive damages; retaliation – McConnell, \$5,000 each for mental harm, property damage and punitive damages; Giddens, \$10,000 each for mental harm, property damage and punitive damages; defamation – Giddens, \$10,000 each for mental anguish and humiliation, harm to reputation and punitive damages; and Scire for \$5,000 each for mental harm and punitive damages. The modified award totaled \$115,000.

Within days after the verdict, Jacobs said he was harassed by guards who filed "false disciplinary reports" against him and placed him on "restricted release," which means he will be held in solitary confinement until his release date. This case remains pending with post-trial motions filed by both parties. See: *Jacobs v. McConnell*, U.S.D.C. (W.D. Penn.), Case No. 2:04-01366-JFC. ■

Additional source: www.sfbayview.com

Ninth Circuit Says Qualified Immunity Warranted for Comb-Binding Denial

by Mark Wilson

On December 2, 2009, the Ninth Circuit Court of Appeals found that a prison librarian was entitled to qualified immunity for denying a prisoner's request to comb-bind his legal papers.

Oregon prisoner Frank Phillips intended to file a petition for writ of certiorari, challenging his conviction in the U.S. Supreme Court. The petition was due on or before June 18, 2001.

On June 8, Phillips was called to the library to bind his petition but the comb-binding machine was not available. On June 11, 2001, Phillips asked to be rescheduled to use the binder. He did not mention his deadline.

Prison librarian Lynn Hust received Phillips' request on June 13, 2001, and on June 18, the filing deadline, she denied Phillips' request to use the machine. On June 25, 2001, Hust's supervisor granted Phillips' request; he comb-bound the petition four days later, but the Supreme Court rejected it as being "out of time."

Phillips sued Hust in federal court, alleging that she denied him access to the courts when she denied him access to the comb-binding machine. The district court granted summary judgment to Phillips. See: *Phillips v. Hust*, 338 F.Supp.2d 1148 (D.Or. 2004) [*PLN*, Apr. 2006, p.35]. Following a bench trial, the court awarded Phillips compensatory damages of \$1,500. Prison officials paid him \$1,250 to settle a

separate retaliation claim.

Hust appealed, and "the panel majority concluded that Hust's actions denied Phillips his right of access to the courts and that Hust was not entitled to qualified immunity because the right was clearly established at the time Hust acted." See: *Phillips v. Hust*, 477 F.3d 1070 (9th Cir. 2007). Judge Diarmuid O'Scannlain dissented.

Hust sought rehearing en banc, which was denied by the full court. However, Chief Judge Kozinski, joined by nine other judges, dissented from the denial of rehearing en banc. See: *Phillips v. Hust*, 507 F.3d 1171 (9th Cir. 2007). Hust then filed a petition for writ of certiorari with the U.S. Supreme Court; the Court granted the petition, vacated the panel opinion and remanded for reconsideration in light of *Pearson v. Callahan*, 129 S.Ct 808 (2009) [*PLN*, Sept. 2009, p.42].

In *Pearson*, "the Court abandoned the rigid two-step order of battle" required by *Saucier v. Katz*, 533 U.S. 194 (2001) in qualified immunity cases. "The Court explained that 'while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.'"

Judge O'Scannlain issued the unanimous Ninth Circuit panel decision on remand. Citing *Lewis v. Casey*, 518 U.S. 343 (1996), the appellate court noted that "the conferral of a capability to bring a non-frivolous legal action does not require states to turn prisoners into liti-

gating machines." Prisoners have a right to meaningful, but not ideal access to the courts. Therefore, "for Phillips to prevail, he must show that use of the comb-binding machine was necessary to allow him 'meaningful access' to the courts."

Exercising its newfound authority under *Pearson*, the Court of Appeals did "not decide whether Hust's actions violated Phillips's constitutional rights." It proceeded, instead, "directly to ask whether Hust is entitled to qualified immunity." The Ninth Circuit concluded with no difficulty that Hust was so entitled, given "the Supreme Court's flexible rules for pro se filings, which do not require and perhaps do not even permit comb-binding."

The appellate court found that Hust's "view that comb-binding was not required was reasonable, as the Supreme Court's flexible rules make plain." Given "the general tenor" of *Lewis*, "it was 'objectively legally reasonable'... for Hust to conclude that her denial of access to the comb-binding machine would not hinder Phillips's 'capability' to file his petition."

Finally, since Phillips did not notify Hust of the impending due date for his petition, "the delay in ... responding to Phillips's request was not unreasonable." The Ninth Circuit remanded with instructions to grant Hust's motion for summary judgment based on qualified immunity. See: *Phillips v. Hust*, 588 F.3d 652 (9th Cir. 2009). ■

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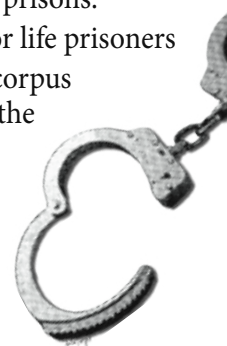
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Virginia Issues Report on Monitoring of Sex Offenders Subject to Registration

by Matt Clarke

In January 2010, the Virginia State Police (VSP) issued a report on the monitoring of sex offenders who are required to comply with registration laws. The report noted a high rate of compliance (94%) with the Sex Offender Registry (SOR) requirements.

The report was signed by Colonel H. Steven Flaherty, VSP Superintendent, and addressed to the governor, House Appropriations Committee and Senate Finance Committee. It noted that there were 16,238 sex offenders on the VSP SOR as of 12-1-09. 3,171 of them were on parole or probation and 7,014 were incarcerated, leaving only 6,053 whose SOR information had to be verified directly by the VSP.

For this task, the VSP assigned 40 state troopers, four sergeants and a first sergeant to the Sex Offender Investigative Unit. The unit was divided into four regions which were further subdivided into a statewide total of 11 sub-regions. The purpose of the unit was to enforce SOR requirements.

Between 12-1-08 and 11-30-09, the unit conducted 2,651 criminal investigations for "Providing False Information" and "Failure to Register." There were 972 arrests and 379 convictions for those types of offenses. During that period, VSP received 1,605 tips or comments requiring investigation through its website.

The manpower level of the unit remains unchanged since its creation in 2006. To meet the 2008 Manpower Augmentation plan goal of one trooper per 100 sex offenders, the unit would have to be increased to 55 troopers plus the five sergeants and four administrative and office specialists II. These 64 employees would verify the home, work and school addresses in the SOR. State law requires sex offenders to update SOR information twice a year.

This represents millions of taxpayer dollars being spent to ride herd on a few sex offenders with no proof that this enforcement activity does anything to prevent sex offenses. Other jurisdictions that have studied the issue--including New Jersey, the jurisdiction that first enacted Megan's Law--have found no

reduction in the rate of sex offenses after the enactment of registration laws. [PLN, Dec. 2009, p. 28]. The reason is that the vast majority of sex offenses are committed by people who have never previously committed a sex offense. [PLN, Aug. 2008, p.16]. This, coupled with the fact that sex offenders have a very low recidivism rate, means that neither registration nor residency restrictions can have much effect on the rate of sex offenses. They can, how-

ever, act as a form of public vengeance, making it difficult for sex offenders to procure housing or get a job while costing the taxpayers many millions of dollars in enforcement of SOR laws, prosecution of SOR law violators and incarceration of SOR violators for the victimless crime of failing to properly register. See: *Monitoring of Offenders Required to Comply With the Sex Offender Registry Requirements*. The report is available on PLN's website. ■

Washington Prisoners Need Not Show Prima Facie Case Upon Challenging Prison Discipline

by David M. Reutter

On February 4, 2010, the Washington State Supreme Court held that prisoners challenging prison disciplinary decisions do not have to make a prima facie case of prejudice to obtain review in a personal restraint petition. However, they still must show that the disciplinary hearing was so arbitrary and capricious as to deny them a fundamentally fair proceeding.

The matter was before the Court on an appeal of the personal restraint petition of James W. Grantham, a prisoner at McNeil Island Corrections Center. Grantham received a disciplinary infraction for possession, introduction, use or transfer of tobacco and controlled substances.

The infraction was issued after a guard, who was under investigation for bringing contraband into the facility, was confronted by other staff members. She turned over a plastic bag that contained smoking and chewing tobacco together with a coffee can containing marijuana. She did not know the name of the person who had given her the contraband but had his phone number, which belonged to Grantham's brother.

Grantham's petition stressed that a recorded telephone conversation between him and his brother did not involve explicit discussions of marijuana or tobacco. He further argued that the notice of charge was defective because it failed to specify the time and place of his con-

versation with his brother.

The Washington Supreme Court granted review primarily to resolve a dispute as to the standard that applies when there has been no previous opportunity for judicial review. It began its analysis by describing the common law history and purpose of habeas corpus, going back to its creation in England during the 1272-1307 reign of King Edward I.

Habeas, like the personal restraint petition, can be a great guardian of liberty, the Supreme Court wrote. It is not a substitute for an appeal, so to protect the finality of judgments the Court has imposed a prima facie pleading threshold before considering the merits of the substantive claim.

While the judiciary is reluctant to disturb a settled decision where the petitioner has already had an opportunity to appeal to a disinterested judge, that limiting principle does not apply to decisions made by executive officers and agents, even if other executive officers and agents are available to review such decisions.

The Washington Supreme Court therefore explicitly overruled the contrary decision of *In re Pers. Restraint of Burton*, 910 P.2d 1295 (Wash.App. Div.1 1996) [PLN, March 1997, p.13], holding that a prisoner challenging disciplinary actions via a personal restraint petition "where no judicial review has been afforded is not required to make a prima facie case of constitutional error and actual and sub-

stantial prejudice, or nonconstitutional error and total miscarriage of justice, as a precondition to relief.”

The Court emphasized, however, that it would “reverse a prison discipline decision only upon a showing that it was

so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender’s prejudice.”

The Court held Grantham could not make such a showing, as he was informed of the charges against him and

given an opportunity to defend himself. The appellate court’s decision dismissing Grantham’s petition was therefore affirmed. See: *In re Pers. Restraint of Grantham*, 168 Wash.2d 204, 227 P.3d 285 (Wash. 2010). ■

Georgia Ends Contact Visits for Death Row Prisoners

by David M. Reutter

Three non-execution deaths on Georgia’s death row in as many months, including two suicides, resulted in a focus on conditions for condemned prisoners at the Georgia Diagnostic and Classification Prison. The response by prison officials was to end all contact visits with family and loved ones.

Death row prisoner Kim McMichen died on October 29, 2009 from pneumonia after being transported to an outside hospital. The New Hope Center, which provides housing for family members visiting prisoners on death row, wrote in a newsletter that McMichen’s death could have been prevented with more timely care.

Then, on November 19, 2009, Timothy Pruitt was found in his death row cell suffering injuries from a botched suicide attempt. He had tried to hang himself with a bed sheet and died on December 6 from complications related to his suicide attempt.

Finally, on New Year’s Day 2010, death row prisoner Leeland Mark Braley was found dead after hanging himself.

Following Braley’s death, prison officials implemented new restrictions they said were meant to enhance security on death row: They revoked all contact visits with family members and loved ones. Pastor Randy Loney, who ministers to death row prisoners, called the new regulations “another kind of death.”

Georgia Department of Corrections

spokeswoman Peggy Chapman said the visit restrictions are meant “to maintain our practice of maintaining safe and secure prisons,” adding, “obviously there was a safety concern.” She claimed the new regulations were implemented in response to a contraband investigation and had nothing to do with the recent deaths on death row.

Sara Totonchi, executive director of the Atlanta-based Southern Center for Human Rights, was skeptical of that explanation. “They say they’re not a result [of the deaths],” she exclaimed. “Then why the hell are they implementing it all of a sudden? Just for the hell of it? It doesn’t make sense.”

Martina Correia, sister of Georgia death row prisoner Troy Davis, agreed. “Every time they punish someone, they punish the families,” she said. “The families are not bringing in [contraband]. We have to go through all kinds of stuff to get into the prison. The only way they can get materials like that into the prison is through the people that work there.” Death row visits are now conducted through what is described as a “grate” that obstructs the view of prisoners and their visitors and prevents all physical contact. “It’s a thick wire mesh,” said Pastor Loney. He made the following analogy: “If you put your hands together and make a little patchwork with your fingers and you try to look through your fingers You see a

distorted face, and it’s dim as well because of the lack of good light.”

The new visitation restrictions, which include a cap on the number of non-family visitors, have had a noticeable impact on the demeanor of death row prisoners. “Their families are their lifelines,” said Loney, “and when they can’t hug their mothers and fathers and children and brothers and sisters, they’re heartbroken ... it’s palpable.”

Death-sentenced prisoners also say they only get about two-and-a-half hours of yard time per week rather than an hour a day as required by prison rules. This, along with the loss of recreational activities such as crocheting, has left them very isolated with little human contact.

“I think everyone agrees that there is a tremendous difference between punishment and dehumanization,” said Pastor Loney. “To deprive people of human contact is far beyond punishment. It becomes dehumanizing.”

Then again, perhaps that’s the point prison officials want to make. The Southern Center for Human Rights and other advocates for prisoners and their families have urged the Georgia Department of Corrections to reinstate contact visits on death row. ■

Sources: *The Sunday Paper*, <http://solitarywatch.com>

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Texas Controversy: Governor Guts Forensic Science Commission

by Matt Clarke

Texas Governor Rick Perry caused considerable controversy on Sept. 30, 2009 when he replaced three members of the Texas Forensic Science Commission, just two days before the commission's hearing on a report that an innocent man may have been executed during Perry's tenure. As a result the hearing was postponed.

According to Cameron Todd Willingham, a 23-year-old unemployed mechanic living in Corsicana, Texas, he woke up on the morning of December 23, 1991 to find his house on fire. He received minor burns but made it out alive. His three infant daughters did not. Local investigators concluded the fire was caused by arson, and the Texas State Fire Marshal's Office agreed. Willingham was the only suspect; he was charged with murder, convicted, sentenced to death and executed on February 17, 2004. He proclaimed his innocence with his last words.

It was later revealed that shortly before Willingham was executed, Governor Perry had received a fax from Willingham's attorney containing an arson expert's report. The report, by Austin, Texas fire science expert Gerald Hurst, who holds a doctorate in chemistry from Cambridge University, stated that the investigators "made errors" and used discredited techniques to determine whether the fire was due to arson.

Hurst had previously debunked arson "evidence" in a Texas woman's homicide case, and would later help get Ernest Ray Willis, an innocent Texas man convicted of an arson-murder, off of death row in October 2004. The evidence in the Willis case was very similar to that in Willingham's. But Hurst was unable to help Willingham establish his innocence because Governor Perry declined to stay the execution.

In response to the Willingham case and other convictions based on questionable forensic evidence, the Texas legislature formed the Texas Forensic Science Commission in 2005. The commission's mandate was to investigate the soundness of the science used to obtain convictions and find ways to improve forensic methods.

State lawmakers designed the commission to represent all interested parties: prosecutors, defense attorneys and forensic scientists. Governor Perry appointed Fort

Worth prosecutor Alan Levy, Integrated Forensic Laboratories pathologist Aliece Watts and criminal defense attorney Sam Bassett to the 8-member commission, with Bassett as chairman. Other members were appointed by the state attorney general and lieutenant governor.

The Innocence Project submitted the Willingham case to the commission for investigation in 2006, after an independent review concluded that all of the evidence pointing to arson had been "scientifically proven to be invalid."

The commission hired nationally-renowned Maryland fire expert Craig Beyler to investigate the Willingham case. The results of Beyler's August 2009 report – which was highly critical of the arson evidence and questioned whether the fire had been deliberately set – were leaked to the media. Beyler found that the methods used by one of the investigators in Willingham's case were contrary to "rational reasoning" and "characteristic of mystics or psychics."

Two days before the commission was scheduled to hold a public hearing on Beyler's report, Governor Perry replaced Bassett, Levy and Watts. The new commission chairman appointed by Perry, tough-on-crime Williamson County district attorney John Bradley, was not known for taking an interest in claims of innocence. For example, he had opposed defense-funded DNA testing of a bloody bandanna found near the site of a woman's murder, even though scientific analysis of some of the forensic evidence used to support the homicide prosecution of the woman's husband had been discredited.

Bradley's first official act as chairman was to cancel the Willingham hearing. He then formed a subcommittee to study the Willingham case; the subcommittee was small enough that it did not have to comply with open meeting laws, and therefore met behind closed doors.

Further, Bradley tried to limit the commission's jurisdiction, claiming in an unsigned memo that the commissioners lacked the "discretion or power" to investigate any forensic evidence that did not originate from a laboratory accredited by the state Department of Public Safety (DPS). The DPS did not begin accrediting labs until 2003, which would have excluded the Willingham case.

Sam Bassett, the commission's former chairman, revealed that Governor Perry's office had been trying to influence the investigation of the Willingham case from an early stage. He said he was twice called to meetings with Perry's then-General Counsel David Cabrales and Deputy General Counsel Mary Anne Wiley. At one of the meetings, they told Bassett that they were displeased with the direction of the Willingham investigation. Afterwards, a general counsel staff member began attending the commission hearings.

"I was surprised that they were involving themselves in the commission's decision-making," said Bassett. "I did feel some pressure from them, yes. There's no question about that."

Despite precedent from the days of former Texas governor George W. Bush which held that recommendations from the governor's staff regarding executions were public records, Perry resisted requests for his staff's recommendations related to the Willingham execution. Further, Governor Perry has said that his replacement of the commission members was "business as usual," as their terms were expiring.

Former Texas governor Mark White, who was famous for appearing in a campaign ad walking in front of oversized photos of prisoners executed on his watch while bragging about his strong pro-death penalty stance, criticized Perry's interference in the commission's investigation. Several days later, White, the staunchest of pro-death penalty Texas governors and a former state attorney general, came out against capital punishment, citing the probability that an innocent man had been executed and the impossibility of preventing such injustices from occurring in the future.

"There is a very strong case to be made for a review of our death penalty statutes and [to] even look at the possibility of having life without parole so we don't look up one day and determine that we as the state of Texas have executed someone who is in fact innocent," White said.

The New Yorker magazine published a detailed 16,000-word exposé on the Willingham case on September 7, 2009 that completely discredited the evidence used to convict Willingham, based on the work of arson expert Gerald Hurst and the scathing report of the commission's

expert, Craig Beyler.

In October 2009, more than 400 Texas citizens sent a letter to commission chairman John Bradley, asking that the commission continue its investigation into the Willingham case. Fifteen former Texas prisoners who had been exonerated were among the signatories to the letter.

During a commission meeting on July 23, 2010, Bradley's efforts to restrict the commission's jurisdiction were rejected; perhaps realizing he had gone too far, Bradley voted against his own recommendation, saying it was "merely for reference." More importantly, in a preliminary report the commission found that "flawed science" was used in Willingham's case but that investigators were not negligent and did not engage in misconduct because they relied on standards and techniques that were acceptable at the time. New fire investigation guidelines, referred to as NFPA 921, were developed by the National Fire Protection Association in 1992, a year after Willingham was convicted.

"Even though there may not have been any malice or intent by fire investigators about not being informed on current standards, that doesn't excuse the fact that based on this misinformation, Cameron

Todd Willingham was executed and that can't be corrected," said Patricia Cox, Willingham's cousin.

The State Fire Marshal's Office stood behind its determination that Willingham had started the fire that killed his children, rejecting the opinions of other arson experts and the commission's finding that investigators had relied on flawed science.

Governor Perry, who apparently went out of his way to influence the Texas Forensic Science Commission's investigation into a potentially innocent prisoner, has refused to back down from his decision to allow Willingham's 2004 execution to proceed. "I am familiar with the latter-day supposed experts on the arson side of it," he remarked. Of course, given the political ramifications if the governor admitted that he let an innocent man be executed, what else could he say?

Perhaps what Texas state senator Rodney Ellis said: "We hope the Texas Forensic Science Commission will stop playing politics with the Texas justice system and get to the important work it was charged to do – ensuring we have reliable evidence in our courtrooms, and a fair and accurate justice system the people of

Texas can have faith protects the innocent and convicts the guilty."

Although the commission's final report will come too late to help Willingham, around 750 other Texas prisoners are serving time for arson-related charges – and some of those convictions relied on the same flawed forensic methods that have been criticized in the Willingham case.

The commission met to discuss the Willingham investigation on September 17, 2010, but Bradley called a closed session to seek legal advice. Commissioners Sarah Kerrigan and Garry Adams reportedly rejected Bradley's efforts to end the inquiry into the Willingham case. The commission will next address the case on November 19, 2010; Bradley said he doubted that meeting would be "anything more than a political farce." ■

Sources: *Austin American-Statesman*, *Houston Chronicle*, *Dallas Morning News*, www.gritsforbreakfast.blogspot.com, *Fort Worth Star-Telegram*, *Chicago Tribune*, www.innocenceproject.org, www.time.com, <http://camerontoddwillingham.com>, *The New Yorker*, www.mysanantonio.com, *Texas Tribune*

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Seventh Circuit Upholds Ban on Dungeons & Dragons

by *Brandon Sample*

The Wisconsin Department of Corrections (DOC) may prohibit the Dungeons & Dragons (D&D) role-playing game and D&D-related publications without violating the First Amendment, the U.S. Court of Appeals for the Seventh Circuit decided on January 25, 2010.

Kevin Singer, a prisoner at Wisconsin's Waupun Correctional Institution, had been playing D&D since he was a child. Until 2004 he was allowed to play D&D and order and possess D&D-related materials at Waupun; however, that changed after Bruce Muraski, the facility's Disruptive Group Coordinator, received an anonymous note from another prisoner.

The note claimed that Singer and three other prisoners were trying to form a D&D "gang," and asked Muraski to check into the matter before it got "out of hand." Muraski ordered searches of Singer's and the three other prisoners' cells. The searches resulted in the confiscation of numerous D&D materials.

Thereafter, Waupun staff banned possession of D&D publications and the playing of all fantasy games. The ban was necessary, according to DOC staff, because games like D&D promote "fantasy role playing, competitive hostility, violence, addictive escape behaviors, and possible gambling."

Singer sued, arguing that the ban violated the First Amendment. To support his claims he submitted fifteen affidavits – some from other prisoners, some from role-playing game experts – which indicated D&D game play and materials had not led to violence or gang activity in the past, and that fantasy role-playing games in general, including D&D, actually promote rehabilitation.

The district court was not persuaded. The court granted summary judgment to DOC officials, crediting Muraski's affidavit which said D&D materials and gaming threatened the safety and security of Waupun. Singer appealed.

Despite what the Seventh Circuit described as an "impressive trove of affidavit testimony," Singer failed to adequately refute the DOC's asserted safety and security concerns. The question was "not whether D&D had led to gang behavior in the past," the appellate court wrote. Rather, the question was "whether [] prison

officials are rational in their belief that, if left unchecked, D&D could lead to gang behavior among inmates and undermine prison security in the future."

In that regard, Singer's affidavits were insufficient to rebut the affidavit testimony of DOC officials, the Seventh Circuit concluded. Most of Singer's affidavits were from current or former prisoners, individuals whose "experiential 'expertise' in prison security is from the wrong side of the bars," according to the appellate court.

Further, the affidavits Singer produced from role-playing game experts

were also insufficient as they failed to "dispute[] or even acknowledge[] the prison officials' assertions that there are valid reasons to fear" an adverse effect on rehabilitation from D&D game play, the Court of Appeals held.

Finally, the Seventh Circuit noted, Singer could still play other "allowable games" and he had access to other "reading material and leisure activities." The district court's grant of summary judgment in favor of DOC officials was, accordingly, affirmed. See: *Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010). ■

For Lease: Never-Used 525-Bed Oregon Jail, \$45 Million or Best Offer

by *Mark Wilson*

A seemingly good idea before the housing market collapsed, the 525-bed, \$58 million Wapato Jail has sat empty in Portland, Oregon since construction was completed in 2004. County taxpayers are paying approximately \$5 million annually on debt service for the facility plus \$400,000 to maintain the empty building each year.

During his campaign in 2006, Multnomah County Commission Chairman Ted Wheeler vowed to open the Wapato Jail. Since then, however, county officials have repeatedly tried, but failed, to do so.

Most recently the Oregon Department of Corrections (ODOC) rejected a county proposal to lease Wapato as a minimum-security alcohol and drug treatment facility. Citing declining prison population forecasts and unstable state funding, on February 10, 2010, ODOC Director and former state senator Max Williams testified before the legislature's Ways and Means Committee that the state should postpone a decision about leasing the Wapato Jail. Williams acknowledged that the state expects significant prison growth by 2013, but recommended that officials wait until 2011 to reconsider options for increasing prison capacity.

ODOC officials claim they could complete construction on the department's own stalled Junction City prison for about the cost of leasing Wapato. Additionally, at least \$17 million in start-up

costs, remodeling and upgrades would be required because the Wapato Jail was designed to house short-term prisoners and does not meet many of the requirements for a prison, according to Williams. The difference between Wapato and a state prison is akin to the difference between a motel room and a house, Williams told lawmakers. Peter Ozanne, the county's deputy chief operating officer for public safety, questioned the ODOC's cost estimates for retrofitting the jail.

Another sticking point is that the county wants to lease the facility rather than sell it, because county officials expect they will eventually need the additional bed space. The ODOC, however, is only interested in purchasing Wapato outright. The costs of retrofitting the jail are too high for prison officials to consider only a 10-year lease that likely would not be renewed, said Nathan Allen, ODOC's planning and budget administrator. Plus the City of Portland would have to change the zoning for the jail, which currently allows the facility to only house county prisoners.

Ozanne believes the county can still make a case for the lease option when demand for prison bed space increases. The ODOC has not ruled out the Wapato Jail entirely, either. "There may be an alternative to negotiate a little harder with the county," said Allen. However, the county will have to lower its \$45 million asking price. "The prospect of getting the

facility at a fairly reduced rate does change the economics of it some," Allen stated. "Though I am not sure what political climate would be in that conversation."

"It's certainly disappointing," admitted Ozanne, who indicated the county was continuing to examine other lease options for the jail. The Citizens Crime Commission agreed, pledging to consider all available opportunities.

When Wapato opened in 2004, the editorial board of *The Oregonian* – Oregon's largest newspaper – declared that it would be "nuts" for the ODOC to build any more prisons so long as the Wapato Jail sat empty. Since then the ODOC has opened two new prisons – but has been unable to afford to open 1,200 medium-security beds at one of those facilities – and expanded two others. The state is paying \$130 million per biennium on prison debt service.

On February 24, 2010, *The Oregonian's* editorial board again suggested that it "doesn't make much sense" for the ODOC to push ahead with stalled construction on a new prison. Rather, the newspaper noted that in 2009, nearly half of the 5,027 prisoners released from ODOC facilities returned to the Portland

area. Accordingly, the paper's editors recommended that the ODOC consider Wapato as a re-entry facility, "because cementing inmate ties to family can smooth re-entry and reduce recidivism rates." Of

course, not imprisoning people in the first place accomplishes the same goal at a much lower social and financial cost. ■

Sources: *The Oregonian*, www.kgw.com

New York Prison Superintendents Live in Lap of Luxury on Taxpayer Subsidy

On the heels of a report that suggests ways to trim costs of New York's prison system, several state legislators are calling for an end to subsidizing luxurious homes for prison superintendents.

Residences for prison guards and superintendents date to the 1800s. They were utilized as incentives to attract wardens and staff, who must be available around the clock.

State records reveal that at least eight prison wardens live in state-owned mansions that are located on or near prison grounds. At least one has a lake view. The only cost to the wardens is a "maintenance fee" that is set by the state budget division.

Shawangunk Correctional Facility Superintendent Joseph Smith makes \$144,574 a year. His position allows him to live in a 6,968 square foot home located

at nearby Wallkill Correctional. He pays the state \$511.54 to live in the home.

Joseph Bellnier, Superintendent of Marcy Correctional Facility, pays the most of any superintendent to live in state subsidized housing. While he earns \$120,279, he only has \$373.40 deducted bi-weekly from his salary for housing, or \$9,708 a year.

"These superintendents live basically for free in large and luxurious homes where they don't have to worry about having to pay property taxes," said State Sen. Jeffrey Klein. "We shouldn't be subsidizing superintendents of prisons."

Klein is calling, along with Sen. Diane Savino, for superintendents to pay the state "a fair and reasonable rate to live there." ■

Source: *Daily News*

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U.S. Supreme Court: No *Bivens* Remedy Available Against PHS Staff

by Brandon Sample

On May 3, 2010, the U.S. Supreme Court held that employees of the U.S. Public Health Service (PHS) may not be sued for constitutional violations under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

While detained by Immigration and Customs Enforcement (ICE), Francisco Castaneda requested medical treatment for an “irregular, raised lesion” on his penis that was growing in size, bleeding and causing pain. Despite being told by three specialists that Castaneda needed a biopsy of the lesion, Esther Hui, a PHS physician, disregarded those recommendations. Castaneda was instead given ibuprofen and antibiotics, plus an extra set of boxer shorts.

In January 2007, Castaneda was finally approved for a biopsy after a fourth specialist recommended the procedure. Instead of performing the biopsy, however, ICE released Castaneda from custody. A week later he had the biopsy at a local hospital and the lesion was determined to be cancerous. Castaneda had his penis amputated and underwent chemotherapy, but later died after treatment proved unsuccessful.

Castaneda’s estate filed suit against the United States under the Federal Tort Claims Act (FTCA), claiming medical negligence. His estate also sued Dr. Hui and other PHS staff claiming constitutional violations under *Bivens*.

The district court and the U.S. Court of Appeals for the Ninth Circuit held that Castaneda’s estate could proceed against the PHS defendants in their individual capacities under *Bivens* notwithstanding 42 U.S.C. § 233(a), which seemed to make the FTCA the exclusive remedy for acts or omissions by PHS officials. [See: *PLN*, April 2010, p.46; Sept. 2008, p.32].

According to the Ninth Circuit, a *Bivens* remedy is rendered unavailable “only when an alternative remedy is both expressly declared to be a substitute and can be viewed as equally effective, or when special factors militate against direct recovery,” citing *Carlson v. Green*, 446 U.S. 14 (1980). Because none of those factors existed with respect to § 233(a), the appellate court concluded that Castaneda’s estate could proceed under *Bivens*.

The Supreme Court granted certiorari and reversed. While the Ninth

Circuit had relied heavily on *Carlson* to support its decision, the Supreme Court considered *Carlson* “inapposite to the issue in th[e] case.” To invoke a *Bivens* action, the Court explained, the defendants must first be amenable to suit. In *Carlson*, amenability was not an issue as the defendants did not claim immunity. In Castaneda’s case, however, the defendants did invoke immunity. Thus, the Court wrote, “the question in this case is answered solely by reference to whether [§ 233(a)] gives [the defendants] the immunity they claim.”

Looking at the text of § 233(a), the Supreme Court concluded that the PHS defendants were entitled to immunity. “Section 233(a) grants absolute immunity to PHS officers and employees for actions arising out of the performance of medical or related functions within the scope of their employment by barring all

actions against them for such conduct,” the Court wrote. Further, it was irrelevant that § 233(a) was enacted before *Bivens* was decided, as the language of § 233(a) was written broadly enough to “accommodate[] both known and unknown causes of action.”

The Supreme Court acknowledged that its decision amounted to “special immunity” for PHS employees given that other federal officials are subject to *Bivens*; nevertheless, the Court emphasized that it was “required [] to read the statute according to its terms.”

The judgment of the Ninth Circuit was accordingly reversed and the case remanded for further proceedings. The impact of this decision primarily will be felt in the federal prison system, as most Bureau of Prisons facilities utilize PHS staff. See: *Hui v. Castaneda*, 130 S.Ct. 1845 (2010). ■

Third Circuit Reverses \$642,398.57 Attorney Fee Award for RFRA Claim by Immigration Prisoner

The Third Circuit Court of Appeals reversed an immigration detainee’s \$642,398.57 attorney fee award, finding that “the District Court’s degree of success inquiry under § 1988 was based on an impermissible reconstruction of the jury verdict.”

Hawa Abdi Jama, a Somali immigrant and a Muslim, was detained as an illegal immigrant at an Elizabeth, New Jersey detention center operated by Esmor Correctional Services, Inc. (Esmor) for the U.S. Immigration and Naturalization Service (INS).

In 1997, Jama and 19 other detainees sued Esmor, INS and numerous individual defendants over abusive treatment and deplorable conditions at the facility. All of the plaintiffs except Jama settled the class-action suit for \$2.5 million. [See: *PLN*, Sept. 2006, p.26; Sept. 1995, p.17].

In 2007, a jury trial was held on Jama’s claims. The jury ruled in her favor on her claim that the defendants substantially burdened her ability to practice her religion, in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb et seq. The jury also ruled in her

favor on a pendent state law claim that Esmor and other defendants had negligently hired, trained, supervised and/or retained guards at the privately-run facility. The jury awarded only nominal damages of \$1 on the RFRA claim and compensatory damages of \$100,000 on the state law claim. [See: *PLN*, Sept. 2008, p.36].

The district court granted Jama’s motion for an award of attorney’s fees under 42 U.S.C. § 1988. It found that “based on its assessment of the evidence, ‘between 33% and 50% of the jury’s negligence claims award of \$100,000 was designed as compensation for Jama’s RFRA-related injuries.’... The Court calculated a lodestar of \$642,398.57 based entirely on counsel’s work on the RFRA claim, and awarded the entire amount against Esmor and Lima, the two defendants found liable under RFRA.” *Jama v. Esmor Corr. Services, Inc.*, 549 F.Supp.2d 602 (D. N.J. 2008).

The Third Circuit reversed on appeal, concluding that “the District Court erred in attributing a portion of Jama’s tort award to her RFRA claim.” Rather, “the District Court was required to presume

that the jury determined that no actual injury was sustained as a result of the RFRA violation, and could not conclude that any portion of the \$100,000 in compensatory damages was awarded to compensate for the RFRA violation.”

The Court of Appeals rejected the defendants’ contention that “under *Farrar v. Hobby*, 506 U.S. 103 (1992), no fee may be awarded as a matter of law because Jama was only awarded nominal damages on her fee-eligible RFRA claim.” The Court found that “*Farrar* is plainly distinguishable because Jama received a substantial award on the litigation as a whole, whereas the plaintiffs in *Farrar* received only a nominal award of \$1 in total.”

Although the appellate court disagreed that *Farrar* conclusively prohibits the award of a fee on Jama’s RFRA claim, it joined five other Circuits in holding *Farrar* requires “that a district court determining the degree of a plaintiff’s success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose.”

The Third Circuit then analyzed “whether Jama’s success on her state law

claim may independently inform the degree of her success under § 1988.” Yet it was surprised to find that the impact of success on state claims as related to the award of fees under § 1988 had not been squarely addressed by that Circuit, and was sparsely litigated elsewhere.

The appellate court rejected the defendants’ argument “that pendent state law claims may only be considered in the success inquiry if the legal standards and operative facts for the state and federal fee-eligible claims are identical.” Even so, “the state and federal claims must certainly bear some relation in order for the state claim to be considered under § 1988.” The standard in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), “should guide a district court’s consideration of pendent state claims in a litigation where a plaintiff has prevailed on a fee-eligible federal claim,” the Third Circuit held.

The attorney fee award was vacated and the case remanded for reconsideration by the district court. Following remand, Esmor and Lima agreed to settle the issue of Jama’s attorney’s fees and costs for an undisclosed amount. See: *Jama v. Esmor Corr. Services, Inc.*, 577 F.3d 169 (3d Cir. 2009). ■

Fraudsters Sentenced in Cornell Prison Construction Scheme

by Brandon Sample

A man who bilked almost \$13 million from Cornell Corrections Corp. has been convicted of federal fraud and conspiracy charges, while two co-defendants pleaded guilty.

In February 2010, Robert B. Surles was convicted by a federal jury in Atlanta, Georgia of conspiracy and 15 counts of wire fraud as part of a construction scam.

Cornell hired Surles to build its Southern Peaks Regional Treatment Center in Colorado in 2003. The company transferred almost \$13 million to an account where the funds were supposed to have been held in escrow, but Surles and his co-defendants gained control of the account and Surles spent \$605,000 on himself. [See: *PLN*, April 2009, p.47].

“This defendant fraudulently induced a company to transfer approximately \$13 million into an ‘escrow account’ that turned out to be nothing but a piggy bank for the defendant and his co-conspirators,” said U.S. Attorney Sally Q. Yates.

Surles’ co-defendants, Edgar J. Beaudreault, Jr. and Howard Sperling, took plea deals and testified against him. Surles was sentenced on June 22, 2010 to ten years in federal prison and three years’ supervised release. Beaudreault received a 37-month sentence plus three years’ supervised release, while Sperling was sentenced to almost 62 months and three years’ supervised release.

“These defendants were part of an elaborate fraud scheme that ironically involved the construction of a prison. They will now experience how business is conducted inside a real prison,” said Yates.

All three co-defendants were ordered to jointly and severally pay \$5,417,500 in restitution to Cornell. See: *United States v. Surles*, U.S.D.C. (N.D. Georgia), Case No. 1:08-cr-00345-CC-AJB. ■

Sources: www.chieftain.com, U.S. Attorney press releases

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Successful Appellate Ruling Invalidating Statute Creates Prevailing Party for Attorney Fee Award

by David M. Reutter

The Washington State Supreme Court has held that a litigant who successfully gets an appellate court to vacate a prison disciplinary infraction and declare a statute unconstitutional is a prevailing party under 42 U.S.C. § 1988, entitling him to attorney fees. The Court further held that upon remand attorney fees would be awardable for all successful claims, not just a retaliation claim as limited by the appellate court.

Before the Washington Supreme Court was a petition for review filed by prisoner Allan Parmelee, who received a disciplinary infraction at Clallam Bay Corrections Center (CBCC) for using inflammatory language in a letter.

The July 20, 2005 letter was addressed to Harold Clarke, Secretary of the Washington Department of Corrections. Parmelee wrote, "I have been puzzled by the widespread hostilities growing ever tense [sic] at CBCC since I've been here. I have finally discovered the formula has to do with a verified reliable source indicating Superintendent Sandra Carter is anti-male – a lesbian Having a man-hater lesbian as a superintendent is like throwing gas on [an] already smoldering fire."

CBCC did not allow the letter out of the prison and infractions on October 13, 2005 for committing the misdemeanor of criminal libel against Carter. After the Clallam County Superior Court dismissed Parmelee's suit alleging libel, slander, retaliation and violations of his rights to due process and free speech, he appealed.

The Court of Appeals held the criminal libel statute was "facially unconstitutional for overbreadth and vagueness." It vacated the disciplinary infraction and remanded the case on all other causes of action except the libel and slander claims. The appellate court denied Parmelee's request for attorney's fees, holding he would not be entitled to fees unless he prevailed on the retaliation claim. See: *Parmelee v. O'Neel*, 145 Wash. App. 223, 186 P.3d 1094 (Wash.App.Div. 2, 2008) [*PLN*, Jan. 2009, p.36].

The Supreme Court wrote that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff."

Thus, Parmelee was a prevailing party entitled to attorney fees on appeal. The Court further held the Prison Litigation Reform Act did not preclude an award because Parmelee's 42 U.S.C. § 1983 complaint in this case alleged a violation of his First Amendment rights, and his attorney fees were incurred to vindicate those rights.

Finally, the Supreme Court found it was error to predicate attorney fees solely on Parmelee's success on the retaliation

claim. The respondents conceded this point. As such, the case was remanded for the appellate court to determine the attorney fee award for Parmelee's successful appeal; it was also remanded for further proceedings in the Superior Court on his claims of retaliation, First Amendment violations and substantive due process violations. See: *Parmelee v. O'Neel*, 168 Wash.2d 515, 229 P.3d 723 (Wash. 2010). ■

Exhaustion Excused Where Warden Misled Prisoner During Grievance Process

by Brandon Sample

Failure to exhaust administrative remedies may be excused when prison officials mislead a prisoner during the grievance process, the U.S. Court of Appeals for the Ninth Circuit decided on January 11, 2010.

In May 2002, prisoner Gerson Nunez was strip-searched upon his return to the Federal Prison Camp (FPC) in Sheridan, Oregon from his work assignment cleaning the visitation room at the adjacent medium-security institution.

Nunez filed a grievance the next day, claiming the search violated his Fourth Amendment rights because a guard had selected Nunez for the search after asking him and another prisoner to pick a number between one and ten. Nunez picked four, which was closest to five, the number the guard had selected, so Nunez was the winner of the strip search "lottery."

The warden denied Nunez's grievance, citing a Bureau of Prisons' (BOP) program statement that supposedly authorized the strip search. The warden referenced the wrong program statement in his response, however, causing Nunez to go on a ten-month wild goose chase for the incorrectly-cited statement, which was restricted and not available to prisoners.

Nunez finally learned of the warden's error, but by then his grievance appeals to the Regional Director and Central Office were deemed untimely.

Nunez sued the guard who conducted the strip search along with numerous other BOP officials. The district court granted

summary judgment to the defendants on the merits and on exhaustion grounds.

On appeal, the Ninth Circuit, in a 2-1 opinion, decided that Nunez was excused from exhausting administrative remedies due to the warden's error in citing the wrong program statement which purportedly authorized the strip search.

Under the Prison Litigation Reform Act, prisoners are only required to exhaust "available" administrative remedies, the appellate court wrote. In Nunez's case, available remedies did not exist due to the warden's erroneous citation to the wrong program statement.

"Rational inmates," the Court of Appeals explained, "cannot be expected to use grievance procedures to achieve the procedures' purpose when they are misled into believing they must respond to a particular document in order to effectively pursue their administrative remedies and that document is then not available."

As such, the Ninth Circuit excused Nunez's failure to exhaust because he "could not reasonably be expected to exhaust his administrative remedies without the Program Statement that the Warden claimed to mandate the strip search, and because Nunez timely took reasonable and appropriate steps to obtain it."

On the merits, though, the appellate court concluded that Nunez's strip search did not violate the Fourth Amendment because it was objectively reasonable, and the district court's grant of summary judgment to the defendants was therefore affirmed. See: *Nunez v. Duncan*, 591 F.3d 1217 (9th Cir. 2010). ■

Ninth Circuit: Los Angeles County Not Liable for Occasional Over-Detentions

by Michael Brodheim

In an official-capacity action brought under 42 U.S.C. § 1983 against Los Angeles County Sheriff Leroy D. Baca, the plaintiffs alleged they remained in the custody of the Sheriff's Department, in violation of their constitutional rights, for periods of time ranging from 26 to 29 hours after a court had ordered their release. On appeal, the Ninth Circuit upheld the district court's second grant of summary judgment to Sheriff Baca on the ground that the evidence proffered by the parties, when viewed in the light most favorable to the plaintiffs, did not support a finding of deliberate indifference.

In a previous opinion, *Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004) [*PLN*, March 2005, p.32], the Ninth Circuit had reversed the district court's prior grant of summary judgment to Baca. In so ruling, the Court of Appeals explained that the district court had failed to apply the analytical framework appropriate for determining whether or not "action pursuant to official policy of some nature caused a constitutional tort," citing *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658 (1978). In particular, the Ninth Circuit said the district court had failed to address the issue of deliberate indifference.

Following remand, both sides submitted evidence in the form of exhibits and declarations. That evidence indicated that the Sheriff's Department processed tens of thousands of detainees every year and, during the period under review, had released nearly 51,000 prisoners. While the exact number of over-detentions exceeding 24 hours was disputed, it was not disputed that the number had peaked in 1997 (at approximately 250) and had declined every subsequent year through 2004. Moreover, it was clear that the total number of over-detentions during the time period at issue did not exceed a few dozen. Additionally, there was no dispute that the Sheriff's Department had instituted several measures designed to reduce the number of over-detentions.

Based on the evidence presented, the district court concluded that as a matter of law, given the volume of detainees and the attendant administrative paperwork that must be processed to ensure any given release is not improper, a few dozen over-

detentions during a period of several years was "reasonable and cannot constitute a *Monell* deliberate indifference claim."

The Ninth Circuit affirmed in a February 5, 2010 decision, holding that based on the evidentiary record, including the curative steps taken by the Sheriff's Department, "no reasonable jury could

find that the defendant was oblivious of, or indifferent to, over-detentions." See: *Mortimer v. Baca*, 594 F.3d 714 (9th Cir. 2010). ■

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Female Assistant Attorney General Pleads Guilty in Wife-Beating Case

by Mark Wilson

An Oregon Assistant Attorney General (AAG) who defends against prisoners' appeals in criminal cases was recently arrested for punching and strangling her wife; she entered treatment and pleaded guilty two weeks later.

On February 12, 2010, AAG Susan R. Gerber, 40, returned home to find that her wife of five years, Janice Dulle, 38, had "started the process of changing the locks" on the couples' Portland condo.

Dulle confronted Gerber, saying she suspected her of having an affair with another woman. Gerber punched Dulle with a closed fist and demanded a phone that Dulle was holding, according to a locksmith who witnessed the assault. When Gerber pushed Dulle against a wall and choked her, the locksmith called 911.

Responding officers noted red marks on Dulle's neck and bruises on her arms. She rated her pain a "3" out of "10" and said she couldn't breathe as Gerber strangled her. But Dulle didn't want Gerber to be prosecuted.

Even so, Gerber was arrested, booked into jail and released with a "no contact order" that prevented her from returning to the condo.

On February 16, 2010, Gerber was arraigned on charges of fourth-degree assault, harassment and strangulation. Her attorney, Michael De Muniz, son of Oregon Supreme Court Chief Justice Paul De Muniz, informed the court that Gerber did not personally appear at the arraignment because she had checked herself in to in-patient treatment for depression.

Dulle's attorney, Patrick Sweeney, attended the arraignment and asked the court to lift the no-contact order because Dulle wanted to visit Gerber at the treatment center. The request was denied.

On March 5, 2010, Gerber pleaded guilty to attempted fourth-degree assault. If she attends anger management classes and obeys other court orders for 14 months, the conviction will be dismissed under a deferred sentencing program.

Attorney Jason Thompson, who also represented Gerber, told the court that the physical altercation was "mutual" and that "either one of them could have been arrested." Although Gerber struggled with alcohol abuse in the past, Thompson told the court she was sober and alcohol was not a factor in the altercation.

Gerber had been employed by the Oregon Department of Justice (DOJ) as an AAG since 2001. Thompson said Gerber is well respected in her field and was looking forward to returning to work.

"She's been a great asset to the state of Oregon, the Department of Justice, for many years," Thompson said. DOJ officials, however, declined to comment on Gerber's employment status. As it turned out, Gerber resigned just one week after

pleading guilty, effective April 1, 2010, according to DOJ spokesman Tony Green.

Apparently the incident has been forgiven and forgotten and the no-contact order lifted. Gerber and Dulle did not comment after the March 5 plea hearing, but Dulle kissed Gerber on the cheek and patted her on the back as they left Multnomah County Circuit Court. ■

Source: *The Oregonian*

Sexual Abuse of Youths at Tennessee Juvenile Facility Widespread

by David M. Reutter

A February 2010 news report by *The Tennessean*, Nashville's daily newspaper, revealed that juvenile offenders are regularly sexually abused at the Woodland Hills Youth Development Center.

The investigation followed a U.S. Department of Justice (DOJ) study that found Woodland Hills had one of the highest rates of abuse of any juvenile facility in the country, ranking among the top 13 facilities for sexual abuse. Nationwide, about 95% of staff sexual abuse at juvenile facilities involves female employees and male prisoners.

Woodland Hills is run by Tennessee's Department of Children's Services (DCS). Despite the DOJ's findings, DCS apparently remains in denial.

"Do we believe those most violent, vile offenses are occurring to our kids? No. And we actually have a lot of evidence showing that it's not happening like that," said Ted Martinez, executive director of residential operations for DCS. "Does this report raise questions as far as how we are looking at things and most importantly how our kids are perceiving some of these relationships? Absolutely."

Under its sexual abuse investigation process, DCS is required to inform Metro police detectives, the district attorney's office and a youth advocacy group whenever an allegation is filed. However, five investigations into the sexual abuse of Woodland Hills youths by kitchen staffer Luana Settle over her two-year employment at the Center revealed that that procedure is rarely followed.

The first four investigations did not find sexual abuse by Settle. Yet during a 2005 investigation she failed a voice stress

analyzer, or lie detector test. That report was declared unsubstantiated.

Two separate investigations into Settle's sexual abuse of Woodland Hills resident Larry Cook, Jr. were returned in 2006 as unsubstantiated. Eventually, Settle and Cook began living together.

Things began to unravel later in 2006 when a 17-year-old Woodland Hills resident checked into the infirmary with chlamydia, a sexually transmitted disease. He told authorities he had had sex with Settle in a kitchen closet. She resigned during the investigation and later pleaded guilty to statutory rape and received a two-year prison sentence.

While Settle faced five investigations involving sexual abuse at Woodland Hills, youths interviewed during the investigation that led to her conviction said she had sex with more than a dozen juveniles. In her notes, Detective Heather Baltz reported that DCS's investigative records were " cursory" and had "very little detail." She further noted that Metro police were never notified of the prior reports concerning Settle.

The Tennessean's investigation uncovered a 2008 letter filed with the Equal Employment Opportunity Commission. "I (formerly) worked at Woodland Hills Youth Development Center from 1999-2003," the letter from DCS employee Ricky Moreland stated. "During that time I personally witnessed several female staff that was alleged to have sexual or inappropriate contact with some of our male students at the time."

Moreland's letter mentioned a female employee who married a resident after

he left Woodland Hills and another staff member who was impregnated by a juvenile at the Center. *The Tennessean* was unable to verify the pregnancy.

When Debra Smith's son finally told her about the sexual abuse at Woodland Hills, she burst into tears. Her son, 15-year-old Charles Owens, is mentally challenged. He waited three weeks before finally informing his mother that a staff

member had solicited him for oral sex.

"He was scared to death that nobody would believe him and he'd get in even more trouble," Smith said. The situation "has made me know how dirty the state custody is for children. They say they're rehabilitating; they're not."

Tennessee lawmakers are looking at the DOJ report and plan to hold committee hearings. "It's our mission as

grown-ups to protect children, to see to it they are fed and are healthy," said state Rep. Sherry Jones. "This is a very serious accusation against DCS, and if you're one of the worst 13 [juvenile facilities] on a list like that, that is awful," she stated, referring to Woodland Hills' sexual abuse ranking by the DOJ. ■

Source: *The Tennessean*

Fake Rape Claim Puts Woman in Prison

by Brandon Sample

A New York woman who falsely claimed she had been raped was sentenced in February 2010 to 1 to 3 years in prison on perjury charges.

In 2005, Biurny Peguero Gonzalez told investigators that William McCaffrey, a Bronx construction worker, raped her at knifepoint. Gonzalez had accepted a ride from McCaffrey, who had a lengthy criminal record. But there was no rape. Instead, Gonzalez made up the incident to garner sympathy from her friends, who were mad at her for ditching them and leaving with McCaffrey.

McCaffrey was convicted and sen-

tenced to 20 years. He served about three years before being released in December 2009 after Gonzalez admitted she had lied and DNA tests revealed that bite marks on her arm were not from McCaffrey.

"What happened in this case is one of the worst things that can happen in our criminal justice system," stated Judge Charles Solomon, when sentencing Gonzalez.

McCaffrey said he wished Gonzalez "the best of luck," and hoped she "doesn't go through" what he went through in prison. He noted that someone who would "lie and paint somebody as a rapist is worse

than a real rapist or a real murderer."

McCaffrey also blamed "the arresting officers, the prosecution" and other officials in the justice system who "wanted to believe the lie, the ADA [assistant district attorney] first and foremost."

The prosecutor in Gonzalez's case had asked for a sentence of 2 to 6 years "so that there's a chance that she will serve what he served." Instead, Gonzalez will be eligible for parole after only one year. ■

Sources: www.nydailynews.com, www.gothamist.com, *New York Post*

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News in Brief:

Afghanistan: An Afghan prisoner being held at a U.S. military base attempted to escape on August 7, 2010, grabbing a rifle and fatally shooting two Marines before being killed by return fire. The location of the base was not disclosed.

Alabama: On August 17, 2010, Steven Giardini, a former Mobile County assistant district attorney who specialized in prosecuting sex crimes involving children, was arrested on enticement and solicitation charges. Giardini is accused of trying to sexually entice what he thought was a 15-year-old girl over the Internet, but he was actually in touch with an agent from the FBI's Internet Crimes Against Children division. Giardini had resigned from the prosecutor's office in April 2009 after his home was searched by FBI agents; the search warrant was sealed, so it is unknown what that investigation entailed. He was released on \$250,000 bond on the enticement charges.

Bangladesh: In August 2010 government officials freed 1,000 prisoners serving life sentences (calculated at 30 years in Bangladesh), in order to reduce overcrowding in the nation's prisons. Bangladesh has around 77,000 prisoners housed in 67 facilities designed to hold 28,000. The released prisoners included those who had served 20 years on their sentences. "A man who commits an offence, if they've been inside for 20 years, this is enough," said Home Secretary Abdus Sobhan Sikder.

California: Two people visiting a prisoner at the Lerdo Detention Center near Bakersfield ended up behind bars themselves. Donelle Flores, 29, was arrested after jail staff learned she had outstanding felony warrants; she was also found to have three syringes, suspected methamphetamine and marijuana, a small knife and a handcuff key. Her companion, Billy Evans, 24, was arrested for being a felon on jail grounds and for receiving stolen property. Flores and Evans were booked into the Kern County Jail.

California: The California Correctional Peace Officers Association (CCPOA), the union that represents the state's 30,000 prison guards and parole officers, announced on Sept. 20, 2010 that it was endorsing Democratic gubernatorial candidate Jerry Brown. The CCPOA, a major player in California politics, has had a contentious relationship with current Republican Governor Arnold

Schwarzenegger. "Simply building more prisons is not the solution," said CCPOA president Mike Jimenez. "We need a governor that understands the nuances and is willing to bring all of the stakeholders to the table in a concerted effort to collectively resolve this ongoing problem."

California: In September 2010 it was reported that 16 condom machines had been installed at the San Francisco County Jail's San Bruno facility. "It may be controversial," stated Sheriff Michael Hennessey, "but I think the larger health education message is important." Kate Monico Klein, with the city's Public Health Department, agreed. "If [providing condoms to prisoners] saves one or two lives, it's worth it," she said.

Colorado: On September 17, 2010, Donald Denney, 56, was arrested at the federal prison complex in Florence, Colorado, where he was trying to smuggle a package of black tar heroin to his son, who is incarcerated at the facility. Denney and his son, also named Donald, coordinated the smuggling scheme through phone calls from the prison which, of course, were monitored and recorded. When Denney arrived at the facility with the heroin concealed in his rectum he was met by FBI agents with a warrant for a body search. Denney had planned to transfer the drugs to his son via a mouth-to-mouth kiss during a visit.

Florida: Hernando County Jail prisoner Brandon Markey lost a bet when he wagered on the NFL Saints v. 49ers game on Sept. 20, 2010. The next day he tried to pay off his debt to fellow prisoner Ricardo Cleveland Sellers, in the form of bear claws from the jail's commissary. However, he reportedly failed to pay an additional "four honey buns" that were owed as part of the wager, and the absence of honey buns led Sellers to punch Markey in the face, according to a report by the Hernando County Sheriff's Office.

Florida: On August 23, 2010, Psalmi Thompson lost custody of her three children after leaving them in a hot car outside the Orange County Jail while she visited for over an hour with her boyfriend, who was incarcerated at the facility. The children, ranging in age from two months to five years old, were placed in the custody of their grandmother. Rescue workers estimated the temperature in the car was as high as 125 degrees, though the back windows were cracked open.

Florida: Officials at the Marion County Jail said they saw a bag containing pills fall from the "genital area" of prisoner Elizabeth Athenia Progris, 22, after she showered at the facility on August 13. The bag was found to contain generic Xanax, and Progris was charged with possession of a controlled substance and introduction of a controlled substance.

Indiana: Over a dozen staff members at the Pendleton Correctional Facility were suspended during a crackdown on contraband smuggling and drug use, according to a Sept. 1, 2010 news report. Twelve prison employees have been accused of personal drug use, one faces termination for trying to smuggle a cell phone and 38 other staff members failed drug tests. Visitation at Pendleton was suspended during a lengthy lockdown while prison officials searched for contraband.

Italy: According to an August 23, 2010 news report, a senior former prosecutor alleged that jailed Mafia bosses were receiving coded messages through an Italian soccer program on TV. The *Quelli del Calcio* ("That's What Football is About") show invites viewers to send in text messages that are displayed in a ticker tape along the bottom of the screen. Investigator Vincenzo Macri said some of the messages were intended for Mafia bosses, and that an intercepted letter sent to an imprisoned mafioso told him to watch the TV show to "learn about something which was dear to his heart." Officials at RAI, the station that airs the program, said they were unaware that some of the text messages may be intended for prisoners.

Massachusetts: The Plymouth County Sheriff's Department announced on Sept. 21, 2010 that the Plymouth County Correctional Facility had been placed on lockdown after an officer felt a burning sensation and became light-headed after being exposed to a white powdery substance in the jail's property room. Five staff members and two prisoners were exposed to the substance, which was later determined by hazmat officials to be mercury and a "known nonhazardous organic material."

Nevada: State lawmakers expressed frustration during a Sept. 9, 2010 hearing because \$500,000 was spent to design a medical unit at the High Desert State Prison, though the building project had to be cancelled. Assemblyman Tom Grady told Nevada Corrections Director

Howard Skolnik that the prison system "needs to get its act together. We can't keep throwing away money." Skolnik said they would be unable to staff the unit due to state budget cuts, and the \$7.8 million project was shelved.

North Carolina: On Sept. 10, 2010, Maria Elliot Davis, 18, left a Bible for a prisoner at the Halifax County Jail. Employees checked the book and found it contained some loose cigarettes and matches. Davis was charged with providing tobacco products to a prisoner and jailed with a \$1,000 bond.

Pennsylvania: Prison officials at SCI Albion are facing a slippery situation that involves goose excrement. Apparently, a large amount of goose droppings are causing sanitation problems at the facility and in the parking lot outside. Prisoners have been cleaning up the goose waste but the U.S. Department of Agriculture was called in to help. A USDA official said they would use non-lethal methods to keep geese away

from the facility, such as pyrotechnics, propane cannons and trained dogs.

Tennessee: Memphis police officers Jennifer Kinnard and Latonia White were transporting a suspect on Sept. 11, 2010 when their squad car crashed into a utility pole. The officers were not seriously injured, though the suspect was hospitalized in critical condition. Kinnard received a traffic citation for failing to pay attention while driving; the Inspectional Service Bureau is investigating the incident.

Texas: On July 29, 2010, Miles McFadden, 30, a guard in the juvenile section of the Bexar County Jail, was arrested on charges of aggravated sexual assault of a child. Prosecutors claim that for the past five years McFadden had been raping a now-16-year-old boy, and had drugged the child and given him a sexually transmitted disease. Jail officials said there had been no complaints regarding McFadden's work performance in the juvenile unit.

Washington: The G Unit at the

Washington State Penitentiary in Walla Walla was locked down on August 30 after a guard was attacked. A week later the E Unit at the facility was placed on lockdown following a fight that involved four prisoners. The units house suspected gang members.

Wisconsin: Taycheedah Corr. Institution (TCI) prisoner Kristine Flynn, 51, was charged with three counts of forgery in August 2010 for forging the name of a Fond du Lac County judge on child custody papers. Flynn was allegedly trying to gain custody of another prisoner's disabled son, and requested \$250,000 from the boy's bank account to care for him. Previously, Flynn had pleaded guilty to five counts of tax credit fraud for filing false statements to obtain homestead tax credits while she was incarcerated. Three other TCI prisoners were charged with tax fraud in connection with the scheme: Wendy Nelson, Amy Prelwitz and Nicole Ousley. 📧

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Limitations Period in Suit Over Delay in Providing Surgery Begins When Prisoner is Recommended for Surgery

by *Brandon Sample*

The statute of limitations in a lawsuit claiming medical negligence by prison officials in delaying a prisoner's surgery begins to accrue when the prisoner is first recommended for surgery by a specialist, the Appellate Division of the Superior Court of New Jersey decided on February 19, 2009.

Cecil Fearon, incarcerated at the East Jersey State Prison, sued Correctional Medical Services and five physicians for excessive delay in providing him with needed neck surgery. On April 28, 2004, Fearon was seen by a prison doctor and recommended for a consult with a neurosurgeon.

Fearon was seen by the neurosurgeon on June 22, 2004 and recommended for a cervical discectomy and fusion. No surgery was scheduled, however. Fearon was seen by the neurosurgeon again in April 2005, some ten months later, and again recommended for surgery. The surgery still was not scheduled until January 2006. The procedure was finally performed in January, but the delay caused Fearon's condition to worsen and compromised the results of the surgery.

The defendants were successful in having the suit dismissed on statute of limitations grounds in Superior Court,

arguing that the limitations period began to run on April 28, 2004 when Fearon was first seen by a prison doctor about his condition and recommended to see a neurosurgeon.

The appellate court reversed, holding that the limitations period for Fearon's claims started on June 22, 2004, the day he was recommended for surgery. Fearon's lawsuit was filed within two years of that date, and thus his claims were timely. The case was remanded for further proceedings. See: *Fearon v. Correctional Medical Services, Inc.*, Case No. A-4686-07T3, 2009 WL 395473 (N.J.Super.A.D. 2009). ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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With Liberty for Some: 500 Years of Imprisonment in America, by Scott Christianson, Northeastern University Press, 372 pages. **\$18.95.** The best overall history of the American prison system from 1492 through the 20th Century. A must-read for understanding how little things have changed in U.S. prisons over hundreds of years. 1026

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. **\$35.95.** PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. 1041

The Ceiling of America, An Inside Look at the U.S. Prison Industry, edited by Daniel Burton Rose, Dan Pens and Paul Wright, 264 pages. **\$22.95.** PLN's first anthology presents a detailed "inside" look at the workings of the American justice system. 1001

Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, PLN Publishing, 221 pages. **\$49.95.** Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1057

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. **\$39.99.** Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. **\$39.99.** Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037

Law Dictionary, Random House Webster's, 525 pages. **\$19.95.** Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. **\$14.95.** A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046

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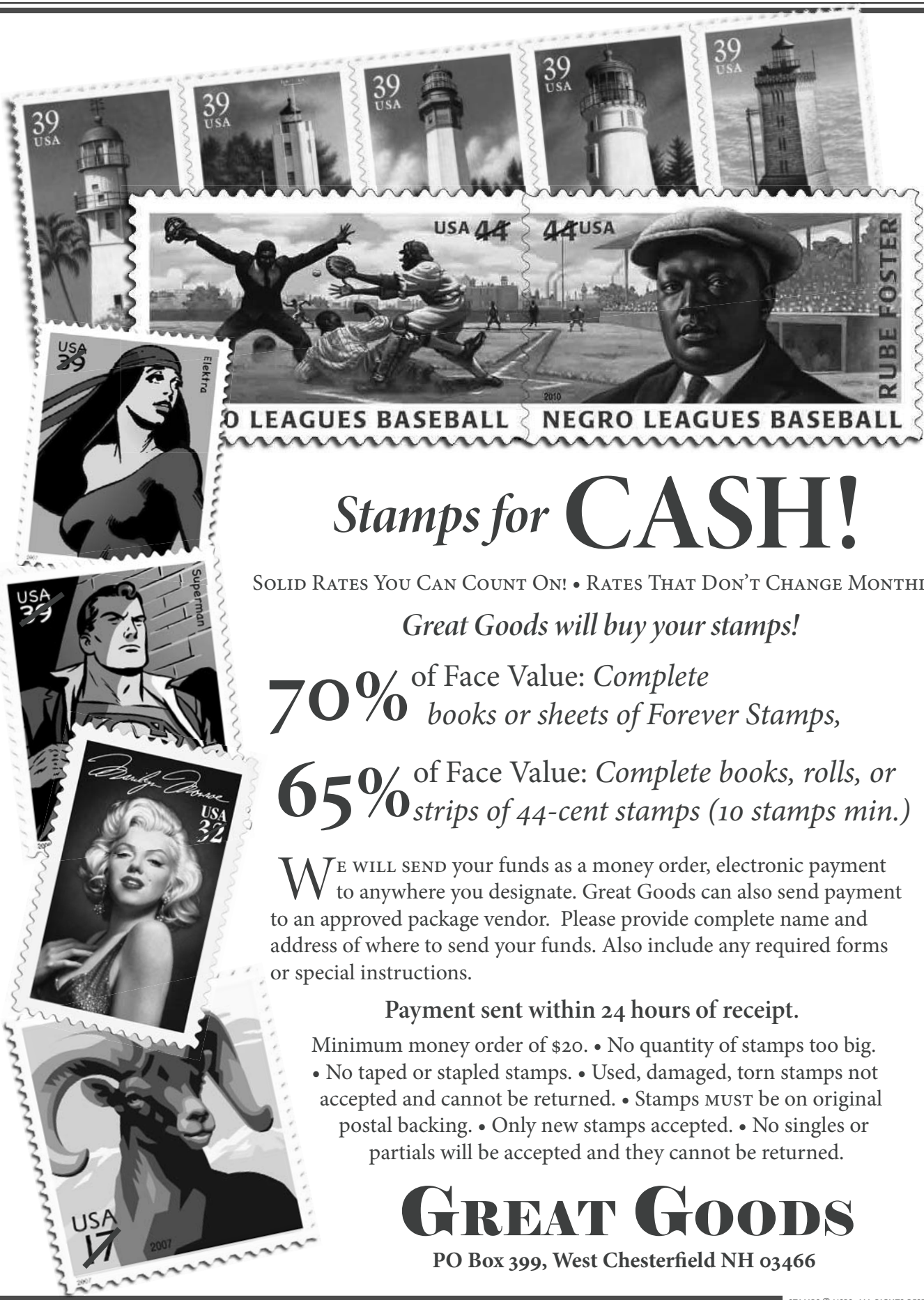
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PRISON

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Dedicated to Protecting Human Rights

November 2010

Private Prison Companies Behind the Scenes of Arizona's Immigration Law

by Beau Hodai

"Beside my brothers and my sisters, I'll proudly take a stand. When liberty's in jeopardy, I'll always do what's right. I'm out here on the frontline, sleep in peace tonight. American soldier, I'm an American soldier..."

So goes the ringtone on Arizona State Senator Russell Pearce's phone—as performed by Toby “cause we put a boot up your ass, it's the American way” Keith. Seconds into any conversation with Pearce on the issue of illegal immigration, you'll find the song fits. Pearce is—in his mind—the “American soldier.” What's more, just as he sees him-

self a soldier, Pearce envisions his home to be none less than the front in a war which threatens the very fiber of the nation.

“There's been 133 nations identified crossing that border. Not just Mexicans, not just Hondurans, not just El Salvadorians, but 133 nations. Many of those are nations of interest, which means that they either harbor, aid and abet, or are somehow connected to terrorist activities,” said Pearce. “And yet they continue to cross that border. We've got prayer rugs that have been found down there, other things that have been found down there—and yet they [the federal government] continue to do nothing.”

Pearce is the primary sponsor of Arizona's controversial Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070 / HB 2162), which was signed into law by Governor Jan Brewer in April 2010.

The most controversial part of SB 1070 is a requirement that state and local law enforcement officials must try to determine the immigration status of people they come into “lawful contact” with whom they have reasonable suspicion to believe are in the U.S. illegally. This has led to claims the law will be enforced through racial profiling of Hispanics.

The bill has resulted in numerous legal challenges from human rights and civil liberties groups, and has been something of a black eye for Arizona's national image. Some cities, such as Los Angeles and the People's Republic of Berkeley, have gone so far as to enact economic contract non-renewal boycotts against businesses based in the state.

Nonetheless, all rhetoric and election year posturing aside, the fact is that some backers of the Support Our Law Enforcement and Safe Neighborhoods Act (dubbed the “Breathing While Brown” law by critics) are wrapping themselves in the flag all the way to the bank.

Some of these proponents are seemingly as dedicated to grandstanding on border politics as they are to promoting the fortunes of private prison corporations, members of the multi-billion dollar immigrant detention industry which stand to reap substantial profits as more undocumented aliens are run through the nation's immigration, detention and deportation mill.

The Machinations of a War on Illegal Immigration

In early December 2009—a full month and a half before SB 1070 was introduced to the Arizona Senate and nearly two months before its counterpart was first read in the House—Pearce formally submitted a version of his proposed legislation to the American Legislative Exchange Council (ALEC), an organization to which he and 35 other Arizona legislators are members.

A 501(c)(3) nonprofit organization, ALEC bills itself as “the nation's largest bipartisan, individual membership association of state legislators” and as a public-private legislative partnership. As such, ALEC claims more than 2,000 state lawmakers (a full third of the nation's state legislators) plus more than 200 corporate and special interest groups as members.

The organization's current corporate

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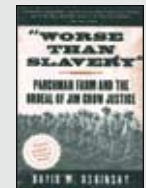
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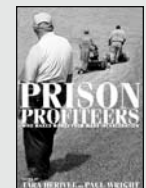
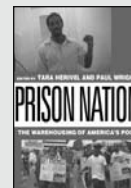
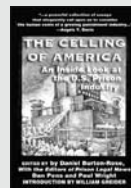
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Private Prisons in Arizona (cont.)

roster includes Corrections Corporation of America (CCA, the nation's largest private jailer), GEO Group (the nation's second largest private jailer), Sodexo Marriott (the nation's leading food services provider to private correctional institutions), the Koch Foundation, Exxon Mobil, Blue Cross and Blue Shield, Pfizer, Boeing, Bank of America, Wal-Mart, Inc. and News Corporation, to name a few.

Despite the fact that federal tax law explicitly forbids 501(c)(3) organizations such as ALEC from taking part in the formation of legislation, ALEC is comprised of nine task forces, each responsible for developing "model legislation" that ALEC member lawmakers then carry back to their home states and introduce as their own.

Although ALEC's legislative members far outnumber corporate members, a look at the group's finances illustrates not only the price corporations are willing to pay for a seat at the table with state lawmakers, but where the organization's loyalties likely lie. According to ALEC's most recent tax records, in 2008 the group reported a total of \$6.9 million in revenue—\$93,387 of which was brought in through legislative membership dues (a two-year membership is available to lawmakers for \$100, or four years at \$200). On the other hand, ALEC received \$5.6 million (all but \$1.3 million of the group's annual budget) in contributions from its corporate and special-interest members.

According to ALEC promotional material, each year member legislators carry an average of 1,000 pieces of model legislation back to their home states—20 percent of which are passed into law.

As a testament to ALEC's efficacy as a pipeline for corporate-backed legislation, since the passage of the federal healthcare overhaul package in late March 2010, legislators in at least 38 states have introduced the ALEC-crafted Freedom of Choice Health Care Act (Health Care Act), which, according to an ALEC press release, was modeled after an Arizona proposal defeated on the ballot in 2008. Ironically, given the fetish Pearce and other ALEC lawmakers have for adherence to federal immigration laws, the Health Care Act is marketed as an assertion of states' sovereignty under the Tenth Amendment.

Pearce is an executive member of

ALEC's Public Safety and Elections Task Force. Private sector executive members of this task force include CCA, the American Bail Coalition (which is comprised of nine of the nation's top bail bond insurer/bounty hunter associations), the National Beer Wholesalers Association, the Wine and Spirit Wholesalers Association, the National Pawn Brokers Association and Prison Fellowship Ministries. The private sector chair of the task force is currently the National Rifle Association (NRA).

According to Michael Hough, director of the Public Safety and Elections Task Force, every bill introduced by any member legislator or corporation must go through a 30-day review process for approval by both public and private sector ALEC members before it can become model legislation. This process, Hough says, was set in motion for Pearce's immigration bill when he submitted it to his fellow members of the task force during the group's December 2009 meeting at the Grand Hyatt in Washington, D.C.

Pearce denies that he submitted the bill to ALEC for any other purpose other than to gain their endorsement and to strengthen its ability to weather legal challenges both in Arizona and in other states.

According to Hough, however, ALEC does not issue endorsements, but rather works with lawmakers on the formation and dissemination of model legislation. And Hough says the model legislation, the "No Sanctuary Cities for Illegal Immigrants Act" (Sanctuary Cities Act), that emerged from the Public Safety and Elections Task Force in early January 2010 is virtually identical to the bill introduced by Pearce in the Arizona legislature later that month.

Pearce says he anticipated that the Arizona law would be challenged by groups supporting "lawbreakers over lawkeepers," such as the American Civil Liberties Union (ACLU). Therefore, as Pearce tells it, he turned to the "brightest minds in the nation" and scoured more than 25 years of legislation to help draft his magnum opus immigration omnibus bill. The result, he says, is a law specifically designed to sustain the challenges of the political left.

One of the "brightest minds" that Pearce sought out was Kris Kobach. Kobach served as an advisor to former Attorney General John Ashcroft in the aftermath of the September 11, 2001 terrorist attacks, helping to implement the

Private Prisons in Arizona (cont.)

National Security Entry-Exit Registration System that called for the monitoring of individuals from Middle Eastern nations. Kobach is currently running for Kansas secretary of state and proudly bills himself on his campaign website as an attorney who “litigates against the ACLU in courts across the country.”

Kobach is also the “national expert on constitutional law” at the Immigration Reform Law Institute (IRLI), a subsidiary organization of the Federation for American Immigration Reform (FAIR). IRLI and FAIR are both funded in part by the Pioneer Fund, an organization that unabashedly studies the ‘science’ of eugenics. Consequently, the Southern Poverty Law Center has designated both IRLI and FAIR “nativist hate groups”—a designation that Pearce has no qualms in dismissing.

“The Center for Poverty [sic] is the closest thing you can get to a Communist organization in America,” says Pearce. “They are absolutely a hate-based organization that hates Americans who stand up for the rule of law.” For his part, Kobach says that being labeled as a racist, a nativist or a member of any hate group is “absurd and hurtful.”

According to both Pearce and Kobach, SB 1070, Arizona’s immigration bill, was not the brainchild of IRLI or FAIR as many media reports have claimed.

“The initial first draft of the bill was done by the legislators in the Arizona legislature who were coming up with a broad template of what they wanted to achieve. I was brought in at that point to advise on what was possible and what wasn’t possible, and to refine the language to make sure it stands up in court,” says Kobach.

Indeed, most of the provisions contained in the Support Our Law Enforcement and Safe Neighborhoods Act had existed in one form or another in legislative sessions prior to the bill’s introduction in the Arizona legislature this year—though Kobach does claim credit for the provision which outlaws “sanctuary city” policies, previously passed by the Missouri legislature in 2008. As a matter of fact, a bill containing language very similar to the Support Our Law Enforcement Act was passed by the Arizona legislature in 2006, only to be vetoed by then-Governor Janet Napolitano. That bill, HB 2577, was the first substantive introduction of the trespassing and “breathing while brown” provisions to the Arizona legislature.

“Breathing While Brown”

All Arizona is seeking to do, says Pearce, is to enforce federal immigration policy—which he says is deliberately barred by liberal lawmakers and “loud-mouth anarchist” leftist groups in so-called “sanctuary cities.”

“It’s illegal to have sanctuary policies in this state under federal law, but we have them all over this country. I mean, L.A. and San Francisco being—if you will—the poster cities of what’s wrong with America,” says Pearce. “I mean, in Arizona, the crime—number two in the world in kidnappings; the home invasions, carjackings—identity theft capitol of the

nation. The killings, the maimings—we can go through the list of officers that have been killed in the city of Phoenix. In fact, in the last ten years, 87 percent of the officers killed in the city of Phoenix were killed by illegal aliens.”

To remedy this situation, the ALEC Sanctuary Cities Act model legislation and Pearce’s Arizona bill both feature anti-“sanctuary cities” provisions which prohibit any municipal, county or state policy that might hamper the ability of any government agency from complying with federal immigration law. Both bills also include sanctions aimed at those who employ illegal immigrants and tougher penalties for human smugglers.

The provision of SB 1070 which has drawn the most fire from critics across the nation is the so-called “Breathing While Brown” provision. Under this section, law enforcement personnel may arrest anyone in their presence without a warrant, provided that the officer has probable cause to believe that the arrestee has committed a crime.

While the ability of a cop to make an arrest without a warrant is nothing new, one of the new crimes a law enforcement officer may cite as grounds for arrest based on probable cause is. The Support Our Law Enforcement and Safe Neighborhoods Act establishes state level offenses that mirror existing federal offenses under United States Alien and Nationality Code, sections 1304(e) and 1306(a).

Section 1304(e) states, “every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt.”

Violation of this section under federal law is a misdemeanor and carries a sentence of up to 30 days incarceration.

Section 1306(a) states, “any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both.”

Once the Arizona immigration law goes into effect, any person found to be in violation of either of these federal laws in

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the state of Arizona—after their immigration/residency status has been determined by an agent of the federal government—will be charged with the new state crime of “willful failure to complete or carry an alien registration document,” a subsection of the state’s criminal trespass statute. These state offenses carry a maximum fine of \$100, along with restitution of jail costs and up to 20 days in jail. A second or subsequent offense carries a term of up to 30 days in jail.

By creating these state-level offenses, the law essentially converts every state, county and municipal law enforcement officer into an enforcer of federal immigration law.

“Basically, you have a mandate for all of the law enforcement in Arizona to question everyone about their immigration status,” said Linton Joaquin, general counsel for the National Immigration Law Center (NILC), a group seeking a federal injunction against the law. “I think it’s inevitably going to be a matter of racial profiling. You have them determining who they have reasonable suspicion as being undocumented ... clearly one factor is race, appearance and ethnicity. You can’t separate that in practice or in reality.”

While the wording of the bill expressly prohibits racial profiling as a means of determining immigration status, Joaquin says the letter of the law will do little to dissuade enforcement through the underlying color of the law.

“[Probable cause] can be incredibly easy to find. If a person looks away, then they are ‘averting their glance.’ If they look right at you, then they’re exhibiting ‘studied nonchalance.’ We see all these terms used to create a sense that there is a basis of suspicion.”

Pearce does not agree with that assessment.

“That’s another lie. They are absolutely not worried about racial profiling. It’s the boogie man thing. It’s like with children, once they believe there’s a boogie man, they have to sleep with the light on—even though there’s no real boogie man,” said Pearce. “It’s fear mongering and they are simply intellectually dishonest.”

According to Hough, one of the differences between the final version of the Support Our Law Enforcement and Safe Neighborhoods Act as signed into law in Arizona and the Sanctuary Cities Act, as promoted by ALEC on the floors of other state legislatures, is that the ALEC legisla-

tion carries more stringent penalties under the criminal trespass section.

Under the Sanctuary Cities Act, first offenses under the trespassing provision are still classified as a class 1 misdemeanor; however, there is no 20 to 30-day cap on incarceration as the final version of the Arizona law provides. Additionally, where the Support Our Law Enforcement Act classifies subsequent offenses as misdemeanors, the Sanctuary Cities Act classifies repeat offenses as felonies, which carry lengthier terms of incarceration.

Meet the New War, Same as the Old War

Questions of justice aside, the net effect of the Arizona law and the ALEC-modeled legislation passed in other states will be to greatly increase the numbers of undocumented aliens arrested and jailed, by effectively converting each state and county law enforcement officer into an enforcer of federal immigration law.

The immigration dragnet created by the Support Our Law Enforcement Act in Arizona and the Sanctuary Cities Act as disseminated by ALEC is a win-win situation for private prison companies, and this war on immigration is not the first time

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Private Prisons in Arizona (cont.)

corporate-backed legislation has filled the prisons and bank accounts of entities such as CCA and GEO Group.

In the early 1990's, while the ALEC Public Safety (then Criminal Justice) Task Force was co-chaired by CCA, another task force member and current private sector chair, the NRA, began an aggressive campaign to introduce variants of two pieces of ALEC-backed legislation at the state and federal level: the so-called "truth-in-sentencing" and "three-strikes" laws.

Truth-in-sentencing called for all violent offenders to serve 85 percent of their sentences before being eligible for release.

Three strikes called for mandatory life imprisonment for a third felony conviction. In some states this was interpreted as life imprisonment for a third violent offense conviction, while in others, such as California, the law was enacted in such a way as to include those convicted of petty offenses such as shoplifting. [PLN was the first media to report the instrumental role the NRA played in bankrolling Washington's Three Strikes law in 1993 (the first in the nation) and Washington State's "Hard Time for Armed Crime" initiative in 1995.]

The NRA campaign, dubbed "CrimeStrike," headed by victim's rights advocate and former Arizona Chief Assistant Attorney General Steve Twist, was seen by many as a reactionary strike at the Clinton administration's gun control ef-

forts when it moved into high gear in 1993. CrimeStrike was the campaign which set forth the precept that "guns don't kill people, people kill people." As such, CrimeStrike promoted state and federal tough-on-crime legislation and derided any lawmaker backing gun control as being "soft on crime."

With memories of the Willie Horton disaster of the failed 1988 Michael Dukakis presidential campaign still fresh in the minds of most American legislators, this accusation invariably hit a raw nerve among Democrats and elicited kneejerk support of the laws.

While the NRA was busy pushing these laws through CrimeStrike, ALEC was pushing its agenda in Pennsylvania with the help of former Herbert-Walker Bush U.S. Attorney General William Barr and ALEC member, then-Pennsylvania governor, and future director of the Department of Homeland Security, Tom Ridge.

In 1995, the Pennsylvania legislature passed several tough-on-crime bills based on ALEC proposals and model legislation. In 2005, while serving as Speaker of the Pennsylvania House of Representatives, state Rep. John Perzel, an ALEC member and Pennsylvania House Majority Leader from 1995 to 2003, joined GEO Group's board of directors.

In November 2009, Perzel resigned from the corporation's board following an indictment handed down that same month for his alleged role in a scandal involving several of his staffers and other lawmakers charged with using taxpayer dollars to fund their campaign activities. Only days

before his indictment, Perzel exercised his option as a board member to purchase 5,000 shares of GEO stock, valued at that time in excess of \$100,000. According to a GEO Group statement, Perzel left on good terms with the company. [See: *PLN*, Sept. 2010, p.34].

Incidentally, Pennsylvania was one of the first states to introduce legislation strikingly similar to the Support Our Law Enforcement/Sanctuary Cities Acts, legislators having introduced their own "Support Our Law Enforcement and Safe Neighborhoods Act" in May 2010.

By 1996, CrimeStrike claimed responsibility for the passage of "three strikes" laws in Washington, California, Georgia, Delaware and North Carolina, as well as truth-in-sentencing laws in Arizona, Mississippi and Virginia.

A contributing factor to the spread of truth-in-sentencing laws was the Violent Crime Control and Law Enforcement Act of 1994. The Act provided millions of federal dollars under the Violent Offender Incarceration and Truth-In-Sentencing (VOI/TIS) Incentive Grant Program to states to build new prisons or contract out beds with private corporations if the states adopted truth-in-sentencing laws for violent offenders.

According to the Bureau of Justice Statistics, by 1998, 27 states and the District of Columbia had adopted federal truth-in-sentencing guidelines and were receiving VOI/TIS funding for corrections expansion. Eleven states had adopted versions of the "three-strikes" legislation.

Several states exceeded the VOI/TIS requirements and imposed broader



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sentencing guidelines, beyond the realm of violent offenses. Arizona, for example, amended its sentencing laws in a way which would require all prisoners to serve their entire sentences, except that they may be eligible for earned release credits for up to a 15 percent sentence reduction. From 1996 to 2001, Arizona received \$57,923,000 in VOI/TIS grants for much-needed prison expansion and operational expenses under the state's new sentencing guidelines.

According to the Department of Justice, the federal government disbursed \$2.7 billion in VOI/TIS grants nationwide during the same five-year period to states that had adopted the guidelines. However, the program was discontinued following fiscal year 2001, leaving states with rapidly-swelling prison populations to foot the bill.

In late 2009 through the first quarter of 2010, several states which had previously espoused the "tough-on-crime" stance promoted through ALEC and CrimeStrike reconsidered and rolled back some of those tough sentencing guidelines in order to slacken the demands wrought on their budgets by overburdened criminal justice systems in the face of massive shortfalls. This, however, has not been the prevailing attitude among Arizona lawmakers—struggling with one of the most severe budgetary crises in the nation—who have stuck by their guns and, instead of revisiting sentencing guidelines, opened nearly their entire prison system to operation by private corrections contractors.

Gov. Brewer signed the Criminal Justice Budget Reconciliation Act (Criminal

Justice Act) into law in September 2009. The law required the state to issue requests for proposals (RFPs) for the private operation of up to nine of the state's 10 prison complexes. This provision of the Criminal Justice Act was quietly repealed by the legislature in March 2010, due primarily to lawmaker concerns that private prison companies were not equipped to handle maximum security facilities. However, the Criminal Justice Act also required the Arizona Department of Corrections to issue RFPs for 5,000 new private medium to minimum-security beds. [Ed. Note: The RFPs for 5,000 additional private prison beds were cancelled by the Department of Corrections in September 2010, though they will be reissued; see: *PLN*, Sept. 2010, p.42].

The bid for privatization in Arizona was unprecedented. The only other instances of a state legislature even considering opening the state's entire prison system to private contractors were the Corrections Corporation of America's failed bids in the mid-80's and mid-90's to take over the entire prison system in its home state of Tennessee. During the second bid, CCA projected an additional \$100 million annually in state revenues as a result of privatization. Upon review, however, the Tennessee legislature realized that the projections were far from accurate. Interestingly enough, the same \$100 million figure was cited by the Arizona state legislature in the Criminal Justice Budget Reconciliation Act—the primary engines of which were Senate President and Arizona State ALEC Chair Bob Burns, as well as Senator Pearce.

Shower in the Desert: It's Raining Money

Over the past decade, the private prison industry has increasingly shifted its attention to the burgeoning fields of undocumented and criminal alien detention.

For example, from January 2008 to April 2010, CCA spent \$4.4 million lobbying the Department of Homeland Security and ICE, the Office of the Federal Detention Trustee, the Office of Budget Management, the Bureau of Prisons (BOP) and both houses of Congress. Of the 43 lobbying disclosure reports filed by CCA during this period, only five do not expressly state intent to monitor or influence immigration reform policy or gain Homeland Security or ICE appropriations.

To illustrate the lucrative payoff this activity has had for CCA, the private jailer reported \$1.7 billion in gross revenue for 2009, attributing about 40 percent of this business to its federal clients ICE, the BOP and the U.S. Marshals Service, all of which house immigrant detainee populations.

And, according to the story the numbers tell, it is easy to see why the private prison industry is eager to expand its stake in the immigrant detainee market. According to ICE Public Affairs Officer Gillian Brigham, in fiscal year 2009, ICE detained 383,524 individuals with an average daily prisoner population of 32,098 spread across the nation's 270 immigrant detention centers.

Due to the rising numbers of immi-

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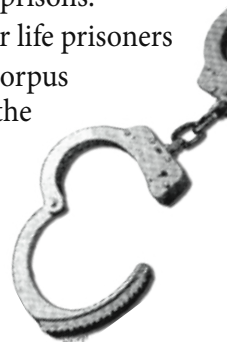
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Private Prisons in Arizona (cont.)

grant detentions in recent years, coupled with the rising tide of economic shortfalls at both the state and federal level (ICE reported a \$140 million budget shortfall for fiscal year 2010), ICE has farmed the operations of many of these facilities out to either county operators under inter-governmental service agreements or to private prison contractors that operate the facilities on a per diem, per inmate basis.

Currently, according to Brigham, seven of these facilities are “contract detention facilities” (CDFs) owned and operated by either CCA or GEO Group. However, says Brigham, there are several types of facilities utilized by ICE for immigrant detention which may be operated by private contractors, including facilities such as county or state-owned jails and prisons contracted out by ICE under “inter-government service agreements” (IGSAs), or other “service processing centers,” which are facilities operated by both federal and private detention staff.

An example of one of these IGSA facilities would be the nation’s largest immigrant detention “tent city” facility, the Willacy County Processing Center in Raymondville, TX. This prison, though owned by the county, is operated by Management and Training Corporation (MTC), a private prison firm based in Utah.

Willacy County’s “tent city” facility, consisting of several massive dome-like structures near the Gulf of Mexico, has the capacity to warehouse in excess of 3,000 immigrant detainees awaiting deportation at any given time. [See: *PLN*, Sept. 2007, p.1].

Unfortunately, according to Brigham, ICE does not keep tabs on who is operating these detention centers at the state or county levels through IGSAs, so it is difficult to assess how many of those prisons are run by private firms.

However, as an indication of what they see to be bountiful times to come, GEO Group and CCA report plans to expand operations or fill thousands of existing immigrant detention bed “inventory surpluses” in Arizona, California, Oklahoma, Texas, Michigan and South Carolina in response to what the corporations refer to as “organic growth opportunities,” chief of which is an anticipated increase in immigrant detentions, coupled with the increased inability of the federal and state

governments to meet detention needs due to budgetary constraints.

In May 2010, during the GEO Group’s first quarter investor conference call, an investor asked GEO CEO George Zoley what impact Arizona’s immigration law might have on business.

Zoley responded with levity: “What, they have some new legislation? I never heard about it. I think I’m increasingly convinced of their need for 5,000 new beds.”

Wayne Calabrese, GEO Group’s vice chair and chief operating officer, offered a more straightforward appraisal.

“I can only believe that the opportunities at the federal level are going to continue at pace as a result of what’s happening. I think people understand there is still a relatively low threshold of tolerance for people coming across the border and those laws not being enforced,” said Calabrese. “And that to me at least suggests there are going to be enhanced opportunities for what we do.”

The Ties that Bind

Whether or not private prison companies influenced the drafting of the Support Our Law Enforcement and Safe Neighborhoods Act during the month that ALEC’s Public Safety Task Force had to review the bill prior to its introduction to the Arizona legislature may be a moot point.

The private corrections/immigrant detention industry has had ample opportunity—and obvious intent—in recent years to influence the drafting of and smooth the way toward passage of this and similar legislation.

According to Pearce, Kobach and Brewer spokesman Paul Senseman, the Support Our Law Enforcement Act went through a lengthy edit and review process from the months before its introduction at the legislature to the day it was signed by the Governor. This review process—aside from the numerous hearings held in both houses of the state legislature—took place predominantly within the office of the Maricopa County Attorney and in the office of Governor Brewer.

A little over a week after Pearce introduced the Support Our Law Enforcement Act on the floor of the state Senate as SB 1070, CCA enlisted Highground Consulting, one of the most influential lobbying firms in Phoenix, to represent its interests in the state.

Lobby disclosure forms filed with

the Arizona Secretary of State indicate that Maricopa County also employed the consulting firm during the time of the bill’s formation.

Highground’s influence extends into Governor Brewer’s office. The firm’s owner and principal is Charles “Chuck” Coughlin, Brewer’s top advisor and campaign manager.

In addition to Coughlin, CCA has further ties to the office of the Governor. State lobby reports reveal that Gov. Brewer’s current spokesman, Senseman, had been lobbying Arizona lawmakers as CCA’s chief lobbyist in the state as an employee of Policy Development Group, Inc., yet another influential Phoenix consulting firm, from 2005 to late 2008. Senseman was appointed as Brewer’s spokesman in January 2009—fresh off the job with CCA. Senseman’s wife, Kathryn, remains employed by Policy Development Group, which still lobbies the state on behalf of CCA.

So, in 2005 and 2006, while Arizona lawmakers—many of them ALEC members—were drafting provisions of what would eventually become the “Breathing While Brown” law (incorporated in HB 2577), Governor Brewer’s current director of communications was lobbying on behalf of the largest private prison company and operator of immigrant detention facilities in the nation.

Additionally, Brewer’s Chief Policy Advisor, Richard Bark—a man mentioned by Senseman, Pearce and Kobach as being directly involved in the drafting of the Support Our Law Enforcement Act—remains listed with the Office of the Secretary of State as an active lobbyist for the Arizona Chamber of Commerce and Industry (ACCI). CCA is a “board level” member of ACCI and is the top employer in Pinal County, located just south of Maricopa County, where CCA operates five detention facilities for both state prisoners and immigrant detainees.

Meanwhile, GEO Group employs Public Policy Partners, a consulting firm which, like Highground, also provides consultation and lobbying services to Maricopa County.

While Public Policy Partners, an Arizona-based company, has over 30 clients in the state, it is worth noting that the firm has only two clients at the federal level: GEO Group (based in Florida) and Ron Sachs Communications, a Florida-based public relations firm which, according to lobby records, promotes issues related to prison

privatization. Public Policy Partners, as a firm, also appears to be an advocate for expanded use of private prisons. Federal lobby records from the first quarter of 2010 show Public Policy Partners' owner, John Kaite, lobbying on behalf of the firm on issues pertaining to "private correctional detention management."

CCA has also shown special interest in Arizona through several recent choices in its corporate structuring.

In 2007, CCA hired Brad Regens as "vice president of state partnership relations" for the purpose of cultivating new contracts in Arizona and California. In the two years immediately prior to his employment at CCA, Regens had worked in the Arizona House of Representatives as director of fiscal policy. Before his appointment as director of fiscal policy, Regens spent nine years working in the Arizona legislature in various roles, including assistant director of the Arizona Joint Legislative Budget Committee.

Further, after hiring Regens, CCA elected former U.S. Arizona Senator Dennis DeConcini to its board of directors in February 2008.

Subsequent Events

Since this article's initial publication in the July 2010 issue of *In These Times*, several developments have unfolded in the case of Arizona's controversial "Breathing While Brown" law.

On July 6, the U.S. Department of Justice (DOJ) filed a challenge to the constitutionality of SB 1070 in the U.S. District Court for Arizona. The DOJ's primary assertion, as stated in a press release, was that the law "unconstitutionally interferes with the federal government's authority to set and enforce immigration policy." As such, the DOJ urged the court to issue an injunction before the

law, through its implementation, caused "irreparable harm" to the functions of both local and federal law enforcement and immigration efforts.

Numerous chiefs of Arizona law enforcement agencies submitted briefs in support of the DOJ challenge, stating that SB 1070 would cause undue burden on their officers and hamper their ability to perform their jobs by alienating a significant portion of the communities they serve. A Tucson police officer, Martin Escobar, had filed a separate lawsuit in April 2010 challenging SB 1070, claiming that he could be held liable for violating people's civil rights if he was required to enforce the law. His suit was eventually dismissed due to lack of standing.

On July 28, the day before SB 1070 was set to take effect, U.S. District Court Judge Susan Bolton issued a temporary injunction in the DOJ's suit, suspending several of the statute's more controversial provisions, among them the requirement that law enforcement officers check an individual's immigration status if they are suspected of being in the country illegally. See: *United States v. State of Arizona*, U.S.D.C. (D. Ariz.), Case No. 2:10-cv-01413-NVW.

On September 2, 2010, the DOJ filed another federal lawsuit, seeking declaratory and injunctive relief against Maricopa County Sheriff Joe Arpaio and his agency, the Maricopa County Sheriff's Office (MCSO), to gain access to documents that Arpaio repeatedly failed to produce. The DOJ had requested records detailing how, or if, federal funds received by MCSO had been used to further alleged discriminatory policing practices that targeted Hispanics—such as racial profiling and discrimination against jail prisoners.

According to the complaint in that

suit, the DOJ had been seeking Arpaio's cooperation since March 2009. Ironically, given the fact that "the federal government has failed us!" is the rallying cry of Arizona lawmakers backing SB 1070 and other "tough-on-immigration" policies, the DOJ's complaint states that Maricopa County (and through it, MCSO) had received nearly \$16 million in federal law enforcement and border security grants in 2009 alone.

Where that money went, Sheriff Arpaio won't say—at least not without a court fight. According to pleadings in the case filed in late September 2010, MCSO denied withholding records from DOJ investigators. Yet according to DOJ documents, MCSO wrote the department as recently as August 27, stating it refused to cooperate fully with the federal investigation. The suit remains pending. See: *United States v. Maricopa County*, U.S.D.C. (D. Ariz.), Case No. 2:10-cv-01878-GMS.

In regard to the private prison industry connection to SB 1070, it has been learned that private prison executives turned out their checkbooks to show their appreciation to Arizona House Speaker and SB 1070 sponsor Kirk Adams. According to data from the National Institute on Money in State Politics, GEO Group founder and CEO George Zoley, along with GEO President and Chief Operating Officer Wayne Calabrese, his wife Rhonda Calabrese and GEO Senior Vice President John Hurley, all wrote checks to Rep. Adams for \$410 (the maximum contribution allowed under state law) on the same day in December 2009. ■

An abbreviated version of this article was first published by In These Times; this expanded and updated version is reprinted with permission from the author.

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From the Editor

by Paul Wright

As we near the end of the year we are doing PLN's annual fundraiser and this one is especially crucial because it is our 20th anniversary. Most publications never publish 10 issues, much less 240. Twenty years is a milestone for any organization and moreso for a publication like *PLN* that has faced obstacles beyond those of the mere publishing industry.

Censorship has been a harsh reality for our entire existence as prison and jail officials believe that if they don't like the news they can censor it out of existence. As this issue notes, we have recently settled our lawsuit against the Virginia Department of Corrections and substantially revamped their mail rules. Unfortunately, even as we resolve censorship issues in one state, two more, Florida and New York, have banned *PLN* on a statewide basis, Florida supposedly because of our advertising content and New York supposedly because we accept stamps as payment. Reader support is what allows us to successfully challenge these censorship attacks and achieve significant changes in how publishers' mail to prisoners is processed, handled and delivered.

If you can afford to make a donation to *PLN* please do so. Every little bit helps and goes a long ways. The price we charge for subscriptions, especially prisoner sub-

scriptions, does not cover all our costs and expenses, especially those related to challenging censorship by prisons and jails. You can make a donation by mail, online or by telephone. A donation to *PLN* will go further and make more of a difference than a donation to almost any other non profit organization. If you cannot afford to make a donation yourself please encourage others to make one.

As the holidays approach please consider buying friends and loved ones either a subscription to *PLN* or one of the books we publish or distribute. Note that the *Prisoners' Self-Help Litigation Manual* is available from *PLN* as well as the publisher. In last month's issue of *PLN* I reviewed the *PSHLM* and incorrectly stated when the 1st edition was published. The 1st edition was

published by the ACLU National Prison Project and authored by James Potts in 1976, not 1983 by Dan Manville.

Be advised that *Starting Out*, the reentry book we had been distributing, is now out of print and no longer available. We will send refunds to any orders we have received for the book since the stock ran out. We maintain a significant book inventory on hand but many times when books go out of print we do not learn this until we are reordering a particular title. Generally books are out of stock because new editions are being prepared and titles updated, but sometimes they are simply not being reprinted. We apologize for the inconvenience.

Enjoy this issue of *PLN* and please encourage others to subscribe. ■

Suit Filed Against Use of Rapiscan on Detention Facility Visitor

by David M. Reutter

In partially denying state officials' motion for summary judgment, an Illinois federal district court discussed the constitutional parameters involved in the use of a Rapiscan Secure 1000 device, which uses "back-scatter" X-ray technology to perform body scans on visitors entering a detention facility.

Before the court was a 42 U.S.C. § 1983 complaint filed by Geneva Zboralski, who alleged violations of her Fourth and Fourteenth Amendment rights as well as claims for invasion of privacy and assault and battery.

The case arose due to searches that Zboralski was required to undergo to visit her husband, Brad Lieberman, a civilly-committed resident at the Illinois Department of Human Services' Treatment and Detention Facility (TDF).

Zboralski had never been suspected of bringing contraband into TDF during her regular visits to see Lieberman from 2000 until May 2005. During May 2005, Zboralski came to the attention of TDF security therapy aide Jo Ellen Martin, who patted her down between ten and 20 times that month.

Martin seemed to make it a point to pat search Zboralski each time she entered the facility. During three of those pat

downs, Martin briefly touched Zboralski's vaginal area. The first time, Zboralski gave Martin the benefit of the doubt that it was an accident when she "felt Martin's index finger briefly move up between her vaginal lips, pushing her pants between her vaginal lips."

The second time, Zboralski felt Martin's finger go between her vaginal lips. The third time was a brief touching of the vaginal area. While Zboralski made no physical reaction or comment on the improper touching at the time, she later lodged a complaint with TDF supervisors Darell Sanders and Steve Strock.

In the face of Zboralski's demand that Martin not touch her anymore, she was told she must either submit to the pat down or be scanned with the Rapiscan. For the next three weeks she was required to undergo a Rapiscan to enter TDF. Zboralski researched the Rapiscan device on the Internet, and found it could display and save images that revealed a person's genitalia and other personal details.

The district court dismissed Zboralski's invasion of privacy claim because there was no evidence that her image had been saved, printed or inappropriately used by facility staff.

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As to Zboralski's claim that she was required to undergo Rapiscans without her consent, the court examined Fourth Amendment law.

Under the applicable case law, a person cannot be subjected to unreasonable searches or seizures. However, since detention facilities are "unique place[s] fraught with serious security danger," the Fourth Amendment does not apply in full force. The question of whether the Rapiscan was unreasonable was one of first impression, as no other court, state or federal, had addressed the issue.

While a body scan would seem to be less intrusive than a strip search or pat down search, the fact that a Rapiscan is "capable of producing a highly-detailed image, which includes genitalia and fat folds" can render it very invasive. It also subjects the person being scanned to potentially harmful X-rays. The U.S. Customs agency only utilizes Rapiscans when reasonable suspicion exists.

The district court said it needed testimony as to how reasonable persons would feel if they were subjected to such scans, to help it determine whether the level of detail affects whether or not the scan is more similar to a pat down

or strip search.

The district court found that since Zboralski had to undergo a Rapiscan as a condition to visit her husband, the search was not consensual as a matter of law. The court also held that Martin's intent was at issue in the assault and battery claim. Thus, the defendants' motion for summary judgment was granted as to two defendants and on the invasion of privacy claim, but denied in all other respects. See: *Zboralski v. Monahan*, 616 F.Supp.2d 792 (N.D.Ill. 2008).

The defendants' second motion for partial summary judgment was granted on July 29, 2010. The district court found that "Based on the record evidence, the court cannot conclude that the plaintiff has met her burden to show that there is a genuine issue of fact regarding the reasonableness of the Rapiscan search." The court held there was no evidence that the Rapiscan caused any physical harm or indignity, though it clarified that it "does not hold that routine searches with this technology are reasonable."

The case remains pending on Zboralski's remaining claims. See: *Zboralski v. Monahan*, U.S.D.C. (N.D. Ill.), Case No. 1:06-cv-03772. ■

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Oregon: Prosecutors, Victims Kill Money-Saving Increased Sentence Reduction Law

by Mark Wilson

In a controversial move touted as saving Oregon an estimated \$6 million, in June 2009 the state legislature passed a bill that increased earned time sentence reductions for non-violent offenders by an additional 10 percent. Just seven months later, however, prosecutors and crime victims successfully pressured lawmakers to suspend the increase in earned time and restrict it to fewer prisoners.

Under the 2009 law, House Bill 3508 (HB3508), offenders who were already eligible for a 20 percent sentence reduction became eligible for a 30 percent reduction unless they were convicted of any of a long list of disqualifying crimes. The law focused only on current offenses, so prisoners who had disqualifying crimes in their past were still eligible. Additionally, if an offender was serving sentences for both disqualifying and non-disqualifying offenses, he or she was entitled to a 30 percent sentence reduction on the non-disqualifying offense but only a 20 percent reduction on the disqualifying charge.

Oregon Department of Corrections (ODOC) officials were tasked with identifying the 4,466 eligible offenders – about 30 percent of the state's prison population. If neither the prosecutor nor victims objected, the prisoner was automatically credited with the additional 10 percent sentence reduction, which sometimes resulted in his or her release, often with just 24-48 hour notice.

If the prosecutor or the victims objected – as happened in 800 cases – the law, in real money-saving fashion, required the original sentencing court to appoint counsel for the prisoner at state expense, hold hearings and allow the objecting parties to voice their concerns. Of course, such objections generally focused on the facts of the crimes rather than whether the offender's conduct in prison warranted a sentence reduction.

"When victims have objected to these releases, judges typically denied the [increased] earned time," said state Senator Suzanne Bonamici, a member of the Senate Judiciary Committee. By February 2010, 798 offenders had been denied the additional 10 percent sentence reduction.

Among those denied were prisoners

convicted of serious offenses such as robbery, arson, attempted murder, assaulting police officers and prison guards, abuse of a corpse, sexually abusing children, possessing dangerous weapons, and downloading child pornography on a prison computer.

"There are very few saints in prison," said state Senator Chip Shields, who co-wrote the law, "which is why this can't happen in an easy way." Still, Shields noted that the law worked exactly as expected, saving Oregon taxpayers \$84 a day for each offender who was released an average of 55 days early.

Of course that argument was lost on victims and prosecutors, who condemned the law for releasing violent criminals, clogging court dockets, reopening wounds for crime victims and being a backdoor attempt to tamper with mandatory minimum sentencing statutes.

"They need to repeal this law," declared Umatilla County District Attorney Dean Gushwa. "I can't believe that they ever intended for this law to shave time off sentences for violent offenders."

"I call it an oversight," countered Senator Floyd Prozanski, a co-author of the law whose sister had been murdered. "Just like any major piece of legislation, we have now realized there are some crimes we intended to include [in the list of disqualifying offenses] that we are going to include." Prozanski advocated "tweaking" the law by adding 20 crimes to the list of disqualifying offenses during a February 2010 special legislative session.

However, Doug Harclerod, a former prosecutor-turned-lobbyist for the tough-on-crime Oregon Anti-Crime Alliance, accused Prozanski and others of pushing a bad law. "It is not a 'tweak' issue," said Harclerod. "The legislature made an error in increasing earned time."

Just as the special legislative session began, Harclerod's group sponsored a statewide radio campaign opposing the expanded earned time law. "These ads are misleading listeners and giving them false information," charged Prozanski.

The ads featured the case of Dem-

etrius Payton, whose November 26, 2009 release from prison was moved up to October 2, 2009. "A woman is asleep in her own apartment," the ad said. "Suddenly she's attacked by a registered sex offender and convicted burglar. Even worse, he got out of prison early because of a law Oregon politicians passed last summer. And he's not the only one."

The problem was that Payton's new crime wasn't committed until January 2010 – two months after he would have been released even without the increased earned time. "They're insinuating these crimes were committed as a result of earned time and that's false," said Prozanski. Harclerod claimed he didn't know about Payton's original release date and said his group had relied on a news story when designing its \$12,000 ad campaign.

Of course it's impossible to unring a bell. The damage was already done, exactly as Harclerod and others who opposed the earned time law knew it would be. During the 2010 special session, Senate Bill 1007 (SB1007) began as Prozanski's "tweak," but when the dust settled a month later the 2009 earned time legislation had been effectively gutted. Republican lawmakers had vocally opposed SB1007 in its original form, and accused Democrats who supported the bill of endangering public safety.

For crimes committed on or after SB1007's February 17, 2010 effective date, earned time sentence reductions were rolled back to 20 percent. Opponents of the bill did not accomplish a complete repeal, however. For offenses committed on or after July 1, 2011, 30 percent sentence reductions will again be available until July 1, 2013, but for a smaller class of offenders, as the list of disqualifying crimes was expanded significantly.

"This is a reasonable period of time to look at the earned time and will allow us to ensure that, when we continue the additional 10 percent program, it will be limited to those crimes we intended," said Senator Prozanski. "We're having a timeout and will continue the program next year. We've realized most of the savings – somewhere between \$4 million and \$5.5 million."

SB1007 also requires the Secretary of State and the Oregon Criminal Justice Commission to audit the ODOC's earned

time program and assess its impact on recidivism rates. "We haven't had the opportunity to see how this is working," said Senator Bonamici. "I'm not convinced there is a danger to public safety." She noted that research has shown fewer released offenders commit crimes in other states that have increased earned time.

Prosecutors are now accusing lawmakers of cutting their pay over the earned time dispute. Prosecutors fought the 2009 earned time increase on behalf of victims, according to Crook County District Attorney Daina Vitols. When it became clear in late June that the bill would pass, prosecutors decided to "get out of the way," stated Kevin Neely, a lobbyist for the Oregon District Attorneys Association.

In subsequent June 2009 budget hearings, however, several legislators suggested that prosecutors should have their pay reduced for fighting the earned time legislation, as their opposition reduced the scope of the bill and thus the projected cost savings. After the budget hearings closed, lawmakers passed a last-minute budget bill that cut about \$170,000 from elected district attorneys' pay. Prosecutors in counties with less than 100,000 residents receive \$87,000 from the state and those with over 100,000 population receive \$99,000. Many counties supplement the state pay of their elected prosecutors.

For many prosecutors the pay cut amounted to about \$5,000. "You're pretty much talking about a month's salary," said Jefferson County District Attorney Steve LeRiche. "What employed person can say they could lose a month's salary and not [feel it]?"

Prosecutors claim that lawmakers used the pay cut to pressure them into an uncharacteristically quiet role regarding SB1007, the bill intended to "tweak" the earned time law. On February 10, 2010, Clatsop County District Attorney John Marquis warned his fellow elected prosecutors by email not to criticize the bill.

"There are many problems with this 'fix' but if any of us say a word they'll cut off our salaries," wrote Marquis. "So I hope everyone has equity for a loan, savings or has been setting aside money." The next day, Malheur County District Attorney Dan Norris circulated an email to other prosecutors claiming that lawmakers were "buying our silence on [legislation] with our salary The legislature has taken a very dangerous low road by tying our hope that we get the salary [restored]

to our rolling over on earned time."

Legislative leaders denied the charge. "Neither I nor anyone I am aware of would tie the two together," said House Speaker Dave Hunt. Some prosecutors insist, however, that they know otherwise. Marquis claimed that based on inquiries at the state capitol, unnamed "legislators who had the power to do this" made the threat.

"I think I'm able to distinguish between truth and rumor," said Marquis, who refused to single out a specific legislator, claiming he did not want to reveal his sources.

Lawmakers said the pay cut was not retribution, noting that many deeper cuts were being made across the board. "Prosecutors were not singled out," stated former Senator Margaret Carter, who co-authored the budget bill. Even Deschutes County District Attorney Michael Dugan's wife, state Representative Judy Stiegler, voted for the bill that reduced prosecutors' pay.

"I remember Mike coming home and saying, 'Do you know you cut my salary?' And I'm like, 'What are you talking about dude?'" said Stiegler. Of course, Dugan didn't want to accuse his wife of being part of the supposed legislative conspiracy; he'd rather call her clueless. "It's my opinion that at least 87 of the people in that building had no inkling whatsoever," said Dugan, suggesting that just three top lawmakers read the bill and knew that their vote would make prosecutors the only elected officials to receive a pay cut as a result of the 2009 budget bill.

"The legislature was facing a projected \$4 billion deficit last year," noted David Rogers, executive director of the Partnership for Safety and Justice, a nonprofit criminal justice reform organization. The earned time bill "was designed to protect critical public safety agencies and programs," he said. Senator Prozanski agreed, observing that "the reality is, we're in dire [economic] times." Apparently, prosecutors upset over their pay cut believe that that reality applies to everyone but them.

In a separate 2009 bill which became effective on January 1, 2010, the Oregon legislature created a 60-day earned time education incentive. Prisoners who lost earned time for misconduct or non-compliance with their program plan can regain up to 60 days of forfeited earned time by obtaining a GED, high school diploma, qualifying college certificate or degree, or

journey-level apprenticeship certificate.

Offenders who have obeyed prison rules and never lost earned time credits will receive no additional benefit from obtaining a GED or college degree. The earned time received as an education incentive cannot exceed the statutory maximum of 20 percent (or 30 percent, if applicable), and cannot be "banked" and applied against any future forfeitures of earned time. ■

Sources: *The Oregonian*, HB3508 (2009), SB1007 (2010), www.oregoncatalyst.com



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Child Porn Investigations May Snare the Innocent

by Mike Rigby

A new threat looms in the Internet Age – the threat of improper prosecutions and wrongful convictions for the unwitting receipt, possession or attempted possession of child pornography. Everyone is at risk, as these offenses can be committed by hackers who gain remote control of your computer, by malicious software that directs your PC to websites with illegal videos and images, or by sexual predators who use your unsecured wireless connection to conduct illicit activity.

Even something as simple as clicking on the wrong hyperlink – set up as part of an FBI sting operation – can land you in prison. So can being a victim of credit card fraud, if hackers use your card information to buy child porn. More disturbing is the fact that even when people are acquitted of such crimes they are nevertheless convicted in the court of public opinion, often resulting in ruined reputations, careers and relationships.

Computer Viruses and Malware

A 2009 investigative report by the *Associated Press* described several cases where innocent people were labeled as pedophiles or sexual perverts after family members or co-workers found porn on their computers.

Michael Fiola, a former employee of the Massachusetts Department of Industrial Accidents, was one of those innocent defendants. In 2007, Fiola's state-issued laptop was checked by his boss after someone noticed that he used four times more data than his co-workers. A technician discovered child pornography in a folder that stores images viewed online. Fiola was fired and charged with possession of child porn.

However, an examination by Fiola's defense counsel found that the laptop had a severe virus infection and was programmed to visit as many as 40 child porn sites per minute. "The overall forensics of the laptop suggest that it had been compromised by a virus," admitted Jake Wark, spokesman for the Suffolk District Attorney's office.

The charge was eventually dropped, but not before Fiola and his wife had spent \$250,000 fighting the case. They used up their savings, took out a second mortgage and sold their car. They also

suffered stress-related health problems. "It ruined my life, my wife's life, and my family's life," Fiola said.

Julie Amero, a 37-year-old substitute teacher in Norwich, Connecticut, suffered a similar fate. In 2004 she was charged with risk of injury to a minor after a classroom computer began displaying pornographic images after she left the class to go to the restroom. Amero tried to close the offending pop-up screens when she returned, but they kept reappearing and were seen by several children.

She was convicted on four of the original ten counts in January 2007, but a bevy of computer experts following the case disagreed with the verdict. Following their outcry, prosecutors had the computer examined by the state police forensics lab, where the true culprit was discovered – a malicious spyware program that generated the pop-ups.

Amero's conviction was dismissed, but for 18 months prosecutors considered retrying the case. Citing stress-related health concerns, Amero agreed to plead guilty to misdemeanor disorderly conduct in 2008 and the felony charges were dropped. "They got a pound of flesh," said Amero, who was fined \$100 and effectively barred from teaching. "The doctors all agreed that I would not make it through another trial." See: *State v. Amero*, Superior Court, New London Judicial District (CT), Case No. CR-04-93292.

As bad as it was, the outcome in Amero's case was still better than that of Nathaniel "Ned" Solon, a Wyoming resident who received a six-year federal prison sentence in January 2009 after traces of child porn were found on his home computer. The illegal files, consisting of partially-downloaded videos, were in a folder used by Limewire, a peer-to-peer file sharing program.

Tami Loehrs, a computer forensics expert who was also involved in the Fiola case, testified that Solon's antivirus program wasn't working properly. It apparently shut down for long periods of time – a sign of a virus infection.

Loehrs found no proof that the traces of child porn on Solon's computer had been viewed or fully downloaded, stating, "There is no conclusive evidence that any of the five files containing suspect child pornography were ever viewed, saved or

copied to another location including storage media such as CD-ROMs."

The jury, which was shown graphic images of child pornography by the prosecution, despite the fact that such images were not viewable on Solon's computer, disregarded Loehrs' findings. Further, the federal judge berated Loehrs at trial and left the bench for six minutes during the defense's closing argument. Solon was convicted and sent to prison for 72 months. "I don't think it was him, I really don't," said Loehrs. "There was too much evidence that it wasn't him." She added, "It can happen to anyone connected to the Internet. Period."

Courts have upheld convictions for possession of child porn despite defenses claiming infection by computer viruses or other malware programs. Solon's conviction was affirmed by the Tenth Circuit in February 2010. See: *United States v. Solon*, 596 F.3d 1206 (10th Cir. 2010), *cert. denied*.

In another case, *United States v. Miller*, the Third Circuit held that even if malicious software or a virus was responsible for downloading or storing illegal content on someone's computer, the defendant could still be convicted of knowingly possessing child porn.

At issue in the *Miller* case was a zip disk containing 1,200 to 1,400 digital images, 13 of which were deemed by prosecutors to constitute child pornography. The defendant, Donald R. Miller, claimed the photos were downloaded in large batches from websites featuring adult porn; he claimed he never saw the illegal images and didn't know how they got on the disk.

Nevertheless, the appellate court held that Miller's conviction for knowingly possessing child pornography could stand even if he didn't knowingly receive the illicit photos (which requires an "intent" element), because he chose to retain the material on the zip disk – despite not knowing that it contained child porn. See: *United States v. Miller*, 527 F.3d 54 (3d Cir. 2008).

Hackers and Trojans

Another complication in child porn prosecutions involves hackers using backdoor Trojans to gain remote access to personal and business computers. If so

inclined, a hacker can use another person's computer to store illegal pornographic images or even plant child porn as an extortion tactic. Hackers can also pretend to be someone else online by "spoofing," or faking, another computer user's Internet Protocol (IP) address.

In October 2002, Julian Green was arrested in Devon, England after cops searched his home computer and found child porn. A computer forensics expert hired by the defense found Trojans hidden on Green's PC. The Trojans – designed to piggyback his browser and log into porn sites – were probably downloaded as e-mail attachments, the expert concluded, and allowed hackers backdoor access to Green's computer. The charges were ultimately dismissed.

In December 2003, companies worldwide began reporting a new breed of cyber extortion that had apparently been going on for about a year. The extortionists threatened to either wipe hard drives or plant child porn and then call the police if the companies didn't pay a nominal fee of \$30. The threats were credible, considering the possibility of Trojans and the ease with which such attacks could be carried out, reported Mark Rasch, former head of the

U.S. Department of Justice's computer crimes unit.

Another concern with these types of cases, Rasch stated, is that evidence consistent with guilt can be planted (such as in child pornography cases) and traces of manipulation hidden from even computer experts, making it "virtually impossible to determine that your target was not guilty." And with sentencing guidelines "becoming ever more draconian for computer-related offenses," Rasch wrote, "it is only a matter of time before not only cyber extortion but cyber set-ups become a reality, if they aren't already."

Hackers gaining remote access to a computer and using it to store illegal files was a defense raised in the case of Matthew Bandy, 16, who was prosecuted for possession of child pornography by Arizona officials. Police conducted a dawn raid on Matt's home on December 16, 2004 after they were notified by Yahoo.com that someone using his IP address had uploaded images of child porn.

While Matt admitted to viewing adult pornography, he denied viewing or uploading the illicit images found on his family's computer. Although it is known that hackers can control other computers

and use them as "zombies" to distribute spam, store files or coordinate attacks on websites, experts disagreed as to whether that happened in Matt's case. Notably, the prosecution objected to providing Matt's attorney with a copy of the computer's hard drive so the defense could conduct its own evaluation; prosecutors even appealed to the Arizona Supreme Court, to no avail.

When Tami Loehrs, Matt's computer forensics expert, finally examined the hard drive, she found 200 infected files and concluded "[i]t would be virtually impossible to determine if, when or by whom the system was compromised. [I]t would be impossible to state with certainty which activities were conducted by users within the household and which activities were the result of one of the many malicious software applications and/or outside sources such as hackers."

Matt, charged with nine counts of possession of child pornography, faced up to 90 years in prison. Instead he pleaded guilty in October 2006 to three "class 6 undesignated felonies" that were unrelated to the child porn found on his computer. He received 18 months' probation; certain sex offender restrictions were initially

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Child Porn Investigations (cont.)

included as probation requirements but later dropped. Matt's family reportedly spent more than \$250,000 on his defense. See: *State v. Bandy*, Maricopa County Superior Court (AZ), Case No. CR2005-014635-001 DT.

Whether or not Matt was in fact guilty of knowingly possessing child porn is unknown. The prosecutor's computer expert, Detective Larry Core, admitted that he didn't look for viruses, evidence of hacking or backdoor access attempts on Matt's computer. However, the prosecution noted that several CD ROMs containing child pornography also were found at Matt's house. The Bandys claimed the CDs were from a backup of the computer's hard drive, and the images may have been reloaded on the computer without their knowledge during a system restore.

"They don't have to prove you're guilty – you have to prove yourself innocent," observed Gregory Bandy, Matt's father.

Questionable Investigative Methods

The FBI has recently adopted a new form of sting operation: posting hyperlinks that supposedly point to files containing child porn. In October 2006, undercover FBI agents used this technique to post hyperlinks on a child porn message board site called "Ranchi." The links sent web surfers to a government server, where the FBI identified the users who clicked on the links by their IP addresses. They then obtained warrants and staged raids of homes in Nevada, New York, Iowa and Pennsylvania.

Roderick Vosburgh, a doctoral student at Temple University and a history teacher at LaSalle University, was subjected to one of those early-morning raids in February 2007 after he was suspected of clicking on the FBI's hyperlinks. He apparently destroyed his computer hard drive and a thumb drive when agents arrived with a search warrant, but several thumbnail files of child porn were found on an external hard drive.

There was dispute as to whether the actual images associated with the thumbnail files had been present on Vosburgh's computer, and he was prosecuted under a federal law that criminalizes "attempts" to download child pornography. He was convicted at a jury trial and sentenced on November 13, 2008 to 15 months in prison

and three years' supervised release.

"I thought it was scary that they could do this," said Anna Durbin, Vosburgh's attorney. "This whole idea that the FBI can put a honeypot out there to attract people is kind of sad. It seems they've brought a lot of cases without having to stoop to this." Due to his conviction, Vosburgh – who had no previous criminal record – will be effectively barred from teaching and required to register as a sex offender after he is released from prison.

The implications of the FBI's hyperlink-bait technique are sweeping. According to an article on CNET News, "Using the same logic and legal arguments, federal agents could send unsolicited e-mail messages to millions of Americans advertising illegal narcotics or child pornography – and raid people who click on the links embedded in the spam messages. The bureau could register the 'unlawfulimages.com' domain name and prosecute intentional visitors. And so on."

Even more frightening, the courts have given their stamp of approval to this prosecutorial approach. Vosburgh's conviction was affirmed on appeal by the Third Circuit in April 2010. See: *United States v. Vosburgh*, 602 F.3d 512 (3d Cir. 2010).

Previously, on March 6, 2008, a U.S. District Court judge in Nevada upheld a magistrate's ruling that the hyperlink sting operation constituted sufficient probable cause to justify an FBI search warrant. Travis Carter, the defendant in that case, argued that any of his neighbors could have used his wireless network to access the link. With the aid of an investigator, the public defender's office confirmed that dozens of homes were within range of Carter's Wi-fi connection.

Further, an expert's affidavit submitted by Carter's defense counsel noted there were "many problems with using an IP address to decide the location of a computer allegedly using an IP address on the Internet. The IP address can be 'spoofed.' A single IP address can be used by multiple computers at multiple locations through a wireless router. The MAC address of a cable modem can be spoofed to allow access to another's Internet connection. A neighborhood with several houses can share one Internet connection and therefore have the same IP address."

Nevertheless, the magistrate judge held that the mere possibility of other people accessing an open Wi-fi connection

"would not have negated a substantial basis for concluding that there was probable cause to believe that evidence of child pornography would be found on the premises to be searched." See: *United States v. Carter*, 549 F.Supp.2d 1257 (D.Nev. 2008). The Fifth Circuit had reached a similar conclusion in *United States v. Perez*, 484 F.3d 735 (5th Cir. 2007).

A large-scale child porn investigation in the United Kingdom has also faced criticism. Jim Bates, 67, a computer specialist, testified as an expert witness in cases involving some of the approximately 4,000 defendants charged as a result of Operation Ore – a 2002 criminal investigation into U.K. users of Landslide, a U.S.-based website that facilitated the purchase of child pornography.

Bates, who believes many of the men arrested as part of Operation Ore may be innocent, used the website of his former company, Computer Forensics, to criticize investigators and the technical competence of other computer experts. "I have evidence to prove Operation Ore was based on a completely false series of premises and police officers should have been aware of this if they had done their job properly," he said.

There was evidence that some of the people prosecuted due to Operation Ore had actually had their credit card information stolen, which was used to purchase child porn without their knowledge. It was later learned that credit card fraud was a major problem with the Landslide website, information provided by U.S. law enforcement officials was faulty, and dozens of defendants may have been wrongly prosecuted.

One such defendant, Dr. Paul Grout, proved that at the same time he had used his credit card at a restaurant in Yorkshire, England, someone else was using it in Lake Tahoe in the U.S. The charges against him were dismissed. Peter Johnson, a U.K. police officer involved in Operation Ore, quit over the witch-hunt nature of the investigation. "I began to doubt the validity of the evidence surrounding the circumstances of the initial investigation in America ...," he said. "I found it difficult to rationalize how offenders had been identified [based] solely on a credit card number."

At least 33 people accused in Operation Ore of purchasing child porn committed suicide. Bates called the investigation a "shambles."

Bates was himself prosecuted and

found guilty of four counts of making a false written witness statement for falsely claiming he had a degree in electronic engineering. He had testified for both the prosecution and defense in cyber-crime cases. [See: *PLN*, Oct. 2010, p.1]. Bates was also arrested in 2008 for conspiracy to possess indecent images of children, apparently related to child porn images in case files in which he had testified as an expert, which he kept at his house. However, the search warrant used to search his home was tossed out by the High Court in May 2009.

Conclusion

The cases described above highlight related problems – the demonization of sex offenders and people accused of viewing or possessing child pornography. Because child predators engender such an innate revulsion, most people tend to scoff when defendants offer even plausible explanations for child porn found on their computers,

such as malicious software or hackers.

These cases are further complicated by the fact that real pedophiles often blame other persons or viruses for illegal files on their computers – claims that the police, the public and the judiciary view with natural skepticism. “It’s an example of the old ‘dog ate my homework’ excuse,” said Phil Malone, director of Harvard’s Cyberlaw Clinic. “The problem is, sometimes the dog does eat your homework.”



Sources: *CNET News*, *Associated Press*, www.securityfocus.com, www.tgdaily.com, www.washingtonpost.com, *BBC News*, www.vnunet.com, www.theregister.co.uk, www.guardian.co.uk, www.law2000.net, www.foxnews.com, “*International Electronic Evidence*” (*British Institute of International and Comparative Law* 2008), www.phoenixnewtimes.com, www.framedforchildporn.com, www.northcountrygazette.org

\$2 Million Award in Maryland Prisoner’s Work Crew Death

A jury in Prince George’s County, Maryland found that state prison and highway officials and the driver of a private dump truck were liable in an accident that killed a prisoner who was picking up trash on the side of the Capitol Beltway. The jury awarded \$2.025 million to the prisoner’s family, later reduced to \$1.37 million.

Prisoner Rodney Jennings, 20, was struck by the dump truck on August 23, 2007 while on a prison work detail from the Herman L. Toulson Boot Camp. After Jennings and two other prisoners finished picking up litter, they were making their way from the left shoulder of the southbound exit ramp to the right shoulder.

As they attempted to cross the ramp, Jennings was hit by the 39-ton dump truck, which was reportedly over the legal weight limit and had inadequately adjusted brakes. His legs were crushed and he was conscious and in severe pain for 45 minutes before he died, said Joseph T. Mallon, Jr., the attorney representing Jennings’ family.

Testimony showed that the truck’s driver, Wayne H. Gross, Jr., was driving faster than the posted 40 mph speed limit and that he improperly crossed a solid white line while speeding up to pass

a tractor-trailer just before he struck Jennings.

The lawsuit alleged that a prison guard mistakenly believed a state highway dump truck was blocking incoming traffic to the ramp. It also stated the warning signs to indicate the presence of the prison work crew were inadequate.

“It was a completely avoidable accident, had either defendant acted in a reasonable manner,” said Mallon. Prison officials agreed it was a terrible tragedy and changed their policy to require that prisoners be driven across ramps and similar areas rather than crossing on foot.

Maryland law caps many non-economic civil damage awards, and the jury award was reduced to a total of \$1.37 million – \$350,000 for the wrongful death claim plus \$1,020,000 to Jennings’ surviving family members, including his four children.

“I’m relieved for the family,” said Mallon. “Although they’ll never have closure, this provides some measure of peace.” Jennings was serving a two-year sentence for drug distribution at the time he was killed. See: *Davis v. Goss*, Circuit Court for Prince George’s County (MD), Case No. 08-21989.

Additional source: *Washington Post*

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Sex Scandal Rocks Oregon's "Camp Cupcake" Women's Prison – Again

by Mark Wilson

On March 25, 2008, an Oregon prisoner we'll call "Jane" reported to work in the physical plant of the Coffee Creek Correctional Facility (CCCF). Her boss, Paul W. Golden, was a civilian ground crew supervisor employed at the prison.

During her first day on the job a fellow prisoner took Jane's hands and placed them on Golden's body in a sexual manner, according to a subsequent federal civil rights action filed in December 2009. Jane was also compelled to expose her breasts to Golden as other prisoners snapped photos of her and each other, the lawsuit alleges.

Jane had been working for just a few days when Golden took her to an isolated shed under the pretext of looking for a sink. Once out of view of surveillance cameras, he forced his hands under Jane's shirt, felt her breasts and reached into her pants. She feared that resisting him would result in disciplinary action or loss of privileges.

Golden forced Jane to pull down her pants as he shot photos with his cell phone. She began crying and begged him to let her go. Instead, Golden tried to force himself on her, but Jane got away and reported the incident to prison officials. An ensuing investigation by the Oregon State Police identified at least ten prisoners who had been victimized by Golden between 2006 and 2008.

Golden took female prisoners on "jobs" outside the prison fence, gave them leisurely work and plied them with cigarettes, soda, food, coffee and the occasional use of his cell phone. In return he had sex with several of the prisoners, collected pictures of their breasts on his cell phone and borrowed money from a prisoner's family, according to the federal lawsuit.

Golden resigned in April 2008 and was indicted on January 6, 2009 on 31 counts of custodial sexual misconduct, rape and supplying contraband related to his abuse of six of the ten identified victims. [See: *PLN*, July 2009, p.47; May 2009, p.1].

Just before going to trial in June 2009, Golden pleaded guilty to 15 counts of sexual custodial misconduct and one count

of supplying contraband. He waived his right to a jury trial on the remaining charges, thinking he would have better luck going before Judge Rick Knapp. He was wrong.

Six current and former prisoners testified they were forced to have sex with Golden, and Judge Knapp found him guilty of an additional 8 of 15 counts of sexual abuse.

Golden was sentenced on July 17, 2009. Judge Knapp said that although some of the convictions were misdemeanors, he wanted every prisoner who was victimized taken into account. "I think it is appropriate to have the sentence reflect the number of victims," the judge stated, just before sentencing Golden to 11 1/2 years in prison, 3 years of post-release supervision, registration as a sex offender, mandatory HIV testing and no contact with his victims. "He's a serial sex offender. There's no question about it," Knapp declared.

CCCF, which opened in 2001, is Oregon's only women's prison. Ironically the facility also serves as the intake center for male prisoners; thus, after Golden was taken into custody he returned to the scene of his crimes, but this time not as an employee. The intake process typically takes 40 days. Golden's "was an abbreviated intake process," said Oregon Dept. of Corrections (ODOC) spokeswoman Jennifer Black. "We wanted to get him into the right bed as soon as possible." That bed is at the Two Rivers Correctional Institution, where Golden will likely remain until at least May 2017.

Not an Isolated Incident

When the dust finally settled on the Oregon State Police investigation, several other CCCF employees had resigned or been charged.

Richard Kaleo Rick, 37, a plumber at the prison, and Troy Bryant Austin, 35, a maintenance worker, both assigned to the physical plant with Golden, had been trading drugs for sex. They were charged with custodial misconduct and delivering contraband, including heroin and methamphetamine. Both were convicted; Rick received three years' probation while Austin was sentenced to three years in

prison plus three years of post-release supervision.

CCCF guard Darcy Aaron Macknight, 29, was charged with custodial sexual misconduct for having sex with a prisoner in a control room. He pleaded guilty on August 4, 2009 and was sentenced to a three-year term of probation plus restitution.

In July 2009, five women filed state tort actions against Golden, Austin, Rick, Macknight, the state and ODOC, alleging claims of sexual assault, battery, harassment, intentional infliction of emotional distress, negligent supervision, statutory negligence and civil rights violations. The women are represented by Salem, Oregon attorney Brian Lathen.

In early December 2009, Lathen filed similar state court actions on behalf of six other current and former prisoners. Four of those lawsuits allege that CCCF guard Richard Mitchell "made it a habit to use his power and authority" to force prisoners to expose themselves and perform sexual acts. Mitchell demanded sexual favors from prisoners in exchange for letting them out of their cells, assigning them prison jobs and promising to make their lives easier, the suits allege. He also coerced prisoners into sexual acts by letting them off the hook for rule violations.

Mitchell was apparently pretty brazen, as he didn't start working at CCCF until February 2009 – one month after Golden was charged – and he resigned on September 21, 2009, suggesting that he began abusing prisoners immediately following the investigation into Golden's sexual misconduct.

One of the suits against Mitchell also accuses CCCF employee Robert Dunlap of abuse. "Dunlap and Mitchell made plaintiff fear that if she did not allow the sexual act to happen, they would reprimand her and make her time in prison extremely difficult and/or lengthen her sentence," the complaint in that case states. Dunlap began grooming the prisoner in the mental health unit, sharing his intimate thoughts with her and promising to let her stay at his house when she was released from prison. "Dunlap made it a habit to pass notes to the plaintiff telling her the sexual acts he wanted plaintiff to

perform,” according to the suit. “After plaintiff followed Dunlap’s orders, he would retrieve the notes.”

The State Police declined to investigate the allegations against Dunlap, however, “because of the inmate’s lack of cooperation,” prison officials said. He is the only staff member accused of sexual abuse who did not resign.

The other two lawsuits filed by Lathen in December 2009 name Austin and Macknight as defendants. In all, Lathen represents twelve current and former prisoners who are seeking over \$10 million in damages. The suits, which were filed individually in Marion County Circuit Court and are still ongoing, include: *McLean v. State*, Case No. 10C-10363; *McShane v. State*, Case No. 09C-24369; *Clemmer v. State*, Case No. 09C-24362; *Farmer v. State*, Case No. 09C-23599; *Cameron v. State*, Case No. 09C-20943; *Rafael v. State*, Case No. 09C-23595; *Wilke v. State*, Case No. 09C-23598; *Saylor v. State*, Case No. 09C-23597; *Blaylock v. State*, Case No. 09C-23594; *Bare v. State*, Case No. 09C-23596; *Weir v. State*, Case No. 09C-23374; and *Shinall v. State*, Case No. 09C-24420.

Four other women prisoners, including “Jane,” filed suit in U.S. District Court against Golden, his supervisor, a CCCF guard, an assistant superintendent and 12 unidentified ODOC employees on December 22, 2009. The court denied the

defendants’ motion to dismiss in August 2010, and the case remains pending. See: *C.K. v. Golden*, U.S.D.C. (D. Ore.), Case No. 3:09-cv-01496-JO.

A Badly Kept Secret

The suit against Golden and other ODOC officials alleges that “over the course of several years, women inside the prison would warn other women about Golden and what he did. It was a badly kept secret. It was so widespread that security staff would stop women from working in the physical plant so they would not be sexually mistreated.”

Portland attorney Michelle Burrows, who has won similar lawsuits alleging sexual misconduct, described the abuse as an “institutional theme” that supervisors knew or should have known about, but ignored. “Management’s kind of blasé attitude toward it has led to a lot of sexual misconduct,” she said.

Prisoners at CCCF complained about Golden’s inappropriate sexual touching and harassment as far back as 2007. He had bragged to those who complained that he “beat” their complaints, according to the lawsuit. Some of the prisoners who complained were disciplined, Burrows noted.

Lathen also holds prison managers responsible. “The lack of supervision, lack of training has given these people an arena where they can commit these assaults,” he

said. “It really now is an epidemic. The whole culture there at the facility is one that needs to be changed.”

Indeed, despite being open just nine years, this isn’t CCCF’s first sex scandal. In fact the most recent sexual abuse investigations are uncannily similar to a 2004 case. At that time, prisoner Amanda Durbin claimed two staff members – one a command-level supervisor – had sexually abused her. The prison employees, Lt. Jeffrey Barcenas and food services coordinator Christopher Randall, admitted to having sex with Durbin and resigned. They later pleaded guilty to misdemeanor charges; Barcenas was sentenced to six months in jail while Randall received a jail term of 45 days. The state settled a lawsuit filed by Durbin in December 2004, paying her \$350,000.

Partly in response to the earlier sex abuse scandal at CCCF, in 2005 the Oregon legislature made it a felony for a prison employee to have intercourse with a prisoner. Any other sexual contact is a misdemeanor. Prisoners cannot be held criminally liable, and consent is not a defense due to the power differential between prisoners and their keepers. Still, as the most recent scandal indicates, the new law has done little to deter sexual predators among staff at CCCF.

ODOC Director and former state senator Max Williams, addressing the

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Sex Scandal (cont.)

prison sexual abuse scandal, was defensive. "The unfortunate part about a story like this is it's somewhat titillating, given the subject matter and it's given a lot of attention," he said. "Then for a lot of people it begins to define what they think prison is really about, when in fact it's a very limited number of inmates and a very limited number of staff."

Williams disagreed that the culture at CCCF condones sexual exploitation of prisoners. "No, I don't think it's an epidemic of abuse. I think we had several individuals at that institution who disregarded the department's policies and training," he stated. "It does create a black eye and paints us in a negative light. And unfairly so, given that we're talking about a handful of [sexually abusive] employees in an organization that's got over 4,500 employees," Williams said.

NIC Review and Recommendations

Williams asked the National Institute of Corrections (NIC) for "technical assistance" in dealing with staff sexual misconduct at CCCF following the 2004 sex abuse scandal. He turned to the NIC again in the summer of 2009. "We've talked to the National Institute of Corrections, which is sort of the national technical assistance group around the issue," Williams explained. "They've been to Coffee Creek twice. At the end of the day the kind of recommendations they're making are essentially all the things we are already doing."

That is not entirely accurate, however. Williams and assistant administrator Bob Kureski stressed that ODOC employees undergo 40 hours of "intensive training," which includes a boundaries class that covers appropriate prisoner-staff relations. At the end of the training the staff members take a test and the trainer writes an administrative report on each employee, according to Kureski. However, insufficient training was one of the most glaring deficiencies cited by the NIC.

At Williams' request, a three-member NIC review team visited CCCF in July 2009, spent three days meeting with administrators, supervisors, line staff and prisoners, then released its report in August 2009. Obtained through a public records request, the 17-page report was heavily redacted by the ODOC, ostensibly due to prison

safety and security concerns.

Even in its redacted form, the NIC report undeniably found the ODOC was much more responsible for sexual abuse at CCCF than Williams wanted to admit. The report outlined 28 recommendations, several of which focused on improved staff training. The NIC report concluded that "staff are struggling due to their lack of understanding the dynamics of managing the female offender," and "Coffee Creek Correctional Facility staff can benefit from additional training which specifically addresses the management of female offenders."

The NIC review team reported that CCCF's executive staff informed them that inadequate training caused confusion among staff. "In discussing the perception of why problems continue to occur regarding staff sexual misconduct, the group felt strongly that staff continues to be confused as to their role in working with the female inmate population," the report stated. "This group felt that training is not providing a clear message to staff. There was also concern expressed that staff do not recognize that small boundary violations are security breaches. This is complicated when staff come to work with their own personal problems."

Similarly, supervisory employees raised concerns about inadequate training. Contrary to Kureski's claim, "this group indicated that staff is assigned to begin work 1-2 months before they receive any training," the report noted. "They indicated that staff is provided no training on working with female inmates; as a result, staff have no idea how to talk to women, and staff seem to be dismissive of the population."

Supervisors also complained about a demeaning "central office staff attitude." The NIC review team wrote that "Staff indicates their awareness that CCCF is referred to as 'Prisneyland' and 'Camp Cupcake,'" and noted "This attitude of CCCF has an impact on the staff that works at CCCF," with employees feeling "devalued."

Line staff objected to the process for investigating sexual misconduct allegations, and the NIC consultants found that "they had never received any training regarding the investigation process, and ... this may be the cause of some of their discomfort with the process." Line staff indicated "that the only training they receive is via computer; that they have no opportunity to discuss the issues or ask

questions for clarification," the report stated.

Williams stopped short of saying that he thinks some of the prisoners' sexual abuse claims are false. "I can't say that I know enough yet, to know whether any of the allegations are bogus," he remarked. "What I can say is that there are people suing the Department of Corrections that at the time of our investigation denied involvement in the activity. So when they could have come forward and said 'yes, this is happening,' they chose not to be forthcoming."

CCCF staff were more blunt, suggesting that prisoners can make false complaints against staff with no repercussions. "Several recent monetary awards to inmates as a result of allegations against staff" are commonly referred to as the "Inmate Retirement Plan" by prison employees who fear false allegations, according to the NIC report. Of course this ignores the fact that all but one of the six CCCF employees recently accused of sexual misconduct resigned, and four were criminally charged and pleaded guilty or were convicted, as were the two staff members involved in the 2004 scandal.

ODOC Ignores the Experts

Despite calling in experts from the NIC, claiming to have a "zero tolerance policy" and arguing that staff sexual abuse is "an extremely serious issue for us," Williams essentially shrugged his shoulders when he said, "there isn't any good answer for people who just decide they're going to abandon their commitment to our ethical standards and violate the law."

Yet he made that comment in the face of the NIC's 28 recommendations to reduce sexual misconduct by prison staff, and according to ODOC spokeswoman Jeanine Hohn only some of those recommendations have been implemented by the prison system.

It's a pointless waste of time and money to call in outside experts if the ODOC is going to ignore the recommendations it doesn't like, despite obvious problems with staff sexual misconduct. Fortunately, court-ordered changes and monetary judgments can't be ignored, and *PLN* will report future developments in the lawsuits filed against CCCF staff and state officials due to sexual abuse by prison employees. ■

Sources: *The Oregonian*, *Statesman Journal*

Investigation Reveals Montana Prisoner Had Relationships with Five Female Staff

In both state and federal prisons it is illegal for staff members to have sex with prisoners. Five female employees of the Montana Department of Corrections, however, reportedly had personal relationships with prisoner Michael Murphy, 36.

Documents obtained by the *Associated Press* following a public records suit revealed that in 2003, two female staff members at the state prison in Deer Lodge were disciplined for having undisclosed relationships with Murphy. Prison officials were shocked to learn in 2008 that he had been involved with three other female employees, too. [See: *PLN*, May 2009, p.1].

One was his therapist, Killian L. Thomas. She told investigators that Murphy "kissed me one day in my office and I just thought what the fuck did I just do." Although she said she felt manipulated and compromised, she engaged in mutual oral sex with Murphy in her office on multiple occasions and gave him about \$400.

Prison guard Lisa Mantz admitted to "swapping spit" with "Murph," and wrote him a love letter detailing how she couldn't wait to have sex with him. Shannon Davies, another guard, said she developed a "limited emotional attachment" to Murphy, sending him a greeting card that said "I'm in love with you."

Murphy, who is serving 25 years for theft, forgery, burglary and criminal endangerment, wrote letters to newspapers and the ACLU of Montana claiming he had been sexually assaulted by some of the women. He was not charged in connection with having sex with prison employees, though one staff member was reportedly prosecuted.

The former director of New York City's corrections department, Martin Horn, now a professor at the John Jay College of Criminal Justice, has little sympathy for female guards who feel victimized. He believes an atmosphere that treats women staff members caught in sexual acts with prisoners less severely than male employees promotes such il-

licit relationships.

"As long as we have a double standard, we are going to see these kinds of behaviors," said Horn. "It is a very slippery slope we go down if we say we are not going to hold female officers to the same standard."

According to Montana State Prison Warden Mike Mahoney, 41% of the prison system's employees are women. A 2007 U.S. Department of Justice study that analyzed the prevalence of sexual assaults in state and federal prisons found that 58% of perpetrators of staff sexual misconduct were female.

Killian Thomas faced disciplinary action by the Board of Social Work Examiners and Professional Counselors due to her sexual relationship with Murphy; she was fined \$500 and her license was suspended for at least one year on July 31, 2009. ■

Sources: *Associated Press*, www.thesmokinggun.com, www.salon.com, <https://app.mt.gov/lookup>

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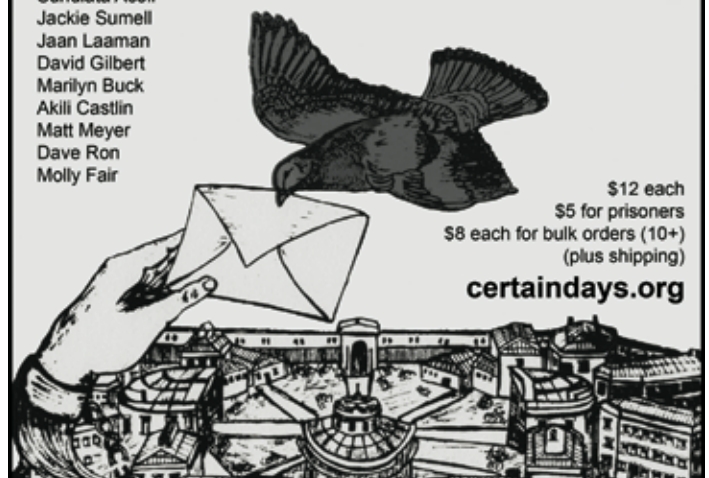
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Wish You Were Here! Jails Adopt Postcard-Only Mail Policies

By January 2010, 13 of Oregon's 36 counties had implemented policies that limit incoming and outgoing mail at county jails to postcards. Ten other counties plan to adopt similar rules in the future. The postcard-only policy is a national trend that began in 2002 in the Maricopa County, Arizona jail system under the direction of Sheriff Joe Arpaio, who is known for his harsh and abusive treatment of prisoners.

Oregon sheriffs touted the new mail policy as a cost-cutting measure, yet most counties admit that it is unknown how much money the policy will save. Only Marion County Jail Commander Jeff Holland was willing to estimate the fiscal impact.

Marion County spends about \$60,000 annually sorting prisoner mail, according to Holland. "We estimate by going to the postcard system, we can cut that in half," he said.

Holland claims that his jail processes over 1,000 pieces of prisoner mail each week and that it takes about nine hours a day to process incoming correspondence. Administrative employees first sort the mail. Deputies then open the letters, remove the envelope flap and stamp, and read and search the letters for contraband or other violations of the jail's mail policy.

The postcard-only rule decreases the likelihood that contraband will be introduced. The most common contraband discovered in mail sent to prisoners is pornography, according to Holland. "It's been a problem off and on as long as I've been in the business – 23 years," he stated.

"We're not trying to be mean or make people upset," said Marion County Sheriff Jason Myers. "It's about efficiency and safety in the workplace." The new mail policy, which reduces the workload on mailroom staff, frees up deputies to patrol jail grounds and focus on safety, Myers noted. Clackamas County Sheriff's Lt. Lee Eby echoed that reasoning.

"We always need more staff, and we deal with what we have," said Eby. "Being able to shift some of these critical duties to office staff would be beneficial for us."

Marion County prisoners must purchase standardized, pre-stamped 3.5-by-8.5 inch postcards that feature a photograph of the jail. In other counties

a 5-by-8.5 inch pre-stamped postcard will sell for 55 cents. Legal mail and official mail to and from public officials is exempt from the postcard policy.

"I do believe they will save some money, but what's the long-term effect of that cost savings?" asked Jann Carsen, associate director of the ACLU of Oregon. "We think that it is a bad policy if it is going to limit the way inmates are going to be able to communicate with their families in a meaningful way."

Oregon's largest jail system is in Multnomah County, which elected not to adopt the postcard-only policy. "We just want them to have open communication with their families and loved ones, and a postcard limits communication with less space," said Multnomah Sheriff's Lt. Mary Lindstrand.

Heidi Boghosian, executive director of the New York-based National Lawyers Guild, which publishes the *Jailhouse Lawyers Handbook*, agreed. She said the postcard policy was part of a "trend to de-personalize those who are incarcerated," and "curtails their right to write to us in a very detailed fashion."

It is "illogical" and "draconian" said Adam Lovell, who runs the Florida-based website www.writeaprisoner.com. "It's a whole other world inside, and the anchors out here are very, very critical to [prisoners]."

"We weren't violating anybody's civil rights," countered Maricopa County Sheriff's Lt. Robert Eastland. "There is no right to privacy when it comes to this."

Clackamas County's Lt. Eby concurred, arguing that prisoners gave up most of their privacy rights when they went to jail. "To say their privacy is gone is pretty ridiculous," he said. "If they want to say emotional stuff [in postcards] they can."

Lt. Eby and Washington County Jail Commander Marie Tyler noted there is no limit – except indigency, of course – on the number of postcards prisoners can mail out.

Jail prisoners are not happy about the policy. There were "a lot of people with animosity toward it," stated Marion County prisoner Timothy Jones. "I don't know what you can say on a 3-by-8 [postcard]," he said. "Some of us got kids and other things that we need to discuss with our families."

Asked if the policy was fair, Jones

remarked, "I'm incarcerated; what is fair? I think it is more unfair to our families."

Sondelyn Laughlin writes to a long-time family friend who is in jail, sending up to three letters a week. "This seems barbaric," said Laughlin. "I know a lot of people that depend on family letters to uplift them and keep them part of their life."

She is irritated by the new mail policy but not deterred. "I guess I'll have to write 10 postcards a day," she said. "Like pages of a letter, it will be pages of a postcard."

"It is essential for ensuring the successful rehabilitation of prisoners that they be able to maintain ties to their families and communities by writing letters," observed David Fathi, Director of the ACLU's National Prison Project. "It is neither prudent nor constitutional to enact an across-the-board policy that significantly restricts the First Amendment freedoms of all current and future pre-trial detainees and prisoners in the jail."

Despite such concerns, Benton, Clackamas, Columbia, Curry, Deschutes, Harney, Jackson, Josephine, Malheur, Marion, Tillamook, Umatilla, Lincoln and Washington Counties in Oregon have adopted postcard-only policies. Coos, Douglas, Jefferson, Lane, Linn, Gilliam, Wasco, Sherman, Hood River and Yamhill Counties plan to implement such policies too, according to the Marion County Sheriff's Office.

Similar postcard-only rules have cropped up at jails in Wyandotte County, Atchison County and Johnson County in Kansas; El Paso and Boulder Counties in Colorado; Alachua, Pasco, Charlotte, Desoto, Manatee, Volusia, Santa Rosa and Lee Counties in Florida; Jackson County and Cass County in Missouri; Yuma County, Arizona; Ingham County, Michigan; and in September 2010 at the Spokane County Jail in Washington State. Most recently, the jail in Ventura County, California adopted a postcard-only rule for mail sent to and from prisoners, effective October 4.

The ACLU has filed lawsuits challenging policies at the Boulder County and El Paso County jails in Colorado that limit outgoing mail to postcards. A class-action suit filed against El Paso County on September 14, 2010 notes that jail prisoners are "barred from sending any

letters to family members, friends, doctors, psychiatrists and members of the clergy, among many other categories of people.” See: *Martinez v. Maketa*, U.S.D.C. (D. Col.), Case No. 1:10-cv-02242 (against El Paso County); *Clay v. Pelle*, U.S.D.C. (D. Col.), Case No. 1:10-cv-01840 (against Boulder County).

“This postcard-only policy severely restricts prisoners’ ability to communicate with their parents, children, spouses, domestic partners, sweethearts, friends or almost anyone else who does not fall within the jail’s narrow exception to the newly-imposed ban on outgoing letters,” said Mark Silverstein, Legal Director of the ACLU of Colorado. “This unjustified restriction on written communications violates the rights of both the prisoners and their correspondents. Families have a First Amendment right to receive all of their loved ones’ written words, not just the few guarded sentences a prisoner can fit onto a postcard.”

Prisoners and their family members filed suit over the postcard-only policy at the Manatee County jail in Florida, which even restricts writing on postcards to black or blue ink and prohibits draw-

ings, preventing prisoners from sending hand-drawn pictures to their children. See: *Gambuzza v. Parmenter*, U.S.D.C. (M.D. Fla.), Case No. 8:09-cv-01891-EAK-TBM.

“The First Amendment protects the rights of inmates, just like it protects the rights of everyone in this country,” said Katherine Earle Yanes, one of the attorneys representing the plaintiffs in the suit against Manatee County. “It’s not only the inmates’ rights that are implicated in this, but the rights of anyone who wants to communicate to inmates.”

The district court dismissed the Manatee County suit in May 2010, finding that it “lacks an arguable basis in law because the Courts have found that the post-card only mail policy is ‘reasonably related to legitimate penological interests.’” A motion for reconsideration is pending and if unsuccessful the dismissal will be appealed, according to Yanes.

A similar lawsuit, filed on Sept. 14, 2010, is challenging a postcard-only policy adopted by the jail in Santa Rosa County, Florida. The plaintiffs are represented by the ACLU of Florida and the Florida Justice Institute. See: *Reynolds v. Hall*, U.S.D.C. (N.D. Fla.), Case No. 3:10-cv-

00355-MCR-EMT.

“The ability of inmates to write to family members has positive rehabilitating effects,” noted Randy Berg, director of the Florida Justice Institute. “To limit letters to a postcard is detrimental to what we should be striving for. When these prisoners get out, they need some type of bond with the family and they shouldn’t lose that connection.”

Sources: *The Oregonian*, *Associated Press*, *ACLU press release*, *The Ledger*, *www.pnj.com*, *Los Angeles Times*

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Reach Out and Defraud Someone: Oregon Jail Prisoners Commit Phone Scams

by Mark Wilson

A fifteen-minute collect call from the Multnomah County jail in Portland, Oregon costs \$2.35, billed to the party who accepts the call. Between May 2006 and April 2009 those calls generated \$3.5 million in revenue for the jail's phone service provider, Texas-based Securus Technologies, Inc., while the county's 38% kickback totaled \$1.3 million. Profits likely would have been higher were it not for a handful of prisoners who made free collect calls from the jail.

The first prisoner caught offering a little competition to what county officials thought was a monopoly on the jail's phone system was Shawn "Sammy Straight Razor" McGinnis. Between December 2006 and October 2007, McGinnis called his parents collect from the jail and they would make three-way connections to Qwest Communications, according to sheriff's deputy Jose M. Torres.

McGinnis claimed to be a small business owner – a landscaper, a window washer or the owner of a cleaning supply company – and said he needed special business lines for each of his 14 employees. He gave Qwest the "profiles" – names, Social Security numbers and dates of birth – of 14 identity theft victims, plus a billing address. After Qwest issued the business lines, McGinnis had them forwarded to the phone number of a fellow prisoner's family or friend.

To avoid the jail phone system's 15 minute cut-off, McGinnis sometimes had a friend on the three-way call to Qwest finish setting up the additional lines on his behalf. "And Qwest was falling for it lock, stock and barrel," said Torres. In fact, one of the billing addresses provided by McGinnis was a Qwest power grid location. "Qwest never even knew they were sending a bill to their own place," Torres observed.

McGinnis then charged fellow prisoners \$50 to \$60 each to use one of the phone lines. They were able to use the number for 90 days before Qwest shut off the service due to nonpayment. People who accepted calls from prisoners who used the Qwest business lines were not charged the \$2.35 collect call fee.

The prisoners' family members and

friends deposited money for use of the lines in McGinnis' jail trust account, which grew so large – he was making \$5,000 a month – that it exceeded the account limit. This forced the county to write McGinnis a check for the amount that exceeded the cap, according to Torres.

Apparently, McGinnis himself made 608 calls to one of the business lines over a 14-month period, totaling \$1,428.80 in unpaid collect call charges. A search of his cell revealed a step-by-step guide to committing the scam and sample responses to questions asked by Qwest staff.

Also discovered were customer orders and complaints. "Hook up another line ASAP and call and give the # to my wife, and I'll have her put the rest of the \$ on your books," wrote one prisoner. "Both of my phone lines is off and I had Jolanda put that money on your book yesterday. What's up with that?" asked another prisoner. "I need you to fix them for me ASAP. I don't have no way to call nobody, and I need to talk to my family bad."

In the fall of 2008, McGinnis was indicted on 35 counts of identity theft related to the phone scam. As of December 2009 the case was still pending, though McGinnis is now serving a federal sentence in Colorado.

Qwest and jail officials did nothing to prevent others from picking up where McGinnis left off. The sheriff's office, police and prosecutors said there was little they could do because the outdated phone system made it difficult to track calls by prisoners. Investigators have to know the number a prisoner is calling in order to track it. While most phone calls from the jail are recorded, the sheriff's office said it lacked staff to monitor the calls.

On March 26, 2009, a guard noticed prisoner Charles Louis Sampson, Jr., 42, repeating a series of phone numbers into a jail phone, according to court documents. When investigators listened to recorded phone calls, they discovered Sampson and a woman he called were committing the same scam started by McGinnis, charging other prisoners \$50 to \$60 each to use Qwest business lines. During a March 29, 2009 call, Sampson gave Darlene E. Henley, his outside helper, an address, a contact name and instructions to pick up

\$90. Henley, in turn, gave Sampson an identity theft victim's "profile."

While setting up business lines on one occasion, a Qwest employee asked Sampson for his business name. "Ah, ah, ah," Sampson stammered before replying "Gold R Us," according to police. Qwest issued Sampson 11 business lines. In all, he sold access to the phone lines to more than 20 prisoners.

When guards searched Sampson's bunk area on April 15, 2009 they found a list of phone numbers, believed to be fraudulent business lines, along with phone numbers of other prisoners' families and friends. Guards also discovered lists of stolen identities.

Sampson and Henley were indicted on 10 counts of identity theft. In December 2009, Sampson pleaded guilty to six counts and was sentenced to five years in prison. Henley pleaded guilty to one count and received probation.

Just as the Sampson case was wrapping up, jail prisoner Randy Lee Hicks and two women, Kellie Michelle Blackwell and Keely Ann Royston, were indicted for committing the same phone scam as recently as August 2009. Hicks put a new twist on the scam by using fellow prisoners as identity theft victims, one of whom received a collection notice while in prison.

Yet another Multnomah County prisoner, Stephen Lee Brown, used the jail's phone system to orchestrate a different sort of scam that targeted an elderly couple in Portland. He claimed to be their grandson and talked them into bringing \$1,500 to the jail to put on his account. Jail employees stopped the fraudulent scheme, and Brown pleaded no contest to multiple counts of identity theft in April 2010. He received six years in prison.

Deputy District Attorney Kevin Demer, who prosecuted the Sampson case, said Qwest and the county were the biggest losers in the phone scam. Yet he admitted it was impossible to identify the amount of lost revenue.

The jail phone scam is not unique to Qwest, noted Bob Gravely, the company's regional spokesman in Portland. He said company representatives have received more training on how to verify infor-

mation to curtail such call-forwarding schemes. "But when they have relatively complete information on a stolen identity, it can be difficult for us to detect," Gravely admitted. "Ultimately, we absorb the loss for this."

"When you have 24 hours a day with nothing to do, you can come up with some ingenious things," remarked Jim Sidler, senior director of marketing, communications and research for Securus Technologies, the Multnomah County jail system's phone service provider, which serves around 3,000 correctional facilities nationwide. "It's kind of a cat-and-mouse game," he said. "We come up with a new thing, and they come up with a way around it."

Multnomah County is seeking to upgrade its jail phone system with technology similar to that used in federal prisons and other jails. "The fact that inmates have pretty sophisticated ways to tap into the systems we know is a reality," admitted Multnomah County Sheriff's Captain Drew Brosh. "I think changing the system like we're proposing to do should create a hiccup in their ability to manipulate it."

The county wants technological improvements including personal iden-

tification numbers for prisoners, voice recognition, an ability to detect and prevent three-way calls, and automated recordings of "This call is from the Multnomah County jail system" at random intervals throughout jail phone calls. Yet Sidler, whose company offers such technology, acknowledged that prisoners elsewhere have found ways to beat those safeguards.

The Multnomah County jail began installing a new phone system in December 2009 that allows staff to track which numbers prisoners are dialing and makes it harder to use three-way calling.

Perhaps the easiest way to put an end to collect call phone scams would be to make the calls affordable so prisoners

do not pursue such schemes. Eliminating exclusive jail phone service contracts, and kickbacks to the county that unfairly inflate the cost of collect calls placed by prisoners, would be a good place to start.

Sources: *The Oregonian*, *Associated Press*

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New York Prison Official Nets \$500,000 in Fraudulent Scheme; Audit Finds 17 Years of Unchecked Corruption

by Mark Wilson

A joint audit/investigation by the New York State Comptroller and Inspector General uncovered a 17-year fraudulent scheme by the former director of the New York Department of Correctional Services (NYDOCS) Food Production Center. Between 1992 and August 2008 the Center's director bilked the state out of \$497,452.61, though he and his supervisors tried to justify the fraud by claiming he deserved all he stole.

NYDOCS houses about 62,000 prisoners at 69 prisons and one drug treatment center. Before 1992, each facility employed its own cooking staff, did its own food purchasing and prepared prisoner meals on-site. A 1992 audit by the State Comptroller put an end to that, however, upon identifying significant food preparation waste.

NYDOCS responded by establishing a Food Production Center at the Oneida Correctional Facility in Rome, New York and designing a cook/chill program to "streamline the manufacturing and service of meals to the inmate population." This program "allows the ... Center to prepare massive quantities of food and quickly chill it to near freezing before it is shipped to facilities throughout the State."

The Food Center "is a state-of-the-art facility designed to provide food and drink on a daily basis to all inmates." It also contracts to supply approximately 1,900 meals a day to local jails in 19 counties and to the New York Psychiatric Center.

The Food Center is staffed by approximately 140 prisoners and 80 employees, and has an annual budget of over \$55 million. From 1992 until his retirement in August 2008, the Center was run by Director Howard Dean, who was described by his supervisors "as the 'czar' of the cook/chill program and an expert in the food service field." They considered Dean's supervision to be "critical" to the Center's success.

Apparently Dean also felt he was indispensable, and thus could do anything he wanted. According to the audit report released on April 9, 2010, Dean's official work schedule was 7 a.m. to 3 p.m. with a half-hour lunch break, Monday through Thursday. "However, Mr. Dean submitted false time sheets ... for 17 years certifying

he worked Fridays, when in fact he never reported to work on Friday," investigators found.

"Mr. Dean freely admitted he did not work on Fridays for the entire 17 years he was in charge of the Food Center," according to the audit. "Mr. Dean claimed he worked longer hours Monday through Thursday," but investigators found that his story lacked credibility, largely because records revealed he did not work extended hours on those days nor could he provide "a specific or legitimate reason why he needed to be at the Food Center after his official work day ended at 3 p.m."

Dean's supervisors alleged they had no clue that he never worked on Fridays, which investigators found to "strain credibility." The investigators "estimated Mr. Dean realized an unwarranted benefit of approximately \$247,830" by submitting fraudulent time sheets.

Dean engaged in several other fraudulent practices, too. Although he worked at the Food Center he resided 88 miles away in Locke, New York. In 1992, Dean's supervisor, Deputy Commissioner Susan Butler, designated Albany as his official work station even though it was 109 miles from the Food Center and 187 miles from his residence. "This designation of an illusory official work station, and its perpetuation by future supervisors allowed Mr. Dean to remain in fictitious travel status and accrue associated benefits during the ensuing 17 years," investigators found.

"Mr. Dean stated he was allowed to engage in this long-standing fraud in order to receive travel per diems in lieu of a pay raise," according to the audit report. "Contrary to his claim of foregoing pay raises," however, "Mr. Dean's salary history shows he received at least two pay grade increases during his 17 years at the Food Center while still collecting unjustifiable travel benefits."

Dean's annual salary when he retired was \$112,743, yet his supervisor, Chief Fiscal Officer Russell DiBello, said "he believed Mr. Dean was underpaid given the level of responsibility entrusted to him at the Food Center, and he knew Mr. Dean was frustrated by his compensation." Further, "Mr. DiBello candidly admitted he

allowed Mr. Dean the continued benefit of being in perpetual travel status and justified this fraud by stating 'I knew the responsibilities of his job were such, his pay was such, that he had a heart attack at that time, and it was a stressful job he had ... so I had no problem with him staying in a motel 3-4 nights a week.'" Investigators "determined this scheme rewarded Mr. Dean [with] \$66,079 in per diem payments and cost the State \$137,353 in hotel expenses. The total value of the fraud was \$203,432 over a 16-year period."

In November 2007, Dean's travel benefits were finally terminated by his supervisor at the time, Deputy Commissioner Gayle Haponik. However, Haponik then set him up in state-provided housing where he remained until his retirement in August 2008. Investigators found that "no reasonable justification for Mr. Dean's use of staff housing was provided." Dean paid only \$87 a month for state housing, while the median rent for apartments in the area was \$461 per month. "Mr. Dean was given an improper benefit which saved him \$374 monthly or \$2,992 for the more than eight months he stayed in staff housing," according to the audit report.

Further, records revealed that between September 25, 2005 and November 12, 2007, "Dean also falsified travel vouchers and provided illegitimate hotel invoices to support claims he stayed at the Quality Inn in Rome, New York on 75 nights he did not." Investigators determined that "as a result, the State incurred 75 extra hotel room charges at \$60 per night and Mr. Dean was paid a travel per diem of \$31-39 for each of the 75 days." The hotel owner "said he spent time with Mr. Dean ... and considered him a good customer." He "charged the extra nights to Mr. Dean's State credit card according to Mr. Dean's instructions ... [and] he ... 'checked in' Mr. Dean on nights he was not actually at the hotel, using the State credit card number on file at the hotel."

The Quality Inn owner "reported the extra room charges were then carried over to other dates to pay for Mr. Dean's then-Assistant Food Center Director, Robert Schattinger, to stay at the hotel. ... Mr. Dean created this arrangement because Mr. Schattinger was not eligible

to have the State pay for him to stay in a hotel in Rome.”

It was also learned that Schattinger, who was promoted to Director after Dean retired, stayed at the hotel on only 21 nights. It is unknown “who stayed in the room the State paid for during the remaining 54 nights.” Schattinger claimed, and Dean admitted, that Dean had told him the room was complimentary. “This scheme alone cost the State \$7,393 in fraudulent travel expenses,” the investigators wrote. “It resulted in the Quality Inn receiving \$4,500 for rooms charged to Mr. Dean’s State credit card for nights he was not actually lodged at the hotel and netted Mr. Dean \$2,893 for travel per diems he was not entitled to receive.”

Investigators also discovered a “double dipping” scheme by Dean whereby he was compensated twice for the same expenses, costing the State an estimated \$1,831. Finally, investigators found that “Mr. Dean received a further improper benefit through the use of a State-owned vehicle, which was approved by supervisors. This benefit was granted in direct violation of Correctional Services’ policies designed to prevent the abuse of State vehicle privileges.” Dean’s improper

use of “a State vehicle and gas and tolls paid for by the State cost taxpayers an estimated \$32,293 over the 17 years Mr. Dean received these improper benefits,” according to the audit.

Investigators concluded that “the improper activity discovered in this matter cost New York taxpayers approximately \$500,000.” Yet Dean said he saw nothing wrong with that. “You are questioning my integrity and I never did anything dishonest that I knew of,” Dean claimed. “This does upset me very much. Correctional Services didn’t give me one red cent more than I honestly earned. In the back of my mind I never received anything I wasn’t entitled to.”

The investigators did not lay all the blame at Dean’s feet, stating, “this fraud was not merely the product of Dean’s intentional deception but was facilitated and allowed to occur through mismanagement, if not conscious acceptance of improprieties, by Mr. Dean’s immediate supervisors.” They found that his supervisors’ conduct “was not only unreasonable but abrogated their duty to the Department of Correctional Services and the public. Management failed to properly supervise the ... Center ... allowing Mr.

Dean’s fraud to continue for nearly two decades. ... The managers’ attitude demonstrates a willful disregard for internal controls. As a result, they created an environment susceptible to fraud, waste and abuse.”

“The magnitude and duration of the deception that occurred highlights not only its systemic nature, but also the cultural environment within the Department which allowed it to occur,” the investigators wrote. “It is simply unacceptable and belied by the evidence to believe Mr. Dean merely deceived his supervisors. Mr. Dean’s fraud occurred for 17 years. For nearly two decades, Mr. Dean failed to work twenty percent of the work week for which he was paid. It strains credulity to believe for 17 years his supervisors were entirely ignorant of Mr. Dean’s arrangement. ... Mr. Dean, who took no steps to conceal his unusual and unauthorized work schedule, was permitted to operate in any manner he saw fit regardless of the rules applicable to other state employees.”

Given that “the evidence reveals that at least some of Mr. Dean’s supervisors, specifically Mr. DiBello, were aware of, and condoned, the fraud that was per-

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NY Prison Fraud Uncovered (cont.)

petrated,” investigators concluded that “They are also culpable as Mr. Dean in harming the taxpayers by violating their duties and not acting in the best interest of the State.”

“Mr. Dean owes the taxpayers of New York state the 20 percent of his paycheck which he never earned, but swindled, and his managers are no less accountable,” said Inspector General Joseph Fisch. “The uninterrupted fleecing of the state’s treasury for 17 years by Mr. Dean could not have occurred without the acquiescence, if not the complicity, of his supervisors.”

The report’s findings were referred to the Oneida County District Attorney’s office for possible criminal charges, including conspiracy, falsifying business records, defrauding the government, larceny and official misconduct. State Comptroller Thomas DiNapoli is also assessing how the audit findings may impact Dean’s \$57,381 annual pension.

On August 31, 2010, the State Comptroller and Inspector General issued another joint report that found Dean had accepted free meals and donations of money and food in exchange for steering contracts to certain vendors. Over a 13-year period, Dean and other NYDOCS officials reportedly received free meals from two food vendors, Global Food Industries and Good Source, Inc., which had \$2.5 million in contracts with the state prison system. In one case, Food Center staff provided one of the favored vendors but not other vendors with a secret ingredient needed to secure a contract to provide cheese sauce to the NYDOCS.

Global Food Industries and Good Source, Inc. allegedly provided free meals for Dean and his co-workers at a steakhouse. Dean also solicited and received free food and donations from vendors for the Food Center’s annual Christmas party and picnic. “The food was free to attendees because most of it was donated by vendors with whom the Food Production Center staff was doing business,” the audit found. The report concluded that Dean had abused his position to “garner every personal advantage he could obtain from the state.”

On September 10, 2010, Dean was charged with grand larceny for stealing \$50,000 by submitting false expense vouchers and failing to work on Fridays

despite being paid for working a five-day week. The statute of limitations precluded charging him with having bilked the state over the entire 17-year-period he was employed as director of the Food Center. Dean pleaded not guilty to the charges, and was released on his own recognition. ■

Sources: *The Enterprise*; www.syracuse.com.

com; “*Seventeen Years of Fraud by the Former Director of the Department of Correctional Services’ Food Production Center*,” *New York State Comptroller and Inspector General report (2008-S-176)*; “*Violations of Law, Conflicts of Interest and Other Improprieties at the Department of Correctional Services’ Food Production Center*,” *New York State Comptroller and Inspector General report (2009-S-6)*

Feds Decline to Pursue Charges in Florida Boot Camp Death

The U.S. Department of Justice announced on April 16, 2010 that it will not pursue civil rights violations or other charges against seven Florida boot camp guards and a nurse in connection with the death of 14-year-old Martin Lee Anderson.

The events leading to Martin’s January 6, 2006 death were caught on a 30-minute videotape. The footage showed Martin collapsing after rigorous exercise, and the guards punching and striking him with their knees. To revive him, they jammed ammonia tablets in his nose and dragged his limp body around the yard. A nurse looked on but failed to intervene. [See: *PLN*, Dec. 2006, p.26; July 2006, p.9].

“What did they want, 45 minutes more [of videotape], another hour?” said Ben Crump, the attorney representing Martin’s parents. “This was one time we

had such hope, such faith.”

The family was told of the decision not to pursue charges during a long emotional meeting with federal prosecutors, who began looking into the case following the October 12, 2007 acquittal of the seven guards and nurse on state manslaughter charges. [See: *PLN*, June 2008, p.20; July 2007, p.11].

Martin’s family received a total of \$7.4 million from the state and Bay County to settle civil lawsuits. Following Martin’s death, Florida shuttered its boot camp program statewide. The failure to obtain convictions against the boot camp employees is the norm for such incidents in Florida, which has a lengthy history of abuse in the state’s juvenile facilities. [See: *PLN*, March 2009, p.22]. ■

Source: *Associated Press*

“Grill” Removal Results in \$95,000 Settlement by Tennessee Jail

A Tennessee man whose “grill” was ripped off by a sheriff’s deputy has received a \$95,000 pre-litigation settlement.

While Anthony McCoy was being processed into the Davidson County Jail for failing to pay child support, McCoy had his gold “grill” yanked out of his mouth by Lt. Tanya Mayhew. McCoy had told deputies that his “grill” was cemented in and could not be removed, but Mayhew did not seem to care.

Mayhew’s actions caused \$10,000 in damage to McCoy’s teeth. Adding to the tooth damage, McCoy went untreated for ten days following the incident.

Mayhew violated Davidson County Jail policy, according to a report by legal

staff for the Metro Council Office.

“[S]ince Lt. Mayhew violated a departmental policy by reaching into Mr. McCoy’s mouth, and since the plaintiff may be able to present evidence that the sheriff’s department has violated these policies on prior occasions,” the Metro Council legal staff recommended the county settle the suit for \$95,000.

Correct Care Solutions, the contractor responsible for providing medical care at the jail, agreed to pay \$20,000 of the settlement. McCoy was represented by attorney David Raybin. This is a pre-litigation settlement, hence no citation. ■

Source: www.tennessean.com



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Former Florida Judge Profiting from Probation Classes that State Offers for Free

Utilizing the connections he made as a judge in Florida's Hillsborough County over a 19-year period, Robert Bonanno is building a business that offers classes to people on probation. What he provides for a fee is the same thing the state supplies at no charge, but with the added incentive of reduced community service hours.

Between July 2009 and April 2010, 166 probationers in Hillsborough County paid \$65 each to attend a four-hour class at Bonanno's Probation & Violation Center. In return, Circuit Judges Manuel Lopez, Daniel Perry and Wayne Timmerman cut some of those probationers' court-ordered community service hours.

While the three judges are supportive of Bonanno's program, others are not. "I think that they're doing something that the Department of Corrections is supposed to do themselves," said Circuit Judge Ronald Ficarotta.

In April 2010, the Florida Department of Corrections held 15 scheduled events in Hillsborough County that included tips for succeeding on probation and information about using public transportation, setting life goals and obtaining job training. Basically, those are the same types of things offered in Bonanno's classes.

Nonetheless, Bonanno envisions his business going statewide, saying it is more effective. Probation officers "can't spend four hours with each client they have," he stated. "They just don't have the time to do it. Even if they did, I don't think the DOC will ever be able to get the same level of trust."

When Bonanno left the bench in 2001, it was under a cloud of suspicion. His career as a judge began to unravel after a bailiff found him in the empty, darkened office of another Circuit Court judge. A grand jury said his explanation for being there ruined his credibility. Bonanno resigned to avoid questions at a state House impeachment hearing concerning an alleged courthouse affair, the sealing of cases and the purchase of a \$450,000 model home. Since his resignation he has worked as a private lawyer and certified mediator.

At least one probationer, Kaitlynn Jackson, liked Bonanno's program, which she said covered material her probation officer had already informed her about. "I liked it," she said. "I mean it was boring. [But] I got rid of 50 hours [of commu-

nity service]." That credit, of one-third of her community service for attending Bonanno's paid class, is not offered to probationers attending the free classes provided by the state.

The Florida Judicial Ethics Advisory Committee was asked to issue an opinion on Bonanno's program, and decided on April 19, 2010 that the practice posed no ethical problems. "A judge may ethically allow a probationer to complete a course sponsored by a private, for-profit organization, in exchange for waiving all or part of any community service ordered as part of the probationer's sentence,"

the Committee held.

That doesn't mean that all judges will now jump on Bonanno's for-profit bandwagon, though. "A majority of judges are uncomfortable with Bonanno," remarked Judge Lopez. Circuit Judge Gregory Holder also expressed reservations. "It's not ethics, it's not morals," he noted. "I'm just not going to allow people to basically buy off community service in a money-making scheme for anyone." ■

Sources: *St. Petersburg Times*, *Florida Judicial Ethics Advisory Committee Opinion No. 2010-10*, www.tampabay.com

Privacy Concerns Raised Over New Law Enforcement Data Mining Technology

by David M. Reutter

New technology that helps law enforcement officials track sexual predators, terrorists and other criminals has been an effective tool that has led to thousands of arrests, but privacy experts are concerned about the convergence of information used to obtain those results.

At the center of the controversy is Hank Asher, referred to by one of his employees as a "mad scientist." Asher, by all accounts, is a computer genius who capitalized on the power of data mining and combining databases.

Asher amazed himself in 1992 when he created Auto Track, a program that integrated information in public databases such as state motor vehicle bureaus with private sources from banks and other businesses that contained Social Security numbers and additional information not available to the public.

When Asher ran his own name through Auto Track he received a long list of "associated" people. The list included "my ex-wife and her newest victim. I thought, 'what have I done?'" He then limited sales of Auto Track to reporters and insurance investigators. He provided it free to the National Center for Missing and Exploited Children.

Asher's admitted history of drug smuggling made law enforcement officials wary. In 1980 and '81, Asher piloted several flights of cocaine from the Bahamas to the United States. He avoided

prosecution by cooperating with drug enforcement agents.

That history led the FBI and DEA to suspend their use of Auto Track in 1999; they were concerned that Asher's company, DBT, could potentially monitor activities in current investigations. DBT's directors forced Asher to sell his ownership stake in order to salvage those law enforcement contracts, and he received about \$147 million from the sale.

In the wake of 9/11, Asher wrote a computer program that culled through hundreds of millions of people looking for the terrorists involved in the attacks. Among the list of 419 possible suspects, the program hit on 9/11 pilot Marwan al-Shehhi. Asher's attempts to demonstrate the program to Bush administration officials were fruitless until he paid former New York Mayor Rudy Giuliani \$2 million in December 2002 and gave a \$15,000 watch to a California sheriff serving on a federal homeland security panel.

About a month later, Asher demonstrated his program to then-Vice President Dick Cheney and Homeland Security director Tom Ridge. That meeting generated \$12 million in federal funding for a pilot program through Asher's latest company, Seisint, Inc.

What resulted was MATRIX – the Multistate Anti-Terrorism Information Exchange, though controversy over costs and privacy laws resulted in some states

dropping out of the project. "There is a lot of scientific evidence that you cannot predict the actions of terrorists or criminals or anyone based on their computer profiles," said Chris Calabrese of the ACLU's liberty and technology project. "That's a very dangerous thing that could cause people a lot of harm."

Seisint also developed a massive integrated database called Accurint, which was designed to "dramatically improve law enforcement's ability to obtain up-to-date as well as historical and background information on individual subjects. The product's artificial intelligence provides aliases, historical addresses, relatives, associates, neighbors and assets."

The MATRIX project ended in June 2005, but Asher had sold Seisint the previous year to the parent corporation of LexisNexis, making \$260 million. Asher's current company, TLO, has leased a 143,000-square-foot complex in Boca Raton, Florida. TLO provides space for investigators with the Palm Beach County State Attorney's Office and other agencies that work on cases involving sex crimes against children.

The computers and servers for law enforcement are not accessible to Asher and his company, which provides a free

tracking system to track children in state care. He garnered the support of John Walsh, host of "America's Most Wanted." But when TLO produced a 3-page list of databases that the National Center for Missing and Exploited Children said would help identify child predators, people got spooked.

The list included financial records, credit card data and even Blockbuster video rental accounts. "He wants to have every scrap of personal data that he can acquire in any and everybody," said Marion Hammer, past president of the National Rifle Association. "I know that he has people working to find ways to get data from state agencies and of course there is data that we would never want him to get his hands on."

LexisNexis sued Asher in April 2009, claiming he had violated a non-compete agreement from when Seisint was sold. Asher countered that he was simply giving away software called FairPlay to law enforcement agencies to help them track child porn on peer-to-peer networks and identify child predators. The lawsuit and a countersuit filed by Asher were withdrawn in August 2009 after the president of the National Association of Attorneys Gen-

eral announced he might form a task force to investigate LexisNexis for antitrust violations, specifically citing the company's litigation against Asher.

The latest product that Asher is developing is called AK (Accurint Killer). He hopes it will change the business of assessing risk and investigating fraud. It may flag potential terrorists, too. He has hired a former FBI agent, former Assistant U.S. Attorney, former commissioner of the Florida Dept. of Law Enforcement, former sheriff and former Florida Attorney General Bob Butterworth to assist with the venture.

"Our new systems have the capacity to address tomorrow's risks and threats," said Asher, who is seeking to generate substantial revenue by combining his technology with people's personal information. "I've never seen financial opportunities like this in my lifetime. I think [AK] will do several billion dollars a year."

Even if that rosy outlook is true, though, Asher's most recent data mining project will likely come at a significant cost to people's privacy. ■

Sources: *St. Petersburg Times*, *Associated Press*, *South Florida Business Journal*, www.legalnewsline.com, www.allbusiness.com

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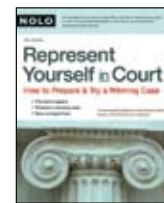
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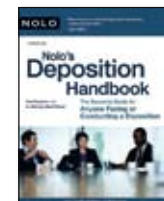
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Did Haitian Police Murder Over a Dozen Unarmed Prisoners?

by Matt Clarke

On January 12, 2010, Haiti suffered a major earthquake that killed more than 230,000 people and, as a side effect, allowed thousands of prisoners to escape from the country's most secure lock-up, the national penitentiary in Port-au-Prince. Les Cayes, Haiti's third largest city, took less damage, though the earthquake and aftershocks made everyone nervous – especially the 467 prisoners in the dilapidated and overcrowded Les Cayes prison.

Unlike the penitentiary which held convicted felons, including hundreds considered a threat to national security, three-quarters of the Les Cayes prisoners were awaiting trial. Many had minor or eclectic charges such as loitering, commercial debt, petty theft, and even practicing witchcraft or werewolfery.

"Understand, you can be arrested in Haiti for practically nothing," said Maurice D. Geiger, an American contractor working on Haitian justice reform. "And once you are arrested and go to prison, it is not only possible, but likely that you will stay there for an extended period of time without seeing a judge."

The detainees in the Les Cayes prison's 14 crumbling concrete cells, frightened by the earthquake and jolted by continuing aftershocks, began screaming to be released and tried to open the cell doors. When they wouldn't calm down, guards removed the loudest of the protesting prisoners, beat them with batons and threw them into the most crowded cells in the prison, which already held more than four times its design capacity. Twice-daily bathroom privileges were suspended and a waste bucket was placed in each cell.

In Cell 3, the response to the assaults was to begin planning an escape under the leadership of Luguens Cazeau, also known as Ti Mousson, a pretrial detainee accused of stealing a satellite dish and a victim of the guards' beatings. Prisoners began digging at the walls and sharpening a toothbrush handle. A detainee in Cell 3 who was formerly a police officer informed the warden about the escape preparations, according to a since-released prisoner.

During the aftermath of the earthquake, the prison's warden, Inspector Sylvestre Larack, called a "maximum alert" but had a hard time getting his 29

guards to show up. Only five guards came to work on January 19, 2010. Larack then went to fill up his car, even though it meant his absence from the facility for several hours.

That was the break that Ti Mousson was waiting for. The prisoners in Cell 3 jumped and stabbed a guard who had opened the door to dump the waste bucket, and gained control of his keys. The guards fled, leaving the detainees in control of the prison. However, the facility was already surrounded by Haitian police and UN peacekeepers from a Senegalese police unit.

After three hours of discussion, Haitian officials ordered the better-equipped UN officers to enter the prison and open fire on the prisoners. They emphatically refused.

"It was not right!" said Abdou Mbengue, the reporting officer for the Senegalese police unit. "It must be said that the Senegalese did not fire a single shot," added the unit commander, Lt. Col. Ababacar Sadikh Niang.

Apparently, the same could not be said of the Haitian officers. Superintendent Olritch Beaubrun of Haiti's antiriot police claimed that his men entered the facility after using tear gas and discovered bodies lying about. He said they didn't fire any shots.

Uniformly, prisoners who were later released and three female employees – cooks – who were in the prison during the escape attempt accused the Haitian police of opening fire on detainees who were unarmed and surrendering.

"They shouted, 'Prisoners, lie down. Lie down. Lie down,'" said Kesnel Jeudi, a released prisoner, describing the storming of the facility. "When the prisoners lay down – while the prisoners were lying down – they began firing."

"All them people they killed, it's not even like they were going to escape," said another former prisoner who survived the police takeover of the prison. "They just shoot them. Like they nervous, they shoot people."

In contrast, Inspector Larack's report stated the police were met with "a hailstorm of rocks and ammunition coming from the detainees." Yet no firearms or ammunition were recovered from the prison.

The three cooks said they were never

threatened by prisoners and none of the prisoners fired on police officers. They said that some prisoners wanted to use them as human shields when the police stormed the facility, but others wouldn't allow it.

"No detainees did any shooting," said Charita Milien, one of the cooks. Her statement was corroborated by the fact that the police reported no officers killed or wounded by gunfire coming from the prison.

The Rev. Marc Boisvert, an American priest who has been providing vocational training at the Les Cayes prison for years, was allowed into the facility the day of the killings. He found prisoners with gunshot wounds left without medical treatment in the cells. He asked the prisoners what happened.

"They all claim that when the shooting started, they had their hands up and were surrendering," said Father Boisvert, a former U.S. Navy chaplain. "The shooting seemed to be at close range, through bars into cells where the people inside had nowhere to go. Essentially, when the authorities finally got their act together, they came in full force and shot people indiscriminately in their cells. It was crazy. People just lost it. People with guns lost it, and other people lost their lives."

That version of the killings was backed up by photographs taken by a UN officer that show bodies in the prison yard and in cells, some of which have multiple gunshot wounds. By the time the local justice of the peace arrived "to certify the damage incurred in the course of the riot," no bodies remained in the cells. Instead, he saw ten bodies in the prison's main yard. The morgue reported receiving 11 bodies of prisoners immediately after the police retook the facility, and several more arrived later after they apparently succumbed to their wounds. Various sources listed 12 to 19 prisoners killed in the incident, and up to 40 wounded.

Haitian officials did not notify family members of the prisoners' deaths. They buried the bodies without autopsies and burned the prisoners' bloody clothing. Haitian authorities maintained the prisoners were killed by other prisoners.

"Ti Mousson put down the 12 detainees," said Police Superintendent Beaubrun. "We did not. We never fired our guns."

Adding to the confusion was the fact that the prisoners had found several old guns in a clerk's office at the prison. The released prisoners and a guard said they believed the guns did not work and did not have ammunition; however, the firearms disappeared from the facility before it was retaken by police, as did Ti Mousson, who escaped.

The UN Senegalese after-action report decried "the amateurism, the lack of seriousness and the irresponsibility of the Haitian National Police officers."

The local prosecutor, Alix Civil, rejected the justice of the peace's initial report after he viewed the aftermath at the prison. "A lot of things were missing from that report," he said. "It was written only to please the chief of the prison." The justice of the peace was ordered to redo his report.

Inspector Larack was promoted to warden of the national penitentiary in Port-au-Prince. Several weeks later, a Haitian National Police inspector general's report on prison officials' conduct during the Les Cayes incident recommended that Larack be demoted; the report did not focus on the actions of the police.

However, a May 23, 2010 *New York Times* article on the killings put pressure

on the Haitian government to do something, prompting President René Préal to establish a joint UN-Haitian commission to investigate the Les Cayes prison deaths. On May 27, 2010, Larack was taken into custody by the judicial police for questioning.

"As far as we're concerned there was a major human rights violation in that prison," said UN spokesman David Wimhurst. "It's a delicate political business being in Haiti and supporting the government. We're not here to undermine them, but nor are we here to turn a blind eye to gross human rights violations."

The U.S. State Department and the Agency for International Development have requested \$141.3 million in funding to help Haiti rebuild its justice system following the January 2010 earthquake. However, U.S. Senator Patrick J. Leahy, who chairs the Senate Judiciary Committee and the Appropriations subcommittee that finances foreign aid programs, in referring to the deaths at the Les Cayes prison, said, "Absent the will to see justice done, we should not waste our money."

Sources: *New York Times*, *BBC*, *Associated Press*

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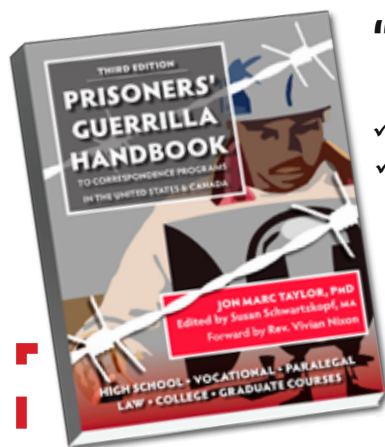
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That's a Lot of Honeybuns: Texas Prison Commissaries a \$95 Million-a-Year Business

by Matt Clarke

Recent reports in the Texas media have focused attention on the state's prison commissaries. However, none have presented the point of view of prisoners or their families. Instead, such reports tend to interview members of victims rights groups and ask them what they think about prisoners being allowed to purchase "luxury" items such as snacks and sodas. The reaction is predictably negative, but apparently that is what passes for objective news reporting in the mainstream Texas press.

One member of Mothers of Murdered Children said that the money put into prisoners' trust fund accounts by their families should be given to the "relatives of victims." This viewpoint assumes that most prisoners are incarcerated for murder or other violent crimes. In fact, many prisoners are serving time for offenses such as drug use, sale or possession, which do not have easily definable "victims."

The truth about prison commissaries in the Texas Department of Criminal Justice (TDCJ) is that they save the state a lot of money. The TDCJ is required to supply indigent prisoners with basic necessities such as tooth powder, stamps, envelopes and stationery. About half of the TDCJ's 160,000 prisoners are classified as indigent – having less than \$5.00 in their trust fund accounts.

The other half must purchase their correspondence materials, toothpaste and other hygiene products from prison commissaries. In 2009, Texas prisoners bought 13 million stamps and pre-stamped envelopes, at a cost of over \$6 million.

The commissaries also generate considerable profit for the TDCJ, as most of the commissary items have a hefty markup. For example, instant Ramen noodle soup, the most popular item sold, carries a 44% markup from a wholesale price of \$.14 each to a retail price of \$.25 each. This means that the prison system makes almost \$3.7 million off the \$8.3 million in Ramen noodle soup sold annually. Markups average around one-third of the retail price, meaning that TDCJ commissaries made a profit of about \$30 million in 2009 on gross sales of \$94.9 million.

Although commissary profits are

mainly used for recreational and educational materials for prisoners, during the 2009 fiscal year the TDCJ recommended diverting \$7 million from commissary sales to help meet a budget deficit.

A common assumption about prison commissaries is that prisoners mostly buy junk food and, further, they shouldn't have to purchase snacks because the prison system provides sufficient meals. Both of those assumptions are misleading.

Texas prisoners do buy a lot of junk food such as chips and soda – \$17.6 million and \$15.9 million worth in 2009, respectively. They also spent \$3.8 million on ice cream, \$3.2 million on candy and \$5.7 million on cookies and pies. Why? Most likely for the same reasons that people not in prison buy comfort food or junk food. But there is also another reason.

How much did Texas prisoners spend on vegetables and fruit? Zero. Nothing. That isn't because all prisoners in Texas hate fruits and vegetables; rather it is because the commissaries don't stock them. Despite multiple petitions by prisoners over the years, TDCJ commissaries continue to primarily stock junk food. Perhaps that is because such items are the most profitable. Whatever the motivation, Texas prisoners don't have the option of patronizing other stores and it is clear that TDCJ commissaries, which are owned and operated by the prison system, care neither about what prisoners want nor what is healthy for them.

"It was never designed as a supplemental food program," said TDCJ spokeswoman Michelle Lyons, referring to prison commissaries.

"The food is there, but it is an institutionally-prepared meal, so it's probably not going to be as tasty as a bag of chips," noted Nolan Glass, TDCJ's commissary director.

Both statements assume that the food served in prison "chow halls" is adequate. Many prisoners and prison experts disagree with that assumption. Complicating the matter is the fact that Texas prisoners, who are required to work without pay if medically able, perform a variety of tasks ranging from toiling all day in agricultural fields to sitting at a desk working as a

clerk. That means they have vastly differing caloric requirements, yet all who are housed at the same prison are fed the same meals.

"It's a fact that TDCJ feeds the inmates kind of minimally, and they are supplementing their diets" by buying commissary food, said Scott Henson, a criminal justice policy researcher and author of the acclaimed Texas criminal justice blog "Grits for Breakfast."

The fact that the highest volume item in TDCJ commissaries by far is Ramen noodle soup supports Henson's observation. Ramen noodles are an item purchased less as junk food and more to supplement a possibly inadequate diet.

Institutional meals can be deficient for a number of reasons. They can also be unpalatable, which may account for the \$5.7 million in condiments purchased by prisoners at TDCJ commissaries in 2009. This writer has personally experienced prison food where the identity of what is being served could only be inferred from its color, as everything on the tray had been boiled more than a day earlier, rendering every item a tasteless, but not colorless, mush. Also within this writer's realm of experience are chow halls that, having prepared an inadequate amount of food, water down servings or dole out half portions. Further, it is not uncommon for kitchen employees and workers to arbitrarily refuse to serve full portions of food.

All of these practices result in a need for prisoners to supplement their diet – a need that is poorly met by prison commissaries that focus on low-nutrition but highly profitable junk food. Perhaps it is time for the TDCJ to rethink the mission of its commissaries and the type of food items they stock. ■

Sources: *Texas Tribune*, *TDCJ*, *KTRK-AM*, <http://gritsforbreakfast.blogspot.com>

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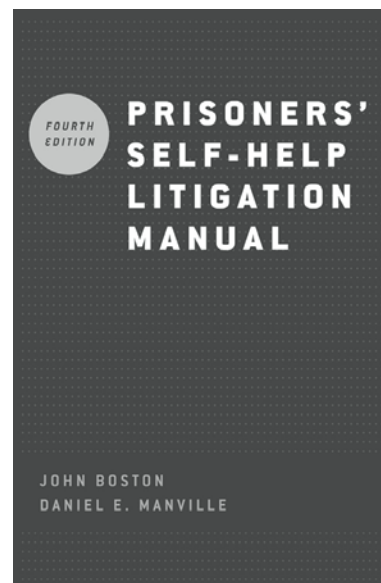
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Washington State Prisoner Who Requested Public Records Entitled to Joinder in Non-Disclosure Injunctive Action

The Supreme Court for the State of Washington has held that a person who requests public records must be joined in an action that seeks to prevent the disclosure of those records.

The Court's May 13, 2010 ruling came in an appeal filed by Washington State Penitentiary prisoner Allan Parmelee. In October 2004, Parmelee requested from the Washington Department of Corrections (WDOC) "photographs, addresses, incomes, retirement and disability information, administrative grievances or internal investigations, and any other related documents" pertaining to numerous prison employees.

Fifteen employees then filed suit against the WDOC seeking a protective order from disclosure of the records, based on a claim of privacy. After the trial court granted the employees an injunction, Parmelee filed a limited notice of appearance seeking to intervene, requesting that the trial court reconsider. His motion was denied and the appellate court affirmed. See: *Burt v. Department of Correction*, 141 Wn.App. 573, 170 P.3d 608 (Wash.App. Div. 3, 2007).

Parmelee petitioned to the state Supreme Court.

Washington's Public Records Act "is a strongly worded mandate for broad disclosure of public records." Persons named in a request for records or to whom the requested records specifically pertain may obtain an injunction to prevent disclosure if the "examination would clearly not be in the public interest and would substantially and irreparably damage any person."

Parmelee challenged the failure to join him in the WDOC employees' injunctive action. The core issue was whether he was an indispensable party to the action. Civil Rule 19, which pertains to mandatory joinder, provides a two-part inquiry.

The first determination is whether a party is needed for just adjudication, which requires establishing the party must be "so situated that the disposition of the action in his absence may ... as a practical matter impair or impede his ability to protect that interest."

It was undisputed that as the requestor of the records, Parmelee had an interest in the subject of the injunctive action. The Supreme Court agreed that the proceedings were not adversarial

because no party represented Parmelee's position as the person who had requested the public records.

While the WDOC had an obligation to release the records absent an exception, it also wanted to protect its employees' personal information and to prevent a workplace employee/employer conflict. In fact, the WDOC had filed a memorandum stating "it has no opposition to [the employees' injunctive] action."

As such, Parmelee should have

been allowed to join the action seeking to prevent his records request, and the lower court's failure to do so impaired or impeded his interest in the subject of that action. The matter was remanded to join Parmelee as a party and to allow him an opportunity to respond to the WDOC employees' request for an injunction prohibiting the release of the requested records. See: *Burt v. Washington State Dept. of Corrections*, 168 Wash.2d 828, 231 P.3d 191 (Wash. 2010). ■

Controversial Report Criticizes Director of Idaho Parole Commission

by Matt Clarke

In February 2010, the Idaho legislature's Office of Performance Evaluations (OPE) released an audit report titled "Increasing Efficiencies in Idaho's Parole Process." Among other things, the report critiqued Olivia Craven, Executive Director of the Idaho Commission of Pardons and Parole, for failing to have a formal grievance procedure for commission employees and for making them fearful of retaliation should they raise complaints.

In a strongly-worded response, Idaho Governor C.L. "Butch" Otter criticized and rejected the report. Idaho Department of Corrections Director Brent D. Reinke separately rejected the OPE report, too. Both said the auditors lacked understanding of the problems facing the parole commission.

Of the 26 recommendations made in the report, Craven agreed with only three, disagreed with four and agreed with but refused to implement one. By far, the most controversial recommendation was that Craven establish "a formal, commission-specific communication and grievance process to improve the working relationship between management and staff and ensure all staff are treated fairly."

Expounding on the need for a formal grievance process, OPE explained that several commission staffers were reluctant to participate in the performance evaluation, "citing concerns about retaliation from their immediate supervisor or the executive director." In fact, 40% of commission staffers expressed concerns ranging "from

frustration with management to being fearful of retaliation by the executive director."

Governor Otter called that part of the report "an unprecedented and troubling departure" that "undermines the findings of a report otherwise conducted in an objective and professional manner."

However, the OPE report maintained that staff morale affects efficiency, and was therefore a legitimate subject in an efficiency evaluation.

State Rep. Maxine Bell, a member of the Joint Legislative Oversight Committee (JLOC), which oversees the OPE, noted that it "really is unprecedented for a performance audit to come out and say, 'Nobody likes their boss.'" Yet she was "disappointed" by the governor's response because "it doesn't serve to help the issue, which is to help them be more effective in the business of paroling people in a timely manner."

Craven, 61, a former parole officer with no college degree, has headed the commission for 25 years. She is known as a 16-hour-a-day workaholic and has been criticized for her proprietary attitude which she expresses by habitually calling the parole board members "my commissioners."

"Maybe I'm cranky and biased, but I kinda think, 'You work for them, not the other way around,'" said Rep. Bill Killen, the House Democratic Caucus Chair and one of the two legislators who had requested the audit. "It's clear, rightfully or wrongfully, the employees

are scared to death. The big message was that the director runs an extremely tight ship. In fact, it's so tight that I'm not sure anyone's vision comes to light except her own."

Rep. Killen's comments were validated by the fact that Craven had intercepted a draft OPE survey that commission employees were to respond to online, which would go directly to the auditors with confidentiality assured. Instead, Craven met with the staff members and instructed them to give their responses to the supervisor who manages parole hearing officers. This prompted the OPE auditors to conduct personal interviews with commission employees rather than rely on the survey.

Almost lost in the political infighting was the fact that the OPE report found Idaho had wasted around \$6.8 million between January 2007 and September 2009 by keeping prisoners beyond their tentative parole dates (TPD). Of course, Craven, Reinke and Otter rejected that finding as well, arguing there are many public safety or administrative reasons that a parole release might be delayed.

While that is certainly true, it does not explain the report's finding that whereas almost 40 percent of prisoners were paroled on time in 2004, only 17 percent were timely released in 2008. Nor does it explain why the percentage of prisoners being held from six months to a year after their TPD grew from 6% to 16% between 2004 and 2008.

Considering that Idaho's prison system housed only 7,283 prisoners in 2009 (up from 1,339 in 1985) and paroled just 2,017 prisoners during the audit period, one would expect the governor and DOC director to express a greater interest in what was presented in the OPE report as a waste of almost \$7 million dollars – as well as training and communication problems affecting the parole commission's efficiency.

"The thing that stood out the most

was the governor's rejection of the report," observed Rep. Cliff Bayer, co-chair of the JLOC. "The sensitivity of it lies in personnel, morale and a possible lack of willingness to disclose. I think everybody

should be receptive to constructive criticism." ■

Sources: *Idaho Statesman*; *Office of Performance Evaluations, Report No. 10-02*

Washington State Pays \$6.4 Million for Failure to Supervise Parolee

Washington State's Department of Corrections (WDOC) has agreed to pay \$6.4 million to settle claims involving the department's failure to properly supervise a parolee, resulting in a string of violent crimes that included rape and murder.

The settlements, filed in Thurston County Superior Court, resolved claims filed on behalf of four women who were victimized by Michael "Cowboy Mike" Braae.

The lawsuits against WDOC claimed that had Braae been properly supervised, he could not have committed the murders and rapes. The complaint stated that WDOC had lost a court order extending Braae's supervision on parole from October 2000 to October 2001. WDOC also failed to place Braae on community supervision; instead he was put on the lowest form of supervision that allowed him to only pay fees.

One of Braae's victims, Susan Ault, 39, was last seen on May 21, 2001. She disappeared shortly after having an argument with Braae. Her body has never been found but the Wahkiakum County coroner issued a death certificate that ruled her death a homicide. Braae remains a person of interest in her disappearance; he was driving her pickup truck at the time he was captured.

Another victim, Marchelle Morgan, was shot in the head and left for dead on a county road on July 14, 2001 but survived. She was unable to testify at Braae's trial for at-

tempted murder due to her brain injuries. A mistrial was declared in that case.

Lori Jones, 44, was raped and murdered in July 2001; she was last seen leaving a bar with Braae, and forensic evidence tied him to the crime scene. Also, Karen Peterson was sexually assaulted by Braae in July 2001 after meeting him at a local bar.

The settlement by WDOC included \$3 million for Jones' family; \$2.4 million for Morgan and her son; \$750,000 for the family of Susan Ault; and \$250,000 for Peterson and her daughter. The settlements were announced in March and June 2010.

"Braae had a history of extreme violence towards women," said Blaine Tamaki, the Yakima, Washington attorney who represented the plaintiffs. However, "[o]nce on parole, he was ignored." See: *Jones v. WDOC*, Case No. 03-2-01531-5; *Satterthwaite v. WDOC*, Case No. 09-2-02408-9; *Morgan-Hayes v. WDOC*, Case No. 03-2-01368-1; and *Peterson v. WDOC*, Case No. 03-2-01369-0, all in Thurston County Superior Court (WA).

Braae was also a suspect in the deaths of a homeless woman in Oregon and one of his former girlfriends, both in 1997. He is finishing a prison term in Idaho and then will be transferred to Washington State to begin his 48-year sentence. ■

Sources: *The News Tribune*, *Associated Press*

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PLN Sues South Carolina Jail that Bans All Reading Material Except Bibles

On October 6, 2010, Prison Legal News, represented by the American Civil Liberties Union (ACLU) and Human Rights Defense Center staff attorney Lance Weber, filed suit in federal court challenging an unconstitutional policy at the Berkeley County Detention Center in Moncks Corner, South Carolina that bans all magazines, newspapers and books – except for the Bible – from being sent to prisoners.

The lawsuit charges that jail officials violated PLN's rights under the free speech, establishment and due process clauses of the First and 14th Amendments to the U.S. Constitution by refusing to deliver PLN's monthly publication and books to prisoners at the facility.

"Our inmates are only allowed to receive soft back [B]ibles in the mail directly from the publisher. They are not allowed to have magazines, newspapers, or any other type of books," a jail sergeant stated in an e-mail to PLN staff.

"This is nothing less than unjustified censorship," said David Shapiro, staff attorney with the ACLU's National Prison Project. "There is no legitimate justification for denying detainees access to periodicals and, in the process, shutting them off from the outside world in draconian ways."

The lawsuit contends that since 2008, PLN's monthly publication and books sent to prisoners at the Berkeley County jail have been returned to sender or simply discarded. The books rejected by jail officials include "Protecting Your Health and Safety," which is designed to inform prisoners about the legal rights they have regarding their health and safety – including the right to medical care and to be free from inhumane treatment.

"We have a clear First Amendment right to communicate with the prisoners at the Berkeley County Detention Center by sending them our publication and books," said PLN editor Paul Wright. "Prisoners do not cede their core constitutional rights simply by being incarcerated, and their being able to receive the material we send is essential to ensuring that their rights are upheld."

There is no library at the Berkeley County jail, meaning that prisoners incarcerated at the facility for extended periods of time are deprived of all access to magazines, newspapers and books – other than the Bible – for months or even years

on end. There is also no process through which the unconstitutional policy can be challenged.

"The Berkeley County Detention Center is totally out of step with most other jails around the country that recognize not just that censorship of this sort is clearly unconstitutional but that providing prisoners with access to books and periodicals is an important lifeline to the outside world," noted Victoria Middleton,

Executive Director of the ACLU of South Carolina. "We should do as much as possible to aid prisoners' successful transition back into society, not impede it."

Filed in U.S. District Court for the District of South Carolina, the lawsuit names as defendants Berkeley County Sheriff H. Wayne DeWitt and several other jail officials. See: *Prison Legal News v. DeWitt*, U.S.D.C. (D. SC), Case No. 2:10-cv-02594-MBS. ■

Native American Firms Reap Large Profits from Immigrant Detention Contracts

by Derek Gilna

Native American companies, many of which have no experience in prison management, are earning large sums of money as conduits for Department of Homeland Security contracts which are then subcontracted out to other firms.

Although apparently legal under current laws and regulations, the practice raises issues of accountability due to a growing number of incidents at such subcontracted detention facilities, according to the Americas Program of the Center for International Policy (CIP).

Tom Barry, a CIP senior policy analyst, states that this "lack of accountability and transparency and irresponsible profiteering are problems that are also prevalent in the very heart of Homeland Security operations ... largely outsourced using highly questionable bidding and contracting processes."

Under current federal law and Department of Homeland Security regulations, Native American companies are favored recipients for immigrant detention contracts, and they reap large profits by assigning those contracts to non-Native American firms. One of the major Native-owned corporations that has received such contracts is Doyton Ltd., which holds the contract for operational, transportation and food services at the 800-bed El Paso Service Processing Center in El Paso, Texas.

According to CIP, "Doyton is one of twelve original Alaskan Native Regional Corporations created as part of the Alaska Native Claims Settlement Act

of 1971." Under additional legislation passed by Congress, Alaska Native Corporations (ANCs) were also permitted to participate in the Small Business Administration's 8(a) programs and allowed to win sole-source contracts, despite criticism from the Governmental Accounting Office which cited a lack of oversight and accountability of sole-source contracts granted to ANCs.

Federal contract awards to ANCs increased by over 900% from 2000 to 2008, jumping from \$508.4 million in 2000 to \$5.2 billion in 2008. Most of those contracts were with the Department of Defense, though the companies have branched out to other areas, including detention services.

Doyton operates several subsidiaries which include Doyton Government Group, Doyton Associated, Doyton Universal Services, Cherokee General Corporation and Doyton Drilling. As these various companies have preferential access to lucrative federal contracts, they are able to prosper even in areas like immigrant detention although they had no prior experience in that field prior to winning such contracts.

Doyton Security Services, one of the affiliated companies, states that it "has grown into a powerhouse in the security field during the past six years. Within the past twelve months this subsidiary has won over \$266 million in new competitive contracts that employ 960 personnel in the homeland security-immigration and customs enforcement field."

Doyton's detention facility contracts have been subcontracted to the Sikh-owned Akal Security Company, which performs the actual day-to-day work required under the contracts. According to CIP, this allows "larger companies with real capacity [to] secure contracts that would otherwise be out of reach, since they don't otherwise qualify as small businesses, minority businesses, or native corporations."

Given such arrangements, it's not surprising that a number of problems have occurred at ANC detention centers subcontracted to other companies. Another Alaska Native Corporation that has obtained detention facility contracts is Ahtna Development Corp., which, prior to obtaining those federal contracts, had no previous experience in correctional services.

Notwithstanding that fact, Ahtna, though its subsidiary, Ahtna Technical Services, Inc., received contracts to pro-

vide operational, maintenance and other support services at the Buffalo Federal Detention Facility in New York, Krome Service Processing Center in Florida, Port Isabel Service Processing Center in Texas and Varick Street Detention Facility in New York City.

In April 2009, two hundred immigrant detainees at the Port Isabel detention facility participated in a passive resistance campaign and hunger strike to protest alleged due process violations and inadequate medical care, according to Maria Muentes, an organizer with Families for Freedom.

A November 1, 2009 *New York Times* article shed light on problems at other Ahtna-run detention centers, including the Varick facility — where detainees

complained of cramped, filthy conditions, inadequate medical care and insufficient food.

According to CIP, "the problems and concerns at the Varick detention center reflect the generalized state of immigrant detention abuses, vindictive and unreasonable transfers, and the lack of accountability and transparency in an immigration incarceration system that is largely outsourced to private firms." ■

Sources: *www.cipamericas.org*, *New York Times*

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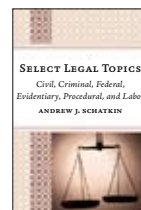
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California Supreme Court Restricts Remedies in Remands for New Parole Board Hearings

by John E. Dannenberg

In a unanimous ruling on July 29, 2010, the California Supreme Court resolved a narrow question regarding lifer parole litigation; namely, what is the proper scope of the remedy ordered by a California court which concludes that a decision by the Board of Parole Hearings (BPH) to deny parole was not supported by “some evidence”?

Rejecting restrictive remedies that had been ordered by two lower courts, the Supreme Court held the proper remedy should be to conduct a new hearing, consistent with due process of law and factual findings by the lower court, that does not limit the type of evidence the Board is statutorily required to consider.

Michael Prather had been sentenced to 27 years-to-life for a 1982 first-degree murder-robbery. At his 2007 parole hearing, Prather was denied parole. He petitioned the Los Angeles County Superior Court, which denied relief. However, his subsequent petition to the Second District Court of Appeal resulted in the appellate court granting the writ and ordering the BPH “to find Mr. Prather suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new and different evidence on Mr. Prather’s conduct in prison subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.”

Separately, in a case involving Miguel Molina’s successful petition challenging a BPH denial of parole related to his 1984 second-degree murder conviction, the Court of Appeal had admonished the Board that “any further delay [of execution of his 2002 grant of parole] is unwarranted,” and ordered the trial court to “in turn remand to the Board with instructions to release Molina on parole in accordance with conditions set by the Board.”

The California Supreme Court granted review in both cases and consolidated them. The Court reviewed its earlier landmark lifer parole rulings in *In re Rosenkrantz*, 59 P.3d 174 (Cal. 2002) [PLN, July 2003, p.30]; *In re Dannenberg*, 104 P.3d 783 (Cal. 2005) [PLN, March

2009, p.44]; *In re Lawrence*, 190 P.3d 535 (Cal. 2008) [PLN, April 2009, p.30]; and *In re Shaputis*, 190 P.3d 573 (Cal. 2008). The Supreme Court admitted that its guidance in *Rosenkrantz*, “to proceed in accordance with due process of law,” was “ambiguous.”

In resolving how to remedy this issue, the Court was guided by the separation-of-powers argument raised by the BPH relative to judicial branch orders that constrain statutorily-authorized executive branch decisions; i.e., courts telling the Board how to do its job.

In Prather’s case, the Supreme Court rejected the confining language that restricted the Board’s reconsideration solely to new evidence of Prather’s conduct in prison. In Molina’s case the Court rejected the directive to release him with no further evaluation by the BPH.

The Supreme Court reasoned that the Board, in doing its statutory job to evaluate *current* dangerousness, should be allowed to consider the entire record as it applies on remand. But the Court announced limitations. If the remanding court had made express findings of fact (e.g., the lifer’s psychological reports prepared for the BPH did not demonstrate “some evidence” of danger, or the lifer’s disciplinary history did not show “some evidence” of danger), on remand the Board can not reconsider such adjudicated factors. However, if there was “new evidence” since the last parole hearing, on remand the Board could consider not only that evidence standing on its own but also how that new evidence might be probative when combined with prior evidence in the record, to reach a *current* assessment of a prisoner’s dangerousness.

At first blush this might appear to provide a loophole for the BPH to synthesize allegations of “new evidence” thinly disguised to be relevant to prior evidence, so as to endlessly litigate parole denials. However, Justice Carlos R. Moreno wrote a clarifying concurring opinion addressing that point. Citing the principle of *res judicata*, Justice Moreno cautioned against remands that serve only to relitigate points already decided. He also noted that *In re Sturm*, 11 Cal.3d

258 (Cal. 1974) long ago required the Board to provide a “definitive written statement of reasons for denying parole” so as to ensure an adequate basis for judicial review.

“The Board cannot, after having its parole denial decision reversed, continue to deny parole based on matters that could have been but were not raised in the original hearing. Such piecemeal litigation would undermine the prisoner’s right to a fair hearing and the ability of the courts to judicially review and grant effective remedies for the wrongful denial of parole,” Justice Moreno wrote.

“In short, the Board, like other litigants ..., is not entitled to the proverbial second bite at the apple. At the parole hearing, it must state definitively its reasons for denying parole, i.e., all the arguments and evidence why the prisoner is currently dangerous. If the denial is challenged, the Board must defend its action on those reasons. If the challenge is overturned, it may not again deny parole based on the same reasons, or based on arguments and evidence that could have been, but were not, raised at these other proceedings.”

Justice Moreno added that an order expediting a remedy would not be improper. Further, if a court is faced with slapping the Board’s hands on a subsequent challenge to the remanded hearing, “then a more drastic intervention, such as an outright order that the Board grant parole, may well be warranted.”

While this new decision clarifies the specifics of judicial remedies in BPH parole denial remands for California lifers, it likely will have little effect on the ultimate success of such litigation. See: *In re Michael Prather and Miguel Molina*, 50 Cal.4th 238, 234 P.3d 541 (Cal. 2010). ■

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Texas Democrat Politicians Keep Private Prison Consulting in the Family

by Matt Clarke

In 2003 and 2004, Texas state Senator Eddie Lucio, Jr. (D) was a consultant for Management & Training Corporation, a private prison firm, and Corplan Corrections, a prison design and development company. Now his son, state Rep. Eddie Lucio III, (D) has signed on to be a Corplan consultant.

Corplan's CEO, James Parkey, typically sells desperate towns on high-risk government-financed prisons, promising them jobs and economic growth. Corplan builds the prisons with local government financing, such as project revenue bonds, but leaves after the construction is complete. How to fill the prisons is up to local officials.

"James Parkey and Corplan are prison developers who get paid when a prison is built," said Bob Libal, a Grassroots Leadership anti-private prison organizer in Texas. "It's not necessarily in their interest to make sure the prison project is successful."

Past Corplan projects include a scheme to build a prison in Hardin, Montana that cost \$27 million to construct but has sat vacant for years because the city has been unable to find prisoners to fill it. [See: *PLN*, Dec. 2009, pp.1, 8].

Corplan, based in Argyle, Texas, was also part of a group of companies trying to build a 2,000-bed immigration detention facility in Willacy County, Texas in 2003 and 2004, with Senator Lucio representing the companies. Lucio suspended his consulting work in 2005 after two Willacy County commissioners and a commissioner from another county who represented Corplan were charged with bribery in connection with the prison project. Corplan was not charged in the bribery scandal. [See: *PLN*, Nov. 2005, p.20].

Parkey's most recent grand scheme was to try to convince local governments in Benson, Arizona; Las Cruces, New Mexico; and Weslaco, Texas to build new detention facilities specifically designed to hold immigrant families. Las Cruces and Benson have already shot down the deal, but Parkey's hopes remain alive in Weslaco, where he hired Rep. Lucio as the attorney for the project.

Weslaco Mayor Buddy de la Rosa said he was introduced to Parkey two years ago and the detention facility proposal has been in the works since that time, with Corplan handling all the details. As late as February

2010, Parkey and Rep. Lucio spoke to the Weslaco city commissioners, urging them to pass a resolution authorizing Corplan to file a grant application for the prison.

However, this is not a good time to be building detention centers for immigrant families. Inhumane conditions at privately-operated family detention facilities, such as CCA's T. Don Hutto Residential Center near Taylor, Texas, attracted international attention and resulted in the Obama administration announcing in August 2009 that immigrant families would be removed from Hutto. [See: *PLN*, Dec. 2009, p.26].

"To my knowledge, and I spoke specifically with Immigration and Customs Enforcement [ICE] about this, they insist they don't have any requests for proposals out there or any plans for building a new family detention facility," said Michelle Brane, director of detention and asylum programs for the Women's Refugee Commission. "I think they're being duped, frankly," she said of the cities being

courted by Corplan to construct immigrant family detention centers.

Frank Smith, field organizer for the Private Corrections Institute, which opposes private prisons, confirmed that neither ICE nor the U.S. Dept. of Health and Human Services were seeking to fund such facilities.

Mayor de la Rosa said he wasn't aware of the shift in federal policy, but remarked that could explain why he hadn't heard from Lucio or Parkey for a while. "They've been remarkably quiet for the past several weeks," he noted.

In May 2010, Parkey pitched a 500-bed immigration detention facility to the city council in Italy, Texas, claiming the prison would provide about 150 jobs. Whether the City of Italy becomes Corplan's latest mark for speculative prison building remains to be seen; regardless, it most likely will not be the last. ■

Sources: *Texas Observer*, <http://realcostofprisons.org>, www.italyneotribune.com

Fifth Circuit Delineates Process Due Before Imposition of Sex Offender Parole Conditions

by Matt Clarke

On May 20, 2010, the Fifth Circuit Court of Appeals held that Texas parolees who had never been convicted of a sex offense, but were subject to onerous sex offender parole conditions (SOPCs), were entitled to specific and extensive due process before the imposition of such conditions.

Raul Meza, a Texas parolee, filed a 42 U.S.C. § 1983 civil rights suit in federal court against the Texas Board of Pardons and Paroles (BPP) and Texas Department of Criminal Justice-Parole Division (TDCJ-PD) employees, alleging his 14th Amendment due process rights were violated when the defendants imposed severe SOPCs on him despite the fact that he had never been convicted of a sex offense.

His parole conditions included requirements that he register as a sex offender, participate in sex offender therapy (SOT), not enter child-safety zones, be placed under super intensive supervision parole (SISP), and not leave the Travis County Correctional Complex (TCCC)

unless accompanied by a parole officer. The combined effect of those conditions meant that Meza had been unable to leave TCCC since he was paroled in 2002.

Meza had been convicted of murdering a nine-year-old girl in 1982. The only time he admitted to sexually assaulting the girl was as part of the mandatory SOT. His lawyer stated that had Meza not admitted to sexually assaulting the victim, his parole would have been revoked for failure to participate in the SOT. The defendants did not contest this explanation. There was no other evidence in the record that Meza had ever committed a sex crime.

Before the SOPCs were imposed, Meza was given notice of the BPP's intention to impose the conditions and provided an opportunity to submit written evidence. Neither he nor his attorney were allowed to attend the hearing, call witnesses or review the evidence used against him. The only presentation to the BPP panel was a TDCJ-PD employee who argued in favor of imposing SOPCs.

The district court held that that was inadequate due process, and the defendants appealed. [See: *PLN*, Oct. 2009, p.30].

The Fifth Circuit found that Meza had a significant liberty interest in being free of sex offender registration and therapy conditions. The appellate court reviewed the process due prisoners in disciplinary cases, prisoners facing involuntary transfer to mental health facilities and parolees facing revocation. The Court of Appeals held that the process Meza was due before SOPCs were imposed included: 1) written notice of the pending imposition of sex offender conditions; 2) disclosure of the evidence to be presented; 3) a hearing that Meza is allowed to attend, at which he may present documentary evidence and call witnesses; 4) the right to cross-examine witnesses (unless good cause is shown); 5) an impartial decision maker; and 6) a written statement by the factfinder of the evidence relied upon and the reasons for imposing SOPCs.

The Fifth Circuit noted that, according to the BPP, parole officials intended to impose SOPCs on around 6,900 prisoners who had not been convicted of a sex offense. However, the appellate court rejected the estimated \$750,000 cost of

providing those prisoners with adequate hearings as a reason to circumvent due process.

The Court of Appeals held that the TDCJ-PD could be sued, even though it was the BPP that imposed SOPCs, because the TDCJ-PD played a key role in the process – including preparing the file used by the BPP, orally arguing in favor of SOPCs, and controlling the implementation of many of the SOPCs. Further, neither the TDCJ-PD nor the BPP was entitled to qualified or Eleventh Amendment immunity.

The district court had dismissed Meza's equal protection claims and challenges to non-sex offender parole conditions, such as requiring him to live at TCCC. The Fifth Circuit vacated the dismissal of those claims, noting that they were not patently frivolous and should be addressed by the district court

following remand.

The Fifth Circuit held that even though Meza was no longer required to register as a sex offender, sex offender registration remained an issue in the case because it created a lifelong stigma. But the Court of Appeals disagreed with the district court's delineation of the process Meza was due insofar that it required the state to provide an attorney for the SOPC hearing.

Thus, the dismissal of Meza's equal protection and non-sex offender claims were reversed and remanded to the district court for entry of an order consistent with the appellate ruling. Judge Weiner filed a concurring and dissenting opinion in which he argued that the state should be required to provide an attorney to represent parolees at SOPC hearings. See: *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010). ■

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Post-Katrina Circumstances Excuse Holding Prisoner Beyond Indictment Deadline

On June 21, 2010, the Fifth Circuit Court of Appeals held that emergency conditions at a Louisiana prison following Hurricane Katrina helped excuse the failure of a warden to release a prisoner for three months after the deadline for filing an indictment against him had passed.

About two weeks after Hurricane Katrina flooded New Orleans in late August 2005, James Allen Terry, Jr. was arrested for looting and possession of a controlled dangerous substance while in possession of a weapon in Orleans Parish, Louisiana. He was taken to the Elayn Hunt Correctional Center (EHCC). An Orleans Parish judge arraigned him and set a \$200,000 bond three days later.

Ordinarily, an indictment must be filed within 60 days after arrest for a felony offense. Due to the chaotic situation in southern Louisiana, however, the state's Supreme Court extended the filing deadline to January 6, 2006. The deadline passed without Terry being indicted. He wrote letters to EHCC Warden Cornel H. Hubert asking why he had not been released, what the addresses were for various Louisiana politicians, and why the law library hadn't responded to his request for habeas corpus forms and inmate counsel.

Hubert had an assistant warden investigate Terry's inmate counsel complaint and he was seen by inmate counsel the next day. The warden also told Terry that Orleans Parish officials had authority over his release and he could not release him without a court order. Terry was released less than a month after he saw inmate counsel, pursuant to an Orleans Parish court order. He had been incarcerated for 7 months – including 3 months after the indictment deadline had passed.

Terry filed a civil rights action pursuant to 42 U.S.C. § 1983 in federal court, alleging that Warden Hubert violated his due process rights and his right of access to the courts by denying him access to a law library, to inmate counsel for his first three months of incarceration, to competent inmate counsel, and to basic information about who to contact to secure his release. Hubert filed a motion for summary judgment on the basis of qualified immunity, which was denied. He then appealed.

The Fifth Circuit held that Terry's letters to the warden indicated he had the ability to file a legally sufficient claim challenging his confinement. He had access to writing and mailing materials, plus contact information. He knew that Orleans Parish controlled his release, that he had been held beyond the extended statutory deadline, and that he needed to petition for a writ of habeas corpus. Terry's inability to obtain a habeas corpus form from the law library was "immaterial because 'a court may liberally construe a pro se petitioner's pleading and treat it as a habeas corpus petition.'"

It would have been different had Terry filed a petition for a writ of habeas corpus and the petition been dismissed "for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he

could not have known." Therefore, Terry's claims related to denial of court access and inadequate inmate counsel failed.

Terry's due process claim also failed. Warden Hubert knew Terry had been charged, arraigned and had a bail hearing. He had no way of knowing that Terry's detention was unlawful absent an order from the detaining authority. The Fifth Circuit also took judicial notice of the damage and disruption caused by Hurricane Katrina, deeming the storm's aftermath a unique circumstance that helped excuse Hubert from liability. Thus, the appellate court found he was entitled to qualified immunity.

The denial of summary judgment was reversed and the case remanded to the district court for entry of judgment in the warden's favor. See: *Terry v. Hubert*, 609 F.3d 757 (5th Cir. 2010). ■

Washington State: Settlement Requires Pierce County to Provide Educational Opportunities to Jailed Youths

The parties in a class-action lawsuit regarding the lack of educational services for juvenile offenders at Washington state's Pierce County Jail (PCJ) reached a settlement that requires the Tacoma School District (District) to provide incarcerated youths with the opportunity to earn high school credits.

Two classes were specified in the lawsuit: the Youth Class, which includes all present and future PCJ detainees and those at Remann Hall who were transferred to PCJ during the school year, who were under eighteen on their first day of confinement and the District's first day of the school year, and who had not yet graduated high school; and the Parent class, which consists of the parents of the Youth Class.

The settlement agreement requires PCJ and the District to implement an educational program that satisfies the legal requirements for providing academic courses to the Youth Class. The program is to commence and operate with the District's regular school instructional calendar or as otherwise authorized by law.

Within 48 hours of booking a Youth Class member, PCJ must inform program

staff of the potential eligible detainee. Within three days of notification, program staff must inquire of the juvenile as to whether participation in the educational program is desired. If desired, an initial assessment of the youth to implement a student learning plan must be conducted within two days. Educational services must begin within two days of the assessment.

The District is required to obtain the detainee's educational records within four days of enrollment in the program. An initial refusal to enroll does not prohibit future enrollment, which can occur by the detainee sending a "kite" conveying his or her desire to participate in educational services.

A written learning plan must be created for each detainee participating in the program. The courses provided must be included in the common school curriculum and allow participants sufficient opportunity to pursue full or partial credit that counts towards the District's high school graduation requirements. The District is required to provide sufficient staff, funding and materials to run the educational program at PCJ. If needed, detainees will receive special education courses.

Placement in segregation does not preclude juveniles from participating in the educational program unless their placement in segregation is related to the program. Members of the Parent Class have the right to provide input into

the written learning plan and to review the participant's educational records. A monitor will review the program over the first four full semesters, with the cost of the monitor paid by the defendants; the parties agreed to bear their own attorney's

fees and costs of the litigation.

The settlement agreement and consent decree were approved by the district court on March 29, 2010. See: *J.W. v. Pierce County*, U.S.D.C. (W.D. Wash.), Case No. 3:09-cv-05430-RJB-JW. ■

Audit Finds Oregon Victims Denied Restitution; Prosecutors Largely to Blame

An audit by the Oregon Secretary of State, released in early 2010, found that crime victims are not getting restitution and prosecutors are largely to blame.

The 2003 Oregon legislature required prosecutors to investigate and present evidence of economic losses suffered by victims, and required judges to order restitution when those losses are substantiated.

State auditors reviewed prosecution records in four of 36 Oregon counties involving 210 restitution-eligible cases. About half (111) of those cases did not include restitution because the victim did not suffer an economic loss or was compensated in other ways, such as by insurance payouts and court-ordered fines.

In 99 cases, about one-third of the affected victims did not provide all of the necessary documentation to claim restitution. In two-thirds of those cases, however, prosecutors failed to take necessary steps to obtain orders of restitution.

Prosecutors defended their failures, claiming they lacked the resources to investigate economic losses suffered by all victims. "Frankly, we just don't hear

back from some of the victims," said John Sewell, district attorney for Hood River County and president of the Oregon District Attorney's Association.

Sewell blamed the bad economy and the lack of a statewide data system, which the legislature had rejected due to insufficient funding. "In these economic times, it's somewhat understandable," said Sewell. "But it's frustrating."

Coos County District Attorney R. Paul Frasier, whose county was among those audited, challenged the auditors' recommendation that prosecutors contact victims by phone or in person if they do not respond to letters. "How much time should we spend going after victims, saying 'What do you want us to do?'" asked Frasier, noting that such steps would require time and resources that many prosecutors do not have.

Multnomah County District Attorney Michael D. Schunk, whose county was also audited, responded to the report by saying that devoting more resources to tracking down restitution for victims would probably mean fewer prosecutions of low-level offenses. "While we try hard to pursue restitution, we simply do not

have the staff," he stated.

Crime victims further have a right to restitution under Section 42 of Oregon's constitution, which provides that victims have "The right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury."

But only, apparently, when prosecutors are willing and able to do their jobs. ■

Sources: *The Oregonian*, www.oaaoregon.com

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PLN Settles Censorship Suit Against Virginia DOC for \$125,250

Prison Legal News announced on September 23, 2010 that it had settled a censorship lawsuit against the Virginia Department of Corrections (VDOC) for \$125,250 in damages, attorney fees and costs.

In October 2009, PLN filed suit against Gene M. Johnson, director of Virginia's prison system, and other VDOC officials for violating its First Amendment rights by censoring PLN's monthly publication in state prisons. The VDOC had claimed that PLN was "detrimental to the security, good order, discipline of the facility, or offender rehabilitative efforts or the safety or health of offenders, staff or others," or included "information geared toward a negative perception of law enforcement." [See: *PLN*, Nov. 2009, p.32].

"There are too many instances of exaggerated claims of security and order by prison officials," noted PLN attorney Steven D. Rosenfield. "The managers of these prisons would be better off concentrating on contraband, low-paying salaries of staff and too many Mickey Mouse rules."

The VDOC failed to notify PLN when its publications were rejected, and prison officials did not let prisoners' family members or friends buy books or magazine subscriptions on their behalf. Further, prisoners had to obtain permission before they were allowed to order or subscribe to publications. PLN argued in its federal complaint that such policies and practices infringed on its First Amendment right to communicate with and distribute reading material to Virginia prisoners, and prevented PLN from challenging censorship decisions.

To settle PLN's suit, the VDOC agreed to pay \$40,000 in damages plus \$83,370 for PLN's attorney fees and \$1,880 in litigation costs, for a total of \$125,250. The VDOC further agreed to make several policy changes, including to: 1) Remove PLN from its Disapproved Publications list; 2) Notify VDOC wardens that "PLN does not appear to be a publication that contains material that violates agency publication policy"; 3) Ensure that PLN will receive prompt notice of any future censorship decisions; 4) Allow family and friends of Virginia prisoners to purchase books and publications for them from approved vendors, including PLN; and 5) Allow PLN to correspond with prisoners

by sending them subscription brochures, information packets, etc.

The VDOC will post notices of the settlement terms "on existing bulletin boards of each state correctional facility for a period of one year," the settlement will remain in effect for three years, and the district court retains jurisdiction to enforce the agreement if needed.

"We are pleased that Virginia prison officials chose to respect the First Amendment rights of publishers that provide reading material to prisoners rather than litigate this censorship case," said PLN editor Paul Wright. "However, it would have been better for PLN, prisoners, their family members and Virginia taxpayers if such censorship had not occurred in the first place, which would have made our

lawsuit unnecessary."

"The Virginia Department of Corrections has a serious problem with censorship and is regularly violating the First Amendment rights of both prisoners and publishers. This agreement is a major victory for them and for the First Amendment," added PLN attorney Jeffrey Fogel.

PLN appreciates the patience of its subscribers in Virginia prisons whose subscriptions were censored prior to the resolution of this lawsuit. PLN was represented by Charlottesville attorneys Jeffrey E. Fogel and Steven D. Rosenfield, and by former PLN General Counsel Dan Manville and Adam Cook. See: *Prison Legal News v. Johnson*, U.S.D.C. (W.D. Virginia), Case No. 3:09-cv-00068. ■

Prisoner Deaths Continue at King County Jail Despite DOJ Intervention

by Mark Wilson

A rash of detainee deaths at the King County Correctional Facility (KCCF) in Seattle, Washington prompted the U.S. Department of Justice (DOJ) to open an investigation into conditions at the jail on October 30, 2006. As the investigation continued so did the deaths, but that did not stop the DOJ from settling with the county in January 2009 – on the same day that KCCF reported the death of yet another detainee, Daphney Justice. More recently there have been 3 suicides at the jail in a five-week period.

As previously reported, on November 13, 2007, DOJ investigators issued a scathing report that found medical neglect and conditions at KCCF had contributed to detainee deaths. In addition to "preventable deaths," the DOJ determined that prisoner abuse was "routine" and that overall jail operations were seriously deficient. [See: *PLN*, Feb. 2008, p.18].

Between 2000 and 2002 KCCF averaged one death annually, but between 2002 and 2006 the average number of deaths per year jumped to five. There were even more prisoner deaths in 2007. The DOJ found at least two deaths that resulted from inadequate medical care plus three suicides in the preceding three years were preventable. The report noted that "suicide prevention training at [the jail] falls

far below generally accepted correctional practices."

The DOJ's 2007 report threatened litigation if remedial measures were not taken at KCCF. "The Department of Justice is optimistic that we can reach common ground with the county on implementing the necessary remedial measures," said DOJ spokesperson Jodi Bobb. County executive Ron Sims agreed that the county "will be able to correct any identified concerns in a cooperative spirit" to avoid a lawsuit. Yet Sims denied that conditions at KCCF violated prisoners' civil rights, arguing that the jail was "constitutionally sound."

The DOJ and King County then entered into a Memorandum of Agreement that required the county to "make significant progress towards substantial compliance within 180 days of the effective date ... and ... implement all provisions ... within 1 year of the effective date."

The Agreement required the county to "develop, implement, and maintain comprehensive and contemporary use of force policies, procedures, and practices regarding permissible uses of force." Those policies must "require staff to report all uses of force, including chemical agents ... and non-routine use of restraints." An internal administrative panel must review all use-of-force incidents, and hairholds –

a technique criticized in the DOJ report – must be reduced or eliminated.

Additional staff training in the recognition of suicidal tendencies among prisoners was required by the Agreement. Improved medical and sanitation practices, including new measures to prevent the spread of infectious diseases, and regular supplies of clean underwear, uniforms, towels and bedsheets were also required.

The County Council approved the DOJ settlement, agreeing to set aside \$2 million to implement the reforms in 2009 and \$1.7 million annually in 2010 and 2011.

Meanwhile, prisoner Daphney Justice, 51, died the same day that the county settled with the DOJ, apparently due to medical-related reasons, and more recently there have been three suicides at KCCF.

On August 16, 2010, prisoner Christopher Goldner killed himself at the jail; Arnold Sharkey committed suicide on September 13, while Ryan Robertson, 33, hanged himself on September 20, 2010.

“In light of the three recent suicides among inmates in custody, [Dept. of Adult and Juvenile Detention] and Jail Health staff, in collaboration with the Department of Justice, have been reviewing every policy and procedure in place to determine if anything more can be done to better identify and protect those most likely to attempt suicide and help reduce the risk of suicide attempts,” the county wrote in a statement following Robertson’s death.

The continuing deaths at KCCF un-

derscore the toothless, all-bark-no-bite nature of the remedial actions that typically result from DOJ investigations. ■

Sources: *Seattle Post Intelligencer*, DOJ Memorandum of Agreement, *Seattle Times*, www.thenewstribune.com

\$2.16 Million Judgment for Prisoner Raped by BOP Guard

On April 7, 2010, a federal jury awarded \$2.16 million to a female prisoner who was raped by a guard at the Federal Correctional Institution (FCI) in Tallahassee, Florida.

Myra C. Solliday alleged that she was raped by Bureau of Prisons (BOP) guard E. Lavon Spence in 2003 while incarcerated at FCI Tallahassee. Spence pleaded guilty in 2006 to conspiracy to defraud and received three years’ probation; he did not defend against the civil suit or appear at trial.

Solliday was but one of many female prisoners who were abused by guards at FCI Tallahassee in a sex-for-contraband scheme that resulted in multiple convictions of prison staff and even two deaths.

When federal agents attempted to serve arrest warrants at the facility for several of the accused guards on June 21, 2006, one of the guards, Ralph Hill, opened fire, killing an agent with the Department of Justice’s Office of Inspector General. Hill was killed by return fire. [See: *PLN*, Aug. 2009, p.44; Aug. 2007, p.38; Oct. 2006, p.12].

Following a one-day trial in Solliday’s civil suit, the jury awarded her \$1,163,625 in compensatory damages and \$1,000,000 in punitive damages. While she obtained a significant judgment, it is unlikely much of it will ever be collected since Spence is personally responsible and will not be indemnified by the BOP.

Solliday, represented by Tallahassee attorney David Michael Frank, has since appealed the district court’s dismissal of other defendants in her lawsuit. See: *Solliday v. Spence*, U.S.D.C. (N.D. Fla.), Case No. 4:07-cv-00363-RH-WCS. ■

Additional source: www.fedcure.org

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North Carolina Lacks Control and Overpays for Prisoner Health Care

by David M. Reutter

North Carolina's Department of Corrections (NDOC) has inadequate procedures to contain prisoner medical costs and it overpays for prisoner medical care, concludes a fiscal control audit issued by the state's auditor.

NDOC spends over \$100 million yearly in prisoner medical care, and the costs continue to increase. It has contractual relationships with hospitals and other service providers to deliver medical services that prisons are not equipped to provide prisoners.

A survey indicated that other states limit medical costs to amounts established in negotiated contracts, to Medicare or Medicaid rates, to rates paid under other programs for indigent care or to discount insurance provider rates.

The NDOC's analysis indicated it incurred higher reimbursement costs for similar medical procedures than those paid by the insurance providers. The Auditor noted, based on its limited comparison of claims data, that payments were made for prisoner medical procedures that would not be considered allowable charges under either the state employee health plan or the Medicaid program. The comparison also revealed multiple rates applied for the same procedure code.

The Auditor examined the 131 largest hospital payments, which accounted for \$8.9 million of the \$31.5 million in hospitalization costs paid, during the audit period. That review revealed six instances where the hospital provider was overpaid, totaling \$170,900. Incorrect payment methodology in five errors amounted to \$148,519 of the reimbursement. The other error of \$22,381 came from NDOC paying the contract rate rather than the amount billed.

An expanded review of payments to one hospital from July 2007 to December 2008 identified payments of \$469,000 in excess of the amount billed due to NDOC paying the contract rate. The overall examination of prisoner hospital service payments revealed NDOC paid, on average, rates that were 467% of the applicable Medicare/Medicaid reimbursement rates.

Hospitals disagree with using Medicare/Medicaid rates for prisoners. "We're talking about a segment of the population that's more dangerous; therefore, more costly to manage and they're often sicker and more costly to treat," said Don Dal-

ton, spokesman for the North Carolina Hospitals Association. "Hospitals are underpaid well below cost in both Medicare and Medicaid."

The Audit also found there is inadequate internal control over the payments of prisoner medical claims. NDOC lacked uniform written policies and procedures related to such claims. Manual entry of claims makes the high volume of transactions susceptible to error. Finally, purchasing agents, rather than legal representatives and experienced medical claims contract personnel, are involved in negotiating and drafting contracts.

NDOC agreed to all the noted deficiencies and said it would act to correct them. Legislators, however, have to take some action to require public hospitals to treat prisoners. "As a taxpayer and not just the state auditor, it's my expectation that

the people who are responsible, the people who can make this go away, the people who can get these costs in line will step up to the plate this session and make this happen," said State Auditor Beth Wood.

The report also found deficiencies in the personnel and payroll process of NDOC. Some employees were paid for hours they did not work and others were underpaid. Some records were not properly authorized by supervisors. The Auditor also found that inadequate controls existed on the control over access to the Offender Population Unified System. Once again, NDOC agreed with the findings and promised to correct them. The Auditor's February 11, 2010 report, *Department of Correction Fiscal Control Audit*, is available on PLN's website. ■

Additional source: WRAL

Ninth Circuit Rebuffs California's Attempt to Terminate CDCR Medical Receivership

by Michael Brodheim

In a strongly worded opinion, the Ninth Circuit affirmed the district court's denial of a motion filed by California state officials to terminate the receivership established in 2006 to oversee and manage delivery of medical care to prisoners in the custody of the California Dept. of Corrections and Rehabilitation (CDCR).

In January 2002 the state entered into a "stipulation and order for injunctive relief" designed to remedy Eighth Amendment violations raised in a class-action suit brought by California prisoners challenging deficiencies in medical care. The order provided for remedial measures to be implemented on a rolling basis, several prisons at a time. [See: *PLN*, July 2001, p.5; Feb. 2003, p.18].

After three years, however, not one prison had successfully implemented the remedial measures. Meanwhile, a "significant number" of prisoners were dying as a result of substandard medical care – a fact then openly acknowledged by the state.

In a six-day evidentiary hearing, the district court heard testimony from experts who described as "abysmal" the CDCR's medical care delivery system, where "medical care too often sinks below

gross negligence to outright cruelty." The state did not seriously contest this testimony and conceded that it was unable to comply with the consent orders to which it had previously stipulated.

In October 2005, the district court observed, "[I]f the system is not drastically overhauled, an unconscionable degree of suffering and death is sure to continue." Three months later the court issued an order appointing a Receiver, in whom it vested all of the powers then held by the Secretary of the CDCR with respect to the delivery of medical care. The state neither objected to nor appealed this order. [See: *PLN*, March 2006, p.1].

The Receiver filed a draft Plan of Action in May 2007 that called for the construction of 10,000 new prison medical beds. The state joined in the motion, which the district court granted, and agreed to all of the Receiver's subsequent revisions over the course of the next 14 months. [See: *PLN*, Nov. 2007, p.38].

State officials balked, however, when they were first asked, then ordered, to fund the court-approved construction by turning hundreds of millions of dollars over to the Receiver's office.

In January 2009 the state moved the

district court to terminate the receivership and replace it with a special mastership (a position with much less power), arguing that the Prison Litigation Reform Act (PLRA) permits appointment of the latter but not the former. Arguing further that the PLRA bars the district court from ordering prison construction, the state also moved to end the Receiver's construction plans.

The court denied the motion to terminate the receivership in March 2009 and held the state's request to end the Receiver's construction plans was premature because those plans had not yet been finalized. [See: *PLN*, Aug. 2009, p.20]. The state appealed.

The Ninth Circuit noted that the state, which had previously admitted its inability to comply with consent orders intended to remedy ongoing Eighth Amendment violations in its prisons, and then acknowledged "without reservation" the district court's authority to appoint a receiver, was "in a poor position" to suddenly object to the receivership.

On the merits, the Ninth Circuit found that the PLRA does not deprive the district court of its traditional equitable power to appoint a receiver; that the record in the case amply justified the appointment of a receiver, both initially and

currently; and that the challenge to the Receiver's still-pending construction plans was indeed premature. The district court's denial of the state's motion was therefore affirmed. See: *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010).

PLN has reported extensively on the *Plata* litigation, which is presently pending before the U.S. Supreme Court on the state's appeal of an order by a three-judge panel that the CDCR reduce its population by around 40,000 prisoners over a two-year period. [See: *PLN*, Aug. 2010, p.1; July 2010, p.14].

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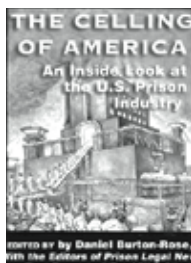
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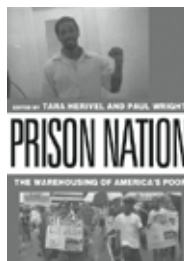
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privatization, class, race and justice, our quixotic drug war, the hidden prison AIDS crisis, and a judicial system tilted toward informers and the affluent.

News In Brief:

Arkansas: Sebastian County jail prisoner Gary Van Wolf, 64, awaiting trial on sex charges involving children, was strangled to death and left in his cell on September 16, 2010. According to a report by the Sheriff's Office, jailers had left prisoners unsupervised for about an hour during the time that Van Wolf was killed. Three jail employees were reprimanded. The suspect in the murder, prisoner Ashley Eugene Kaufman, 25, had learned about Van Wolf's charges when they made video court appearances.

Arkansas: No charges will be filed against Tucker Maximum Security Unit Sgt. Billy Hayes, who was manning a security checkpoint when he shot and killed Lester McGowan, a parolee who attempted to drive away after officers tried to stop him on June 20, 2009. [See: *PLN*, April 2010, p.24]. A Department of Corrections investigation determined that the shooting was justified because McGowan was a threat to people on the prison's property. Hayes fired a round through the back window of McGowan's car, hitting him in the back.

California: Steven "Matt" Schultz, serving 26-years-to-life at Folsom Prison, was sentenced in October 2010 to an additional 50-years-to-life term for killing another prisoner two years earlier. Schultz pleaded guilty to using a box cutter blade to slash the throat of Shannon Graling, a convicted child molester, in the prison's recreation yard. Graling was serving a 401-year sentence at the time he was killed.

California: The California Rehabilitation Center in Norco was placed on lockdown on October 10, 2010 following a fight involving 10 to 15 prisoners; four were sent to a hospital in serious condition with stab wounds. No explanation was provided for the brawl.

Dubai: In June 2010, the Civil Claims Court awarded Dh200,000 (about \$54,700) to an Armenian businessman, identified as "SC," who was beaten by guards at the Dubai Central Prison on August 1, 2007. SC, who suffered spinal injuries that required surgery, was one of several detainees assaulted during a cell inspection. The prisoners were forced to move between two lines of police and prison staff, who beat and kicked them. Twenty-four guards and the director of the prison were found guilty of abuse of power, conspiracy and assault in 2008; they received sentences of three to six months, which

were later suspended. SC was permanently disabled as a result of the beating.

Florida: Frank Singleton wasted no time in renewing his criminal career after being released from the Palm Beach County jail in March 2008 – he tried to carjack a woman in the jail's parking lot. Singleton was quickly captured, as he couldn't drive away because he didn't know how to operate the car's manual transmission. He pleaded guilty and was sentenced on October 1, 2010 to six years in prison plus four years' probation. Asked why he had tried to carjack the vehicle, Singleton reportedly said he "didn't feel like walking."

Florida: Danny Lee Tucker, a 410-pound prisoner, died at the Hernando County Jail on October 13, 2010. Tucker, 58, had been booked into the facility about two weeks earlier due to violation of a domestic violence injunction. He was placed in the jail's medical section due to his "extreme obesity" and other health-related problems. Tucker was the second prisoner to die at the Hernando County Jail in a three-month period.

Illinois: On October 4, 2010, Cook County Sheriff Tom Dart announced a new laundry program at the Cook County jail. Under the program, military veterans incarcerated on nonviolent charges work in two shifts to clean and sort the clothing, towels and bedding used by the jail's 9,200 prisoners. Sheriff Dart said the prisoners will receive job skills plus the county is expected to save \$100,000 a year by having prisoners handle the jail's laundry services, which previously had been contracted to an outside vendor. Aramark Correctional Services is overseeing the new laundry program.

Illinois: Timothy Fuller, 42, a guard at the Cook County Jail for 15 years, was charged on October 4 with trying to smuggle marijuana and cocaine to a prisoner in the jail's Division 11 building. He had agreed to bring in the drugs in exchange for \$400, but the go-between was a female undercover officer. Fuller had requested that a woman deliver the drugs so he could "flirt with her and, he later suggested, take her out on a date." Instead, Fuller was suspended, jailed under a \$40,000 bond, and faces a termination hearing.

Kansas: The Wyandotte County jail is purchasing 37 laptops that will allow visitors to video-visit with prisoners using Skype, a popular Internet-based phone system. Visitors need a computer,

Internet access and a webcam in order to use the service. Prisoners can receive two free Skype sessions a week; visitors will be charged \$.25 per minute after the free sessions. A similar Skype system at the Ada County jail in Idaho has generated \$2 million in revenue. The video sessions will be recorded, except for visits with attorneys or chaplains.

Kazakhstan: It was reported in October 2010 that prisoners protesting horrific conditions in Kazakhstan prisons – including torture, beatings and rapes – were mutilating themselves by cutting open their stomachs. "Protests are still going on and it looks like they will, unfortunately, continue and more people will self-mutilate," said Tanja Niemeier, a political advisor. "It is the only way they have of protesting at the desperate conditions they face." More than 100 Kazakhstan prisoners have slashed their stomachs to draw attention to their complaints. The United Nations has accused the Central Asian country of covering up the abusive nature of its prison system.

Kentucky: Eleven prisoners on a jail work detail cleaning up debris at the Harlan County courthouse were charged after they got high on some "nerve pills" they found, which were apparently leftover evidence. The prisoners were charged with possession of contraband and placed in segregation for three months. The pills were sent to a lab for identification.

Louisiana: The state Department of Corrections is considering selling two prisons as a way to cut costs due to budget shortfalls. "Everything has to be put on the table," said Corrections Secretary Jimmy LeBlanc. The state may sell the Winn Correctional Center in Atlanta and the Allen Correctional Center in Kinder to private prison companies. Winn is already run by CCA, while Allen is operated by the GEO Group. The sale would generate an estimated \$70 million. "That's \$70 million to help us get through a very difficult year," LeBlanc stated. In October 2010, the Louisiana prison system sold a piece of property used in livestock operations for \$1.2 million, and the department is trying to sell 2,000 acres near the Hunt Correctional Center. The state is facing an estimated \$1.6 billion budget deficit during the next fiscal year.

Minnesota: On October 9, 2010, around 200 unionized prison guards attended a rally to protest \$68 million

in proposed budget cuts for Minnesota state prisons. The guards, members of AFSCME Council 5, were concerned that the prison population was increasing and prisoners were becoming more violent. The funding cuts, which would prevent the hiring of more staff at the state's eight prisons, would exacerbate those problems, they claimed.

New York: Montgomery County jail prisoner Louis Torres, Jr., 30, attempted to escape from a transport van on October 13. He popped the lock on the van's door and jumped from the vehicle while it was returning to the jail from the courthouse, where he had been charged with parole violations. Torres struck his head and was

pronounced dead after being taken by ambulance to a nearby hospital.

New York: Roberto Morales, a New York City jail guard, was arrested on October 8, 2010 and charged with sexually assaulting a transgender prisoner at the Manhattan Detention Complex. The assault occurred in a stairwell at the jail in September 2009, when the prisoner was being held in a male housing unit; Morales was implicated based on DNA from a rape kit. A 13-year veteran with the city's Correction Department, he was suspended and is facing a felony charge of committing a criminal sexual act. The prisoner, who was not named, has filed a lawsuit against the city. "This is just a

case of complete and utter indifference to a transgender woman," said the prisoner's attorney, Ilann M. Maazel.

Oklahoma: On Sept. 7, 2010, two prisoners at the McDonald County Jail, Justin Forcum and Eric Bishop, escaped by climbing out through a hole in the roof. They then allegedly stole a truck and went to buy some drugs. Forcum and Bishop drove back to the jail, parked the truck and set it on fire to create a diversion. They were caught when they tried to sneak back into the facility through the hole they made when they escaped. "I really couldn't believe it, I couldn't believe they came back, you would think if you got out you'd stay out instead of trying to sneak

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News in Brief (cont.)

back in," said Undersheriff Bud Gow.

Oregon: A detainee at the Coos County Jail was taken by ambulance to a hospital on Sept. 21, 2010 after she was found unconscious and not breathing. It was later determined that Amanda M. Colmenero, 22, had hidden a container of drugs believed to be methamphetamine in her vagina when she was arrested, but the container ruptured while she was in a holding cell. Colmenero was hospitalized in critical condition.

South Africa: Thirteen police officers were arrested in September 2010 on charges of misconduct, gross negligence and aiding in the escape of eight prisoners. The prisoners had been taken to court in Johannesburg but were not restrained with

leg irons or handcuffs, and thus were able to make their escape. Seven of the eight prisoners, charged with murder and robbery, were quickly recaptured.

Venezuela: Thousands of prisoners went on a hunger strike in early September 2010, including 3,400 at the Tocoron prison in the northern Aragua state; 1,137 at the Vista Hermosa facility in southeast Bolivar state; and 80 at the Minima prison in Carabobo state. They were protesting overcrowding and poor medical care, and seeking improvements to visitation areas. Conditions in Venezuelan prisons are abysmal; according to Venezuelan Prison Watch, 221 prisoners died in the first quarter of 2010.

Washington: On October 13, 2010, the union that represents 6,000 prison guards in Washington state filed suit in an attempt to forestall job cuts by the Department of

Corrections. The lawsuit, filed by Teamsters Local 117 in King County Superior Court, claims the state is altering prison workers' wage, hour and employment conditions without engaging in collective bargaining. The Washington DOC had recently cut almost 300 prison jobs and closed the Larch Corrections Center.

West Virginia: The Gilmer Federal Correctional Institution remained on lockdown for several weeks following a riot that erupted in the prison's recreation yard on September 23, 2010. The disturbance, which involved about 75 prisoners in two rival groups, lasted four or five minutes before guards regained control of the yard using "chemical munitions." Three prisoners were treated at local hospitals for minor injuries. The Federal Bureau of Prisons and the FBI are investigating the incident. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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With Liberty for Some: 500 Years of Imprisonment in America, by Scott Christianson, Northeastern University Press, 372 pages. \$18.95. The best overall history of the American prison system from 1492 through the 20th Century. A must-read for understanding how little things have changed in U.S. prisons over hundreds of years. 1026

Prison Nation: The Warehousing of America's Poor, edited by Tara Herivel and Paul Wright, 332 pages. \$35.95. PLN's second anthology exposes the dark side of the 'lock-em-up' political agenda and legal climate in the U.S. 1041

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Prisoners' Guerrilla Handbook to Correspondence Programs in the U.S. and Canada, updated 3rd ed. by Jon Marc Taylor, Ph.D. and edited by Susan Schwartzkopf, PLN Publishing, 221 pages. \$49.95. Written by Missouri prisoner Jon Marc Taylor, the *Guerrilla Handbook* contains contact information and descriptions of high school, vocational, para-legal and college correspondence courses. 1057

The Criminal Law Handbook: Know Your Rights, Survive the System, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 608 pages. \$39.99. Explains what happens in a criminal case from being arrested to sentencing, and what your rights are at each stage of the process. Uses an easy to understand question-and-answer format. 1038

Represent Yourself in Court: How to Prepare & Try a Winning Case, by Attorneys Paul Bergman & Sara J. Berman-Barrett, Nolo Press, 528 pages. \$39.99. Breaks down the civil trial process in easy-to-understand steps so you can effectively represent yourself in court. The authors explain what to say in court, how to say it, etc. 1037

Law Dictionary, Random House Webster's, 525 pages. \$19.95. Comprehensive up-to-date law dictionary explains more than 8,500 legal terms. Covers civil, criminal, commercial and international law. 1036

The Blue Book of Grammar and Punctuation, by Jane Straus, 110 pages. \$14.95. A guide to grammar and punctuation by an educator with experience teaching English to prisoners. 1046

Legal Research: How to Find and Understand the Law, by Stephen Elias and Susan Levinkind, 568 pages. \$49.99. Comprehensive and easy to understand guide on researching the law. Explains case law, statutes and digests, etc. Includes practice exercises. 1059

Deposition Handbook, by Paul Bergman and Albert Moore, Nolo Press, 352 pages. \$34.99. How-to handbook for anyone who conducts a deposition or is going to be deposed. 1054

Finding the Right Lawyer, by Jay Foonberg, ABA, 256 pages. \$19.95. Explains how to determine your legal needs, how to evaluate a lawyer's qualifications, fee payments, and more. 1015

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Spanish-English/English-Spanish Dictionary, Random House. \$8.95. Two sections, Spanish-English and English-Spanish. 60,000+ entries from A to Z; includes Western Hemisphere usage. 1034

Writing to Win: The Legal Writer, by Steven D. Stark, Broadway Books/Random House, 283 pages. \$19.95. Explains the writing of effective complaints, responses, briefs, motions and other legal papers. 1035

Actual Innocence: When Justice Goes Wrong and How to Make it Right, updated paperback ed., by Barry Scheck, Peter Neufeld and Jim Dwyer, 403 pages. \$16.00. Describes how criminal defendants are wrongly convicted. Explains DNA testing and how it works to free the innocent. Devastating critique of police and prosecutorial misconduct. 1030

Webster's English Dictionary, Newly revised and updated, Random House. \$8.95. 75,000+ entries. Includes tips on writing and word usage, and has updated geographical and biographical entries. Includes recent business and computer terms. 1033

Everyday Letters for Busy People, by Debra Hart May, 287 pages. \$18.99. Hundreds of sample letters that can be adapted for most any purpose, including letters to government agencies and officials. Has numerous tips for writing effective letters. 1048

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Starting Out! The Complete Re-Entry Handbook, edited by William H. Foster, Ph.D. & Carl E. Horn, Ph.D., Starting Out Inc., 446 pages. \$22.95. Complete do-it-yourself re-entry manual and workbook for prisoners who want to develop their own re-entry plan to increase their chances of success after they are released. Includes a variety of resources, including a user code to the Starting Out website. 1074

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A., by Mumia Abu Jamal, City Lights Publishers, 280 pages. \$16.95. In *Jailhouse Lawyers*, Prison Legal News columnist, award-winning journalist and death-row prisoner Mumia Abu-Jamal presents the stories and reflections of fellow prisoners-turned-advocates who have learned to use the court system to represent other prisoners. 1073

Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It, by Terry Kupers, Jossey-Bass, 245 pages. **Hardback only; prisoners please include any required authorization form.** \$32.95. Psychiatrist writes about the mental health crisis in U.S. prisons and jails. Covers all aspects of mental illness, prison rape, negative effects of long-term isolation in control units, and more. 1003

The Habeas Citebook: Ineffective Assistance of Counsel, by Brandon Sample, PLN Publishing, 200 pgs. \$49.95. This is PLN's second published book, which covers ineffective assistance of counsel issues in federal habeas petitions. Hundreds of case cites! 1078

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Hepatitis and Liver Disease: What You Need to Know, by Melissa Palmer, MD, 457 pages. **\$17.95**. Describes symptoms & treatments of hepatitis B & C and other liver diseases. Includes medications to avoid, what diet to follow, exercises to perform, and a bibliography. 1031 ☐

Crime and Punishment In America, by Elliott Currie, 230 pages. **\$16.95**. Effective rebuttal to right-wing proponents of prison building. Fact-based argument shows that crime is driven by poverty. Debunks prison myths and discusses proven, effective means of crime prevention. 1019 ☐

Prison Writing in 20th Century America, by H. Bruce Franklin, Penguin Books, 368 pages. **\$16.00**. From Jack London, Malcolm X and Jack Henry Abbott to George Jackson and Edward Bunker, this anthology provides a selection of some of the best writing describing life behind bars in America, from those who have been there. 1022 ☐

Soledad Brother: The Prison Letters of George Jackson, by George Jackson, Lawrence Hill Books, 339 pages. **\$18.95**. Lucid explanation of the politics of prison by a well-known prison activist. More relevant now than when it first appeared 40 years ago. 1016 ☐

Marijuana Law, by Richard Boire, Ronin, 271 pages. **\$17.95**. Examines how to reduce the probability of arrest and prosecution for people accused of the use, sale or possession of marijuana. Info on legal defenses, search & seizures, surveillance, asset forfeiture and drug testing. 1008 ☐

Prisoners' Self-Help Litigation Manual, updated 4th ed. (2010), by John Boston and Daniel Manville, Oxford Univ. Press, 960 pages. **\$39.95**. The premiere, must-have "Bible" of prison litigation for current and aspiring jail-house lawyers. If you plan to litigate a prison or jail civil suit, this book is a must-have. Highly recommended! 1077 ☐

Ten Men Dead: The Story of the 1981 Irish Hunger Strike, by David Beresford, Atlantic Monthly Press, 334 pages. **\$16.95**. Story of IRA prisoners at Belfast's Long Kesh prison. 1006 ☐

10 Insider Secrets to a Winning Job Search, by Todd Bermont, 216 pages. **\$15.99**. Roadmap on how to get a job even under adverse circumstances—like being an ex-con. Includes how to develop a winning attitude, write attention-grabbing resumé's, prepare for interviews, networking and much more! 1056 ☐

The Politics of Heroin: CIA Complicity in the Global Drug Trade, 2003 Ed. by Alfred McCoy, 734 pages. **\$34.95**. Exposé of the government's involvement in drug trafficking. 1014 ☐

Lockdown America: Police and Prisons in the Age of Crisis, by Christian Parenti, 290 pages. **\$19.00**. Analyzes the war on the poor via the criminal justice system. Well documented and has first-hand reporting. Covers prisons, paramilitary policing, SWAT teams and the INS. 1002 ☐

The Prison and the Gallows: The Politics of Mass Incarceration in America, by Marie Gottschalk, Cambridge University Press, 451 pages. **\$28.99**. Great political analysis of the confluence of events leading to 2.3 million people behind bars in the U.S. 1069 ☐

Women Behind Bars, The Crisis of Women in the U.S. Prison System, by Silja J.A. Talvi, Seal Press, 295 pages. **\$15.95**. Best book available that covers issues related to imprisoned women, based on interviews with hundreds of women behind bars. 1066 ☐

How to Win Your Personal Injury Claim, by Atty. Joseph Matthews, 7th edition, NOLO Press, 304 pages. **\$34.99**. While not specifically for prison-related personal injury cases, this book provides comprehensive information on how to handle personal injury and property damage claims arising from accidents. 1075 ☐

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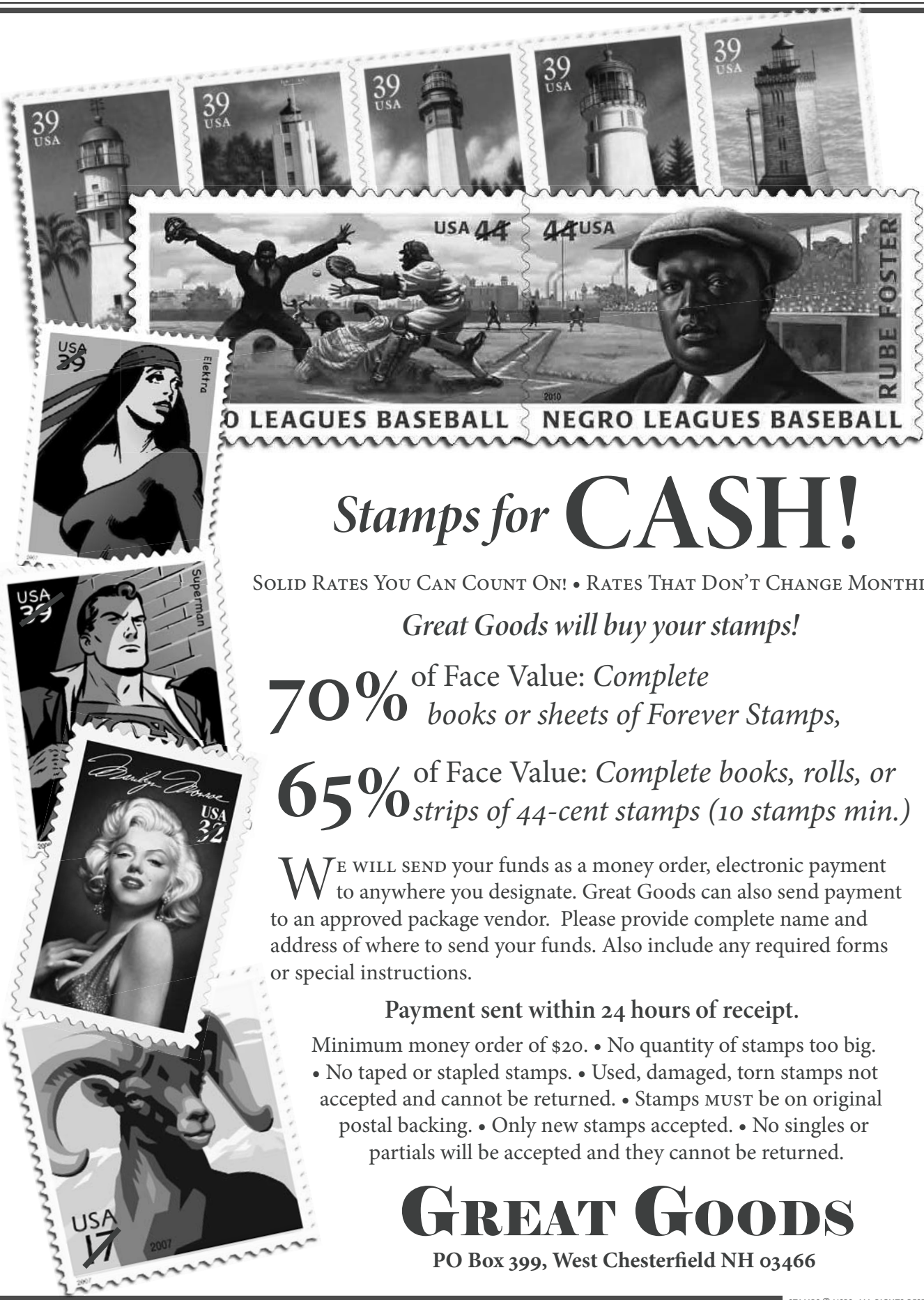
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December 2010

The Graying of America's Prisons

by James Ridgeway

Frank Soffen, now 70 years old, has lived more than half his life in prison, and will likely die there.

Sentenced to life for second-degree murder, Soffen has suffered four heart attacks and is confined to a wheelchair. He has lately been held in the assisted living wing of Massachusetts' Norfolk prison. Because of his failing health and his exemplary record over his 37 years behind bars—which includes rescuing a guard being threatened by other prisoners—Soffen has been held up as a candidate for release on medical and compassionate grounds.

He is physically incapable of committing a violent crime, has already participated in pre-release and furlough

programs, and has a supportive family and a place to live with his son. One of the members of the Massachusetts state parole board spoke in favor of his release. But in 2006 the board voted to deny Soffen parole. He will not be eligible for review for another five years.

The “tough on crime” posturing and policymaking that have dominated American politics for more than three decades have left behind a grim legacy. Longer sentences and harsher parole standards have led to overcrowded prisons, overtaxed state budgets, and devastated families and communities. Now, yet another consequence is becoming visible in the nation's prisons and jails: a huge and ever-growing number of geriatric prisoners.

Increasingly, the cells and dormitories of the United States are filled with old, often sick men and women. They hobble around the tiers with walkers or roll in wheelchairs. They fill prison infirmaries, assisted living wings and hospices faster than the state and federal governments can build them—and since many are dying behind bars, they are filling the mortuaries and graveyards as well.

The care these aging prisoners receive, while often grossly inadequate, is nonetheless crippling expensive—so much so that some recession-strapped states are for the first time seriously considering releasing older terminally ill and mentally ill prisoners rather than pay the heavy price for their warehousing. It remains to be seen what will happen when such fiscal concerns run head on into America's taste for punitive justice. A recent report by the Vera Institute made this clear.

Politicians no doubt did not imagine

this Dickensian landscape of the elderly incarcerated when they voted to lengthen sentences and impose mandatory minimums three or four decades ago. But their actions are yielding an inevitable outcome. While the graying of the prison population to some extent reflects the changing demographics of the populace at large, it owes considerably more to changes in law and policy. And this is likely to continue into the foreseeable future.

Growing Old Behind Bars

According to The Sentencing Project, the United States imprisons five times as many people as it did 30 years ago and more than seven times as many as it did 40 years ago. Our criminal justice system now keeps 2.3 million people behind bars—about half of them for drug offenses and other nonviolent crimes. Twenty-five years ago, there were 34,000 prisoners serving life sentences; today the number is more than 140,000. The fact that each person is spending a longer stretch behind bars means that the falling crime rates of the 1990s do not translate into fewer prisoners. It also means that more and more people who committed offenses in their 20s or even their teens are growing old and dying in prison.

The situation is particularly stark in California, Texas and Florida, which have large prison populations with cells crammed to overflowing because of harsh sentencing laws. In California, the population of prisoners over 55 doubled in the ten years from 1997 to 2006. About 20 percent of California prisoners are serving life sentences, and over 10 percent are serving life without the possibility of

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UPDATE ON CLASS ACTION

SCHILLING, ET AL. V. TRANSCOR AMERICA, LLC, ET AL. **U.S.D.C., NORTHERN DISTRICT OF CALIFORNIA, CASE NO. 3:08-CV-00941 SI**

On February 16, 2010, the United States District Court in San Francisco, California granted Plaintiffs' request to permit this action against Transcor America to proceed as a Class Action. Plaintiff mailed and published notice of the court's decision and advised class members that if they did not give notice of their election to "opt out" of the litigation by August 16, 2010, they would remain in the case. Therefore, if you did not opt out and if you were transported by TransCor America, LLC, from a jail, prison, or state hospital in restraints, remained in the vehicle for more than 24 hours, and were deprived of overnight sleep in a bed between February 14, 2006, and the present, you are a member of this national civil rights class action.

YOU DO NOT NEED TO DO ANYTHING AT THIS TIME TO REMAIN A CLASS MEMBER

Plaintiffs' counsel has received thousands of requests for information on this matter. While we appreciate your interest and the information you have provided, we cannot possibly respond to all the correspondence we receive. Please note that you will be notified either by mail and/or through published notice of any significant developments in the case and about any deadlines you may need to respond to. At this time, there is nothing you need to do to remain a member of the class.

Plaintiffs filed this action on behalf of themselves and all other persons similarly situated. The Court has certified a class consisting of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who remained in restraints in the transport vehicle for more than twenty-four (24) hours continuously without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than twenty-four (24) hours. The class does not include pretrial detainees and prisoners who were transported by TransCor on behalf of a federal agency.

Plaintiffs' counsel will continue to litigate this matter on behalf of plaintiffs and the class they represent and will notify plaintiffs and the class when significant events occur in the case. This lawsuit will eventually conclude either by settlement or with a judgment in favor of or against all the members of the class. That judgment, whether favorable or not to class members, will bind the members of the class. This action will be maintained on your behalf by plaintiffs and their attorneys of record.

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Graying Prisons (cont.)

parole. Louisiana's prison system now holds more than 5,000 people over the age of 50—a three-fold increase in the last 12 years.

While 50 or 55 may not be old by conventional standards, people age faster behind bars than they do on the outside: Studies have shown that prisoners in their 50s are on average physiologically 10 to 15 years older than their chronological age. Older prisoners require substantial medical care because of harsh life conditions as well as age. Prisoners begin to have trouble climbing to upper bunks, walking, standing in line and handling other parts of the prison routine. They suffer from early losses of hearing and eyesight, have high rates of high blood pressure and diabetes, and are susceptible to falls.

A recent study by Brie Williams and Rita Abalades, published as a chapter in the book *Growing Older: Challenges of Prison and Reentry for the Aging Population*, found that in addition to chronic diseases that increase with age, older offenders have problems such as paraplegia because of the legacy of gunshot wounds. Many have advanced liver disease, renal disease or hepatitis. Still others suffer from HIV/AIDS, and many more from drug and alcohol abuse. Living under prison conditions, they are more likely to get pneumonia and flu.

Many prisons are notorious for not taking prisoners' health complaints seriously, and there is anecdotal evidence this problem may be compounded when prisoners are elderly. A doctor under contract in one southern prison stated in a recent interview how a diabetic man's illness was misdiagnosed, resulting in months of excruciating pain and the amputation of toes and part of one foot. Back in prison, the man asked for prosthetic shoes so he could get around by walking; his request was denied.

Another elderly prisoner complained of an earache which went untreated for months. When it became unbearably painful, the prisoner was shipped to a local hospital emergency room under contract to the prison. There the doctors found the earache was brain cancer—and by then, too advanced to treat.

The exploding prison population has further undermined the already questionable quality of prisoner medical care. In California, which has the nation's largest

number of state prisoners, a panel of federal judges found that the state of medical care was so poor that it violated the Constitution's ban on cruel and unusual punishment, and was in danger of routinely costing prisoners their lives. The only solution, the judges said, was to reduce prison overcrowding caused by the state's draconian mandatory sentences. The court recommended shortening sentences and reforming parole, which it believed would have no impact on public safety; it has given California two years to comply, though state officials have since appealed to the U.S. Supreme Court. [See: *PLN*, August 2010, p.1].

Impact on Older Prisoners

Albert Woodfox and Herman Wallace, members of the Angola 3, have spent most of the past 37 years in lockdown in Louisiana.

A civil action currently in federal court claims that both men, now in their 60s, have suffered serious harm to their physical and mental health from their years in isolation, spending 23 hours a day alone in 6x9-foot cells.

What distinguishes this case in particular is that it not only challenges the constitutionality of long-term, continuous solitary confinement, but draws on its particular effect on aging prisoners.

According to medical reports submitted to the court, the men suffer from arthritis, hypertension and kidney failure, as well as memory impairment, insomnia, claustrophobia, anxiety and depression. Wallace, who just celebrated his 67th birthday, has also become hard of hearing and has had increasing difficulty communicating with attorneys or friends on the phone and during visits.

Under the Americans with Disabilities Act, he and other hearing-impaired prisoners should receive whatever special care they require. In Wallace's case, according to one of his attorneys, the prison (he has been transferred out of lockdown at Angola to lockdown at Hunt near Baton Rouge) gave him one—not two—hearing aids, which made matters worse by adversely affecting his balance (the prison has promised to provide a second hearing aid).

Many older offenders suffer from serious mental illness—some of it produced or exacerbated by lengthy incarcerations. One study revealed depression among male prisoners was 50 percent higher than for those living outside. All in all, 54

Graying Prisons (cont.)

percent of older prisoners met standards for psychiatric disorders. Williams and Abraldes wrote, "In one report from a maximum-security hospital, 75 percent of elderly prisoners were admitted between age 20 and 30 and the majority were schizophrenic."

At Louisiana's Angola prison, the warden reported that 2,000 of over 5,000 prisoners were on psychotropic drugs. Many mentally ill prisoners are simply warehoused and fed drugs to keep them under control. Even worse, some are labeled "discipline" problems, and end up in solitary confinement. A 2006 report from the Commission on Safety and Abuse in America's Prisons found that mentally ill prisoners are increasingly being relegated to isolation cells where they live in "torturous conditions that are proven to cause mental deterioration."

For the most part, however, old prisoners have far fewer disciplinary problems than younger prisoners. A research study conducted by Kristie Blevins and Anita Blowers, criminologists at the University of North Carolina, suggests that older prisoners present less of a disciplinary problem than younger prisoners, and their offenses are relatively minor. The 2004 study looked at 428 men between the ages of 55-84 in state correctional facilities around the U.S. Past studies have found that many perceived behavior problems among the elderly can be attributed to "victimization," that is, getting harassed and beaten by other prisoners.

Low Recidivism

In addition to causing less trouble inside, older offenders released from prison have a low recidivism rate. They

are also likely to cost taxpayers far less than the \$70,000 a year which, according to Williams and Abraldes, is the average expense of keeping a geriatric prisoner imprisoned. The continued incarceration of these aging and dying prisoners, then, clearly does not serve to protect society. Its only purpose is punishment.

In 2008, the federal government launched the Elderly Offender Home Detention Pilot Program, under which prisoners aged 65 and over can be released into a kind of supervised house arrest. As outlined by Families Against Mandatory Minimums, eligibility guidelines are strict: offenders must have served at least 10 years and 75 percent of their sentences; no lifers and no perpetrators of "crimes of violence," including sex crimes and firearms violations. The total number expected to participate is 80 to 100 nationwide, out of a total federal prison population of over 200,000.

Pennsylvania's onerous law on compassionate release, dating from 1919, was revised in 2008 so that old, dying prisoners might be released into custody of family or friends—provided the corrections department does not find them to be a security risk and they are equipped with electronic monitoring devices.

According to an analysis by the Pennsylvania Prison Society, which tracks the revised law, "It provides for release to a hospital, hospice, or other licensed provider for terminally ill prisoners or those dying within one year. A home with licensed care may also be approved but then the prisoner will have electronic monitoring." But the effect of this purported reform is unclear because the courts haven't decided how to interpret it. Susan McNaughton of the Pennsylvania Department of Corrections said statistics concerning compassionate release are scant, but in the past, "on average about six inmates are released from Pennsylvania state

prisons annually this way. I am not aware of any such releases since this new law was enacted."

Before such releases can take place, attorneys for an old and ill prisoner will have to take the case through the Pennsylvania court system. It must go before the state superior court which, according to an attorney with the Pennsylvania Institutional Law Project, another group that has been involved in the reform effort, could take two years.

This may well be too long for Tiyo Attallah Salah, 76, a prisoner at SCI Dallas near Wilkes-Barre currently serving life without parole. A former jazz musician, Salah has developed long-distance relationships with a large network of friends, including Lois Ahrens of the organization Real Cost of Prisons, Marina Drummer of the Angola 3, and historian Howard Zinn, whose support helped him earn a college degree and study law. He now tutors other prisoners and has assisted 250 prisoners in earning their GED high school equivalency diplomas. Salah currently is sponsoring a prison abolition group from inside SCI Dallas.

Salah suffers from high blood pressure, arthritis and prostate problems, and nearly died from diabetes. The prison pumped the old man full of steroids to keep him going. Like all prisoners, he has to walk up and down flights of stairs, to the shower and to meals. Salah's job was cleaning showers on his hands and knees, and even though increasingly ill, he didn't want to give up the job because it earned him 20-40 cents an hour, money he used to purchase goods at the prison commissary, such things as socks, sweat pants, tea, maybe a hat.

In early November 2009, he told Ahrens there was no heat in the cell block and he was trying to get more clothes. Ahrens, who is in close contact with Salah, says at one point he could scarcely walk. He has been saved by a broad network of friends inside as well as outside the prison, with

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younger prisoners stepping in to take over his job and bringing him something special to eat from time to time, like a piece of fruit.

At Norfolk prison in Massachusetts, a state which has no compassionate care law—and where one in six prisoners is serving a life sentence—offenders have banded together in an organization called the Lifers Group. They have drawn up a model bill they hope can be introduced in the state legislature. Fred Smith of St. Francis House, which currently helps newly-released prisoners in adjusting to society, recently was invited by the group to give a talk inside the prison. He found more than 100 prisoners turned out to hear his offer of support.

The long-termers' model bill would permit the corrections department to grant a medical release to prisoners who are not judged to be a danger to society, when they face terminal illness or when "confinement will substantially shorten the prisoner's life."

Frank Soffen, whose case was described at the beginning of this article, is cited by the Lifers Group as an example of an offender the new law could help. But Soffen, too, may die long before any reforms take place.

The final consequence of the aging prison population, and especially of life sentences, is that more and more offenders are dying in prison. Angola, home to 5,000 offenders, is well known for its hospice, where trained prisoners ease the last days of fellow prisoners; the program is cited as a model for other prisons to emulate. You can get an idea of what it's like by look-

ing at a documentary film on the hospice by Edgar Barends, called "Angola Prison Hospice: Opening the Door."

The hospice sees plenty of use, since an estimated 85 percent to 90 percent of the prisoners who enter the gates will never leave. Angola's warden, Burl Cain, is also proud of the fact that the prison has its own mortuary, a coffin-making shop and a cemetery called Point Lookout, and gives each prisoner a funeral service. "Two funerals a month," Cain told one Christian publication, "that's just about the only way out of here."

Colonel Bolt, a former Angola prisoner who got out after 20 years in solitary, knows he is an exception to the rule. But he says that some men have spent so long at Angola that they can't even envision living out their old age on the outside. "They've been down so long," Bolt said, that "they don't have no friends ... don't have no lawyers. There's nothing out there for them.... They concentrate on things keeping you going ... [they want to] occupy time ... writing, drawing." When these men think of what's going on outside, he said, "they get so frustrated ... don't see no way out"—so some of them simply stop thinking about it.

Some prisoners can't even imagine going home to die, because they've had no home but Angola for most of their lives. When they die, Bolt said, "If the family got the money—they can bury them outside. Send the body to the front gate and [someone] will come get it out." But many prisoners who "get to certain age," he said, no longer have family, and no one who is "going to spend that

money" for a coffin or a funeral.

When that happens, he continues, they "bury you down on the plantation.... Old partners, old friends can take care of you.... Go down to Point Lookout. A lot of cats want to be buried by their friends... [They say] 'I'm going to live here and die here ... if I got out what can I do?' If you got three life sentences, four life sentences, what are you going to do?" ■

James Ridgeway is the senior Washington correspondent for Mother Jones magazine. This article was first published in two parts in The Crime Report (www.thecrimereport.org), and is reprinted with permission.

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From the Editor

by Paul Wright

Welcome to the last issue of *Prison Legal News* for 2010. By now subscribers should have received our annual fundraiser letter requesting donations. Unlike other non-profit organizations, we do not bombard our subscribers with dozens of beg letters a year; we only send out one. But when we send out a request for financial support, we really mean it. Our subscription and advertising income only covers a portion of the expenses related to publishing the magazine. The remainder is made up by individual donations and grants.

If you believe in an independent media, this is your chance to support it. In addition to publishing *Prison Legal News*, the Human Rights Defense Center also publishes books (more on that below), provides advocacy on behalf of prisoners in select cases and vigorously challenges prison and jail censorship practices around the country. None of which would be possible without support from our readers.

If you can afford to make a tax deductible donation to the HRDC or PLN, please do so. Equally important, please encourage others to make a donation to support our work, to subscribe and to advertise and purchase books from us. It all helps. Every day I receive letters, e-mails and phone calls thanking us for the work we do. That is all nice but at the end of the month, we need money to pay the printer, the post office, the rent, employees and the assorted

expenses that are incurred publishing a magazine and all the other work we do on behalf of the imprisoned. The post office, the printer, etc., will not do things in exchange for "thanks," they need money. We run a very lean operation and have bare bones expenses. Donations that are made to HRDC and/or PLN will go further and have a bigger impact than donations made to almost any other organization.

I am pleased to report that the second book by Prison Legal News Publishing has been printed and is available for shipping. *The Habeas Citebook: Ineffective Assistance of Counsel* by Brandon Sample is printed and ready to ship. The book offers a compendium of hundreds of cases where federal courts granted habeas relief due to ineffective assistance of counsel. It will save pro se litigants hundreds of hours

of research. Ads and details on ordering are elsewhere in this issue of PLN.

The much awaited *Prisoners Self-Help Litigation Manual* is also available and we have been shipping a lot of copies to prisoners around the country. Note that the publisher is advertising the book in *PLN* but it can also be purchased directly from PLN as well.

Since we moved our office to Vermont we have vastly improved our book sales process. It helps that our office is above the post office! Generally all book orders are shipped the same day they are received. If you are looking for a holiday gift, please consider a book from PLN or a subscription.

Enjoy this issue of *PLN* and best wishes for a new year of greater struggle. ■

\$10.5 Million Settlement in Tennessee Juvenile's Death Caused by Guard's Chokehold

The privately-operated Chad Youth Enhancement Center (Chad) in Ashland City, Tennessee paid \$10.5 million to settle a lawsuit involving a juvenile's death. The youth, Omega "Manny" Leach, 17, died from asphyxiation caused by a guard's chokehold on June 2, 2007.

A surveillance camera caught what attorneys for Leach's estate called a "brutal attack." It showed Chad guard Randall Dale Rae, Jr. throw Leach to the ground and then choke him. Another guard, Milton Gerald Francis, arrived as Rae was holding Leach on the ground with his arms pinned behind his back. Francis took over restraining Leach. When a nurse arrived, she noticed Leach was not breathing and had no pulse.

"Tragically, the death of Manny Leach was not only preventable, it was predictable," the estate's attorneys, Thomas R. Kline, David K. Inscho and Mark Alan Hoffman, wrote in court pleadings. "Chad had an egregious history of excessively and injuriously restraining its residents, failing to comply with state reporting requirements for injured residents, and improperly screening, training and disciplining its employees."

Chad, a 90-bed mental health center now known as the Oak Plains Academy that is run by Universal Health Services,

Inc., was criticized in a September 25, 2008 report by the Disability Law & Advocacy Center of Tennessee. The report found "that Chad staff members use restraint/physical holds too frequently and without sufficient grounds (e.g. restraints are implemented in non-emergency situations in violation of federal law and facility policy)."

Leach, who was from Philadelphia, was adjudicated delinquent for stealing a car and later found in violation of his probation after testing positive for marijuana. He had been in and out of mental hospitals and treatment centers since the age of 11.

A medical examiner ruled Leach's death a homicide. At least 30 youths were removed from Chad after Leach died, and the Tennessee Dept. of Mental Health and Developmental Disabilities suspended further admissions to the facility.

However, as regularly occurs when guards kill a prisoner, no one was prosecuted. A Tennessee grand jury declined to bring charges against Rae or Francis. The \$10.5 million settlement, reached in February 2010, was the only justice obtained in this case. See: *Dolby v. Universal Health Services, Inc.*, U.S.D.C. (E.D. Penn.), Case No. 2:07-cv-05288-MSG. ■

Sources: www.law.com, www.dlactn.org, www.caica.org

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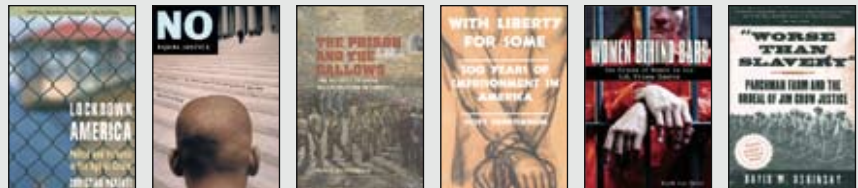
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Audits of Tennessee DOC Reveal Deficiencies

by Mark Wilson

The Tennessee Department of Correction (TDOC) and several of its contractors violated state law, according to two audit reports issued by the Comptroller of the Treasury's Division of State Audit.

According to an April 2009 financial and compliance audit, the TDOC failed to generate employee separation notices within 24 hours of separation as required by state law. Auditors found that 53 percent of the reviewed notices were filed an average of 10 to 18 days late, and as many as 23 days late in some cases. Such delays could negatively impact former employees' unemployment benefits.

TDOC management also failed to assess and mitigate "the risks associated with information systems security, which increases the risk of fraudulent activity," auditors found. While not revealing the "specific vulnerability identified," auditors determined that TDOC staff "did not always follow the department's Management Information Services Procedure Manual in order to maintain proper information systems security." TDOC officials claimed they had "been closely monitoring these issues ... for over two years."

Tennessee's Financial Integrity Act requires agency heads to "submit a letter acknowledging responsibility for maintaining the internal control system of the agency" to the Comptroller of the Treasury by June 30 of each year. In 2006 the TDOC did not submit its letter until October 4, according to the report.

A separate April 2009 performance audit found non-compliance with the TDOC's contract with Spectrum Health Systems, Inc. to provide 6-to-9-month comprehensive alcohol and drug treatment programs at six prisons. The audit further revealed miscommunication and confusion concerning contract amendments, plus a lack of penalties, short of termination, for noncompliance. Auditors recommended that future contracts include non-compliance consequences such as liquidated damages.

TDOC policy requires intake health examinations within fourteen days of arrival for all prisoners. However, the Tennessee Offender Management Information System (TOMIS) revealed that "more than half (51.79%) of the health intake examinations were

completed late or not at all."

Auditors also noted that the TDOC had been tracking recidivism since 2001, but found "weaknesses in the methods used ... for tracking and measuring the recidivism rate." They concluded that "based on the methods used for calculating and measuring recidivism, the recidivism rate appears to be understated as a result of reincarcerations and overstated as a result of counting the number of releases."

The report recommended that the TDOC use "more than one measure for calculating recidivism to ensure a more accurate recidivism rate." Additionally, the TDOC should publish its recidivism reports more often than every three to five years, because that "frequency ... impedes the department's ability to determine an accurate recidivism rate and may reduce the ability to determine the effectiveness of the programs and services offered."

The auditors repeated a 2003 finding that the TDOC must improve prisoner pre-release services by developing methods of measuring program effectiveness. "Based on the tracking methods, the department cannot adequately determine an accurate success rate of the program," the report stated.

The audit also documented interesting observations in several areas that did not warrant specific findings.

Contracts

The TDOC contracts with Nashville-based Corrections Corporation of America (CCA), a private prison company, to operate three facilities that house state prisoners. Tennessee law requires CCA to purchase prisoner clothing from TRICOR, Tennessee's prison industry program. Auditors found that CCA purchased significantly less clothing than comparable TDOC facilities. In fiscal year 2008, for example, one state-run TDOC facility spent \$130,009.53 on prisoner clothing compared with totals of \$2,722.65, \$9,765.13 and \$13,511.83 for the three CCA-operated prisons.

Auditors also noted that First Medical Management, the TDOC's largest health services contractor, paid over \$1.3 million in liquidated damages for contract violations between January 2006 and June 2008.

County Cost Reimbursements

Under the County Correctional Incentives Program (CCIP), counties are reimbursed for housing TDOC prisoners. "During fiscal year 2007, reimbursements to counties totaled over \$103 million," according to the audit report. As previously found, the "county Final Cost Settlements are still not submitted to the department in a timely manner [and] ... this practice can result in underpayments or overpayments to the counties," auditors concluded.

Guard Turnover

"Systemwide, for fiscal year 2008, the [guard] turnover rate was 28.3%, an increase of 0.8% from the fiscal year 2007 rate of 27.5%, which was already very high," according to the report. "The department's employment recruiter stated that the average cost to recruit and train a new correctional officer is approximately \$10,000 and it takes ... approximately three years to recover the cost." Yet 71.5% of prison guards who left in 2007 had two years or less of TDOC employment.

A comparison of Tennessee with fifteen other states indicated that as of July 1, 2007, the TDOC paid newly-hired guards \$1,098 below the average salary paid by the other states. "It appears that, given the salary differential, the department will continue to have problems retaining employees," the auditors noted.

Prisoner Education Opportunities

TDOC prisoners are offered the General Educational Development (GED) test. In 2006, 2007 and 2008, 71%, 74% and 67% of prisoners passed the test, respectively, totaling 1,935 prisoners who obtained GEDs during that time period.

The TDOC also provides a wide array of vocational training programs in all but four short-term prisons. In 2008, Tennessee's prison system had 1,991 vocational program positions available systemwide.

Additionally, the TDOC "has partnered with two universities to offer college level courses. David Lipscomb University, a private institution in Nashville, offers undergraduate courses at the Tennessee Prison for Women (TPW) As of Spring 2008, there has been a 100% retention rate for the TPW students," the auditors wrote.

"The other partnership is with the University of Tennessee at Martin, resulting from the department's receipt of an Incarcerated Youth Offenders grant from the U.S. Department of Education. The \$292,527 grant is for one year (July 1, 2007 – June 30, 2008) and two subsequent years if funding is appropriated. (The department has received funding for fiscal year 2009)." An average of 230 prisoners were enrolled in college courses systemwide between 2005 and 2008.

TDOC prisoners "may be awarded an Educational Good Time Credit, a one-time credit of 60 days that may be given to an eligible prisoner who successfully receives a General Educational Development diploma, a two- or four-year college degree, or vocational certificates that comprise completion of a job cluster," according to the audit report.

STG Management

The TDOC began its Security Threat Group (STG) program in 1999. "Once [an] inmate has been confirmed as an STG member, the warden may recommend to the STG Hearing Committee that the inmate be placed in either the STG Phase Program ... or the STG Housing Unit," the report stated.

"The STG Housing Unit Program ... was started on December 29, 2006, and is capable of housing up to 128 STG inmates," according to the auditors. "The concept behind the STG Housing Unit is containment. STG members ... are not required to participate in unit programs; however, there is programming available Because participation is voluntary,

placement in the STG Housing Unit can be an indefinite assignment. If inmates choose to participate in the unit programs, they must complete all programs, remain write-up free, and obtain their GED or documentation stating that they have advanced as far as they can in education. Afterwards, the inmates may renounce their gang affiliation and be placed on STG Monitoring for one year in a general population setting."

As of April 23, 2008, 97 of 189 suspected STG prisoners had successfully completed the Housing Unit program but some were still subject to the one-year monitoring period, according to the auditors.

The TDOC's STG Phase Program began in Spring 2000 and houses up to 94 prisoners. "The program ... is a behavior management program geared toward inmates who tend to be problematic. This program is targeted toward inmates who are stepping down from maximum custody following an STG incident or those who have been involved in recent STG activity and have fallen just short of consideration for maximum security placement. The programming ... is delivered in three 90-day phases and uses in-cell workbooks and/or some small-group programming. As inmates successfully complete each phase, some of the privileges that have been taken away are reinstated."

Phase Program participation "is mandatory, and there are consequences if inmates refuse to participate," the report noted. Unwillingness or failure to complete the program within 12 months results in disciplinary action and possible transfer to the STG Housing Unit. Prisoners are "given a maximum of two chances ... to complete the programs." Two failures result in permanent STG status throughout a prisoner's present and future incarceration.

In 2006, 54 of 106 prisoners (50.9%) successfully completed the TDOC's STG program and one-year monitoring period. In 2007, 45 of 97 prisoners (46.4%) completed the program and monitoring. No TDOC prisoners successfully completed the Phase Program and monitoring period in 2008.

In regard to the STG programs, the audit report noted "there are no written goals, no defined percentages, and no up-to-date success/failure rates." ■

Sources: *TN Division of State Audit, TDOC Financial and Compliance Audit (April 2009)*; *TN Division of State Audit, TDOC Performance Audit (April 2009)*; *Associated Press*

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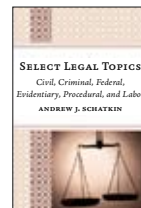
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Washington State Federal Court: Unconstitutional to Shackle Prisoner in Labor

by Matt Clarke

On May 3, 2010, a U.S. District Court in Washington State held it was unconstitutional to shackle a prisoner in labor.

Cassandra Brawley, 30, was a Washington state prisoner. In 2006 she was arrested for second degree theft and received a fourteen-month prison sentence. She was five months pregnant at the time. Although Brawley had six previous felony convictions, she had never been convicted of a violent offense. Because she had two outstanding warrants and had failed to report once while on community supervision, however, she was classified as medium security and placed on "escape status."

In April 2007, while incarcerated at the Washington State Corrections Center for Women, Brawley began leaking fluid, including a "gush of water." She was transported to a hospital where they determined that her membranes had not ruptured and she was not in labor. She returned to the prison where infirmary personnel noted possible Braxton-Hicks contractions in her medical file. During this transport she was "fully restrained" with her legs shackled, hands cuffed and a belly chain connected to both the shackles and handcuffs.

Several days later, Brawley reported having contractions four to five minutes apart. The infirmary ordered her transported to the hospital "due to the possibility of active labor." She was again fully restrained during the trip. According to Brawley, prison guards Herbert Joy, who was armed and drove the transport vehicle, and Brydee Glasco, were aware she was in labor, with Glasco timing her contractions. At the time, the Washington Department of Corrections (DOC) had a clear policy stating that a "female offender will not be restrained during labor and delivery of an infant." (DOC Restricted Policy 420.250).

At the hospital, Joy remembered one nurse being upset that a male guard was escorting a prisoner who was "obviously in labor." Joy and Glasco chained Brawley to the hospital bed. She had complications due to lack of fluid and possible fetal infection, and eventually had to have an emergency cesarean section. The chains were removed for the operation but re-

placed immediately afterwards.

Twenty-two days after the birth of her son, Brawley was released from prison. She then filed a 42 U.S.C. § 1983 civil rights suit against Joy and Glasco in federal court, alleging their actions constituted cruel and unusual punishment.

The state and the DOC were dismissed as defendants by stipulation, and Joy and Glasco filed a motion for summary judgment. The court held that Brawley did not have to exhaust administrative remedies because she was no longer a prisoner at the time she filed her lawsuit, and that the doctrine of laches did not apply as Brawley filed within the appropriate statute of limitations.

There was also evidence in the record that Brawley suffered unnecessary pain and was exposed to a serious risk of harm by being shackled during labor without any penological justification. Glasco claimed she was unaware that Brawley was in labor, even after Brawley was given an epidural for pain and to attempt a vaginal birth, but those were disputed factual is-

sues to be determined at trial.

The central aspect of the case was whether a right to be free of shackling was clearly established. Noting a lack of Ninth Circuit precedent, the district court adopted the Eighth Circuit's reasoning from *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009) [*PLN*, Apr. 2010, p.20], holding that the right of a prisoner in labor to be free of restraints was clearly established prior to September 2003. Therefore, the defendants' motion for summary judgment was denied with respect to failure to exhaust, laches and qualified immunity.

Four days after the court's ruling, the defendants agreed to settle the case for \$125,000. Brawley was represented by Legal Voice, a women's rights organization that worked to have legislation passed in Washington State concerning policies for shackling prisoners in labor. See: *Brawley v. State of Washington*, U.S.D.C. (W.D. Wash.), Case No. 09-cv-05382-RJB. ■

Additional source: www.king5.com

\$1.5 Million Settlement in Suffolk County Jail Class Action Toilet Suit

A \$1.5 million settlement has been reached in a class action lawsuit on behalf of approximately 4,000 former prisoners of Building 4 of Massachusetts' Suffolk County House of Correction.

The complaint alleged Eighth Amendment violations for cruel and unusual punishment. When it was built, Building 4 lacked toilets or sinks in the cells. Prisoners had to seek permission from guards to use the bathroom during lockdown. This inadequate system that was based on the whim of guards to allow bathroom use resulted in some prisoners having to void their body waste into containers.

Class members were defined as all prisoners "who were housed in Building 4 of the Suffolk County House of Correction at any time from August 3, 2003 to February 7, 2008." After the latter date, the Cell Push-Button System was in place "that allows a certain number of cells to release themselves to go to the bathroom."

The lead plaintiffs, Daniel O'Neil and Michael Davis, "will receive a bonus payment of \$10,000 or \$20,000, which will depend on the Court's discretion or to what party's request it will accept. Likewise, the Court will determine whether to award \$2,500 or \$5,000 to class members Kunta Allen, Wayne Belger, Cacarr Brisbon, Joseph Kacvinsky and Charles Tucker."

The remaining class members will receive a per diem based upon the number of days spent in Building 4 and the number of class members participating in the settlement. The total award cannot exceed \$3,500 per member.

The attorneys representing the class, Howard Friedman and David Milton, will receive attorney fees of \$500,000 from the settlement, which was preliminarily approved by the Court on June 14, 2010. See: *Tyler v. Suffolk County*, U.S.D.C. (D. Massachusetts), Case No. 1:06-11354. ■

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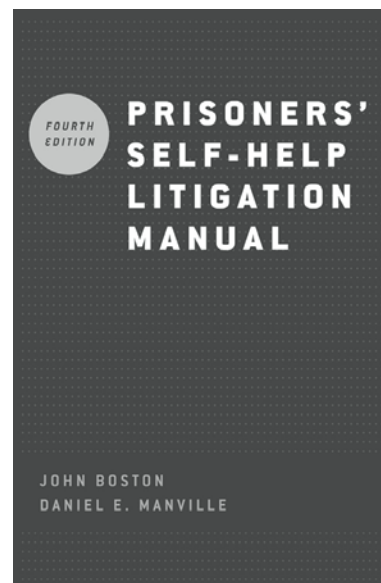
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Breaking Free: Prisoners Find Voice in Zines

by Danielle Maestretti

I swore that this time, I wouldn't allow you to destroy me, to steal my life no matter what you did to me. Somewhere along the way, I found that I wasn't a victim. I would be a survivor, a fighter. I would see my son again. I would enjoy a summer day, a cool winter night or the spring rain. I would bask in the sunshine with my lover. I would defeat you, beat you at your own game, and teach others how to survive and fight you. — Lee Savage, from Tenacious

Lee Savage was in prison for the third time, months into a mind-numbing stay in solitary confinement at the Lowell Correctional Institution in Ocala, Florida, when she took to writing. During this stint in isolation, she says, “things started up in me.” She penned fiery essays and poems, tightly knitting the political and the personal: anarchism and classism, her criminal history of abuse and addiction, her experience coming out as a lesbian, and her suicide attempt during her first stint at Lowell.

Her work found a place in a number of zines—self-published, self-assembled booklets that reflect the whims and desires of the person putting them together. In the case of prisoner zines, that usually means giving men and women behind bars a voice, and a lifeline to their peers and the outside world. They're typically distributed to and read by prisoners themselves, but a handful of copies find their way to prison activists, legal professionals, and members of the alternative media.

Savage has been out for seven months. She's trying to find paying work as a writer and struggling to get a new project off the ground: Savage Independent Publishing,

which will create a new set of prisoner zines that will focus on women prisoners housed in maximum security units.

“I want something to give these women a boost in their confidence and self-esteem so that when they get out, they won't believe all the lies that were told to them—that they were no good,” she says. “I want them to have something of their own that's in print, because that was a big boost for me. That kept me going.”

In 2002 a group of women at Oregon's Coffee Creek Correctional Facility set out to create a zine to stir discussions about the female prison experience, including motherhood, sexual assault, and poor health care. Without access to photocopiers, computers, or other equipment, they needed someone on the outside to coordinate the effort.

They found Vikki Law, who has been involved in prison activism since the mid-1990s, when she started a books-for-prisoners program in New York City. She helped publish the first issue of the luminous, lively *Tenacious* in 2003, and has since overseen 19 installments of the zine. Most of the contributors send handwritten submissions, which Law deciphers and types, and any back-and-forth between editor and writers takes place through the mail—which can take months.

Tenacious is free to female prisoners who request it (male prisoners pay postage and readers on the outside two or three dollars). Law prints and distributes between 50 and 75 copies of each issue, but sometimes fewer make their way into the system, in part because mailroom censors can ban, destroy, or reject the final product. (In Idaho, *Tenacious* is considered prisoner-to-prisoner correspondence, which is against state regulations.) Still, despite the risk of reprisal, the zines travel, as women slip them onto prison library shelves and pass copies to friends and cellmates.

Reading *Tenacious*, there's no way to know how much poetic license any one prisoner is taking in an effort to communicate desperation. After reading a few issues, though, one can't help but see a commonality in the narratives. From institution to institution across the country, petty mind games, abuses of power, and dangerously inadequate health care seem to be the rule, not the exception.

Since he founded the South Chicago

ABC Zine Distro in 1998, Anthony Rayson, an anarchist writer in Chicago, has published hundreds of zines by, for, and with prisoners. It's such a vast, varied collection that there's a living archive and catalog at DePaul University library. The titles, which address everything from race and class to legal rights to obesity, can be found in prisons nationwide. Rayson also periodically publishes catalogs and suggestions about how to pass the zines along: by enlisting family and friends on the outside, surreptitiously using printing machines on the inside, or hand-copying a zine from front to back. “Prisons have dorms with 100 guys in them,” he says. “You get one zine in there, and every single one of them's gonna read it, until it melts or a guard grabs it.”

Rayson corresponds with hundreds of prisoners and is always juggling a handful of new projects and expanding the scope of others. Under his guidance, an *Animal Farm*-esque collaboration between two prisoners, *The Last Act of Circus Animals*, grew from 50 pages to 100, and Rayson tapped three prisoner-artists to do the illustrations before releasing it as a special three-zine set. “It's the most impressive writing and thinking and artwork that I see anywhere,” he says. “They say ‘become the media,’ and that's what we did.”

At juvenile detention centers across the country, young offenders have an above-ground zine of their own: *The Beat Within*, a 60-some-page collection of youth-produced writing and art that's published with the support of New America Media, a San Francisco-based association of ethnic media outlets.

The *Beat* has a built-in instructional component. The zine's facilitators, who are sometimes former offenders themselves, conduct weekly workshops at about a dozen juvenile halls. They encourage kids to write about what makes them happy or what choices they wish they'd made. Staffers work with them and choose “pieces of the week” to print in the zine. Other submissions are sent in from around the country, from other juveniles and now-adult former *Beat* writers alike, and printed in the back. All in all, says cofounder and director David Inocencio, each issue of the *Beat* is pared down from at least 2,000 submissions.

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create, by telling these stories, is a history book of the week,” Inocencio says. “It’s an awesome platform when kids take it seriously and you’re able to watch them evolve as writers or as thinkers.”

The writing process, at any age and even without the mentoring component of the *Beat*, is a huge part of what makes prison zines so essential, particularly as public and private penitentiaries around the country cut funding for rehabilitative programming. It also makes sense that zines would be the go-to medium behind bars, since they’re cheap to produce, aren’t beholden to profit motives, and preserve the prisoners’ rawest voices.

But down the line I hope that journalists and editors from larger publications come across these powerful tales and find a way to distribute the work more widely. At their best, prisoner zines humanize the institutionalized, which is the first step toward confronting a system that is desperately in need of reform. ■

Danielle Maestretti is the Utne Reader librarian. She manages the magazine’s library of 1,300 alternative periodicals, including magazines, journals, alt weeklies, and zines. This article is reprinted with permission from the author and first appeared in the Utne Reader.

Florida Prison Guards Plead Guilty to Federal Cocaine Charges

As a result of plea agreements reached between April and May 2010, eleven Florida prison guards and five other defendants have pleaded guilty to federal cocaine possession charges. The arrests occurred following a two-year investigation into corruption at Florida prisons located in Palm Beach County.

The sixteen defendants entered into separate plea agreements that resulted in guilty pleas to either federal charges of conspiracy to possess cocaine or possession of cocaine with intent to distribute.

The investigation involved undercover FBI agents recruiting guards from Glades Correctional Institution, South Bay Correctional Institution and the Florida Road Prison. The guards, and five others who posed as prison guards, ran loads of fake cocaine out of Miami-Dade County for payments of \$5,000.

Pleading guilty in federal court were Latess Hill, Jentle Chatman, Zedra War-

ner, Belinda Davis Brown, Tanika Wright, Samantha Wilkerson, Kenyetta Biggs, Elisha Allen, Melvin Brown, Antonio Key, Jason Miller, Marcus Pitre, Dondia Wilkerson, Pakesha McCray, Takisha Golden and Melissa Jefferson. All were sentenced between July and August 2010 to prison terms ranging from 21 to 57 months plus up to five years of supervised release.

The federal investigation coincided with a state probe that resulted in six prison employees being arrested on charges of bribery, introduction of contraband into a correctional institution and conspiracy. The prison staff members charged in state court included Sgts. Alanda Ray Shaw and Sheroen Lenard Dukes; guards Natasha Lacola Beckles, David Jermaine Stewart and Marlon Anthony Ellison; and substance abuse counselor Osmond W. Williams. Those cases remain pending. ■

Source: *Palm Beach Post*

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Virginia Grand Jury Finds Misconduct at County Jail

by Michael Brodheim

The findings of a Virginia grand jury convened in September 2007 to investigate “conditions that involve or tend to promote criminal activity” at the Henry County Jail were released to the public on February 1, 2010.

After interviewing current and former members of the Henry County Sheriff’s Department, investigators and agents of the Virginia State Police, and current and former jail prisoners, the grand jury found that over the course of five years, from 2004 to 2009, there had been repeated cases of unprofessional and criminal misconduct by members of the Sheriff’s Department. Such acts of misconduct, however, were mostly too old to be prosecuted.

Still, the grand jury probe yielded perjury indictments against two officers – deputy Glenn Brett Stokes, 39, who, the grand jury concluded, lied about matters related to sexual contact with a female prisoner; and former deputy Mary Lois Markland, 58, who, according to the grand jury, lied about having provided cigarettes to prisoners. Stokes and Markland were both arrested, and Stokes was suspended without pay.

The grand jury found credible evidence that jail employees had facilitated the passing of messages and other items between prisoners in different cell blocks – without necessarily being aware of the contents – a practice deemed inappropriate at best and a serious dereliction of duty, compromising the safety and security of staff and prisoners alike, at worst. The grand jury also found that officers had illegally smuggled drugs into the jail, at least in 2004.

The grand jurors reserved their most damning language for findings related to sexual contact between male officers and female prisoners. They described such contact as “ranging from casual flirtation to carnal knowledge to behavior so perverse as to be outside the scope of the criminal law.”

The grand jury concluded that the presence of drugs and contraband, in addition to sexual misconduct at the jail, reflected “glaring failures” on the part of supervisors and administrators in addressing deficiencies at the facility. Still, while noting that serious problems persisted, the grand jurors commended Sheriff Lane Perry for making much-needed reforms – including installing video cameras in

the jail – after more than a dozen law enforcement officials, including then-Sheriff Frank Cassel, were indicted in 2006 in connection with a scheme to misappropriate drugs, guns and money seized as evidence in criminal investigations. [See: *PLN*, June 2008, p.42].

The grand jury cited a need for additional reforms, including that the Henry County Sheriff’s Department reach out to other agencies for training related to internal affairs investigations.

Former deputy Mary Markland was

convicted of perjury on August 30, 2010. “The cover-up was worse than the conduct” that Markland was accused of, the judge said, noting it was unclear whether giving tobacco products to prisoners constituted a crime. Lying to the grand jury, however, was definitely a criminal offense. Former deputy Glenn Stokes is scheduled to go to trial on December 14, 2010. ■

Sources: *Roanoke Times*, *Henry County Special Grand Jury Report* (Feb. 1, 2010), *Martinsville Bulletin*

\$1.8 Million Settlement in New Mexico Woman’s Attempted Jail Suicide

by David M. Reutter

A lawsuit that claimed insufficient suicide prevention procedures and staff training at New Mexico’s Santa Fe County Adult Detention Facility (SFCADF) resulted in a woman’s suicide attempt has been settled for \$1.8 million.

When 23-year-old Nanette Romero was arrested on a minor offense and placed in the SFCADF, the jail was under a Memorandum of Agreement (MOA) with the U.S. Department of Justice.

The MOA, entered into on November 1, 2004, required SFCADF to revise “existing suicide prevention policies relating to identification and screening of potentially suicidal inmates, appropriate housing for suicidal inmates, effective watch procedures, duration, and conditions of monitoring, suicide intervention procedures, communications regarding suicidal behavior and information needed to protect suicidal inmates.” It also provided for staff training and emergency procedures to respond to suicide attempts.

Despite the MOA’s requirements, little had changed at SDCADF when Romero entered the jail on July 17, 2006. During the medical screening process, she informed the nurse that she was undergoing methadone maintenance. The nurse, Nancy Fudge, did not recommend or provide medical treatment, and she cleared Romero for housing in general population.

The failure to provide Romero her prescribed 85 mg. of methadone per day caused her to suffer severe withdrawal symptoms the next day. She was moved to

the medical area and placed under constant suicide watch. She made multiple attempts to remove an IV that provided intravenous fluids. After she passed out and was resuscitated, she cut her hands and wrists with her name badge. She began to vomit, which compromised her breathing, after she was forced to stop cutting herself.

Transport to and a brief stay at a local hospital resulted in stabilization of Romero’s medical condition. Back at SFCADF, she was placed on constant suicide watch. Romero was unhappy with this situation, and pushed to be returned to the general population.

Meanwhile, a “turf war” ensued between the director of mental health services and the nurses, who wanted Romero kept on at least a 15 minute watch, while the psychologist ordered a 30 minute watch. Dr. Russell Brown, a psychiatrist under contract with SFCADF, agreed with the nurses and overrode the psychologist.

The purported psychologist, Dr. Terri Greer, admitted during her discovery deposition in the lawsuit that “she had purchased both her masters and Ph.D. degrees from off shore diploma mills which required no classes, no attendance, [and] no course work. Her working career had largely consisted of being a beautician,” wrote the plaintiff’s attorney, Robert R. Rothstein, in an email. “At one point, one of the defense lawyers was heard to grumble: ‘the head of our mental health services was a fucking hairdresser! Only in New Mexico. What a state.’”

The conflicting orders on Romero's cell door left the guard in confusion. As most guards do, Michael Sunds chose to take the easier route, holding to the 30 minute watch order. This resulted in Sunds allowing Romero to go to the T.V. room. She was observed to be watching television at 9:21 p.m., but when the nurses learned of the situation it was too late.

When they entered the T.V. room at 9:51 p.m., Romero was found hanging from the television cord. She was taken down and successfully resuscitated. Nonetheless, she suffered anoxic brain injury. Romero lost significant cognizant ability and is mentally retarded. She will be severely disabled for the rest of her life and must be supervised and cared for by her mother.

The \$1.8 million settlement was reached

on July 7, 2010. Romero and her mother, Della Sherwood, were represented by Santa Fe Attorneys Mark H. Donatelli, Robert R. Rothstein, and John C. Bienvenu. They

received \$761,160.79 in attorney fees and costs. See: *Sherwood v. The Board of County Commissioners of Santa Fe County*, USDC, D. New Mexico, Case No. cv-2009-722. ■

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Colorado Closes Boot Camp Program

by David M. Reutter

Following the graduation of 23 prisoners from its boot camp program on May 27, 2010, Colorado suspended the program. A combination of high costs and low returns led to the boot camp being scuttled.

Military-style boot camps for low-risk juvenile offenders were all the rage during the prison build-up caused by “get-tough-on-crime” laws, which have been the linchpin of criminal justice policy in the U.S. for the past three decades.

It was expected that rigid discipline would cause juveniles to change their attitudes and thus their behavior. However, the results have sorely disappointed. Colorado has released 155 prisoners from its boot camp program in Buena Vista since 2007, and 51 percent have since returned to prison.

“The lowest-risk offenders go into the camp,” said Colorado Department of Corrections (CDOC) spokeswoman Katherine Sanguinetti. “You would have expected a huge difference in recidivism.”

Yet the only difference in the recidivism rate was that it was just two percentage points lower than for so-called high-risk offenders. Plus the costs of the program were higher; in the past year alone, the cost per boot camp participant soared from \$78 to \$108 per day.

A decrease in minimum-security prisoners contributed to the higher costs. Between 1999 and 2008, the number of boot camp participants dropped 40 percent to 322 from 540. Since opening in 1991, Colorado’s boot camp has offered a GED program and substance abuse treatment. About 90 percent of the prisoners who went through the boot camp had drug or alcohol abuse problems. The short-term program may not have been long enough to result in permanent change, and ongoing treatment may have been better for the boot camp participants, said Sanguinetti.

Colorado’s boot camp program also had a high drop-out rate. The program has enrolled 7,742 prisoners since its inception; of those, one third, or 2,570 participants, dropped out. Only 957 completed their GEDs in the program. Of the 98 drop-outs released in 2007, 61% reoffended.

Critics have questioned the effect boot camps have on juvenile offenders. A June

2003 U.S. Department of Justice study determined that differences in the recidivism rates between prisoners in boot camps and those in the general prison population were small or negligible.

Facing a budget crunch, the CDOC decided to scrap its boot camp program and shift those funds to higher-security prisons. Of course, placing juveniles in those settings has proven to have

negative results, too.

Pending an improved budget situation, the state’s boot camp may return. “We are suspending the program, but we are not doing anything to the facility in case it is possible to start it again in the future,” Sanguinetti noted. ■

Sources: *Denver Post*, www.mountainmail.com

Washington Commission Finds AT&T is Prison Collect Call Provider

by Mark Wilson

On April 21, 2010, the Washington State Utilities and Transportation Commission (Commission) handed the dedicated loved ones of PLN’s tenacious Editor an important victory in their long-running challenge of prison collect call rates.

In 2000, Zuraya Wright, Sandy Judd, and Tara Herivel sued AT&T Communications of the Pacific Northwest, Inc. (AT&T); T-Netix, Inc. (T-Netix); Verizon Northwest, Inc. (Verizon); Qwest Corporation (Qwest); and CenturyTel Telephone Utilities, Inc. (CenturyTel), in the Superior Court of Washington for King County.

Plaintiffs alleged that between June 1996 and December 31, 2000, they received collect calls from prisoners confined in four Washington Department of Corrections (DOC) facilities. They also alleged that the named telephone companies were operator service providers (OSPs) that violated Washington’s rate disclosures for the collect calls they received.

The Superior Court dismissed Verizon, Qwest and CenturyTel from the suit, then referred two questions to the Commission under Washington’s “doctrine of primary jurisdiction,” which “requires that issues within an agency’s special expertise be decided by the appropriate agency.” The court sought the Commission’s expertise as to: (1) whether AT&T and T-Netix were OSPs under the contracts at issue; and (2) if so, whether they violated Washington’s rate disclosure regulations. See: *Judd v. Am. Tel. & Tel. Co.*, 136 Wash App 1022 (2006).

Both AT&T and T-Netix filed an-

swers with the Commission, claiming that they were not OSPs during the relevant period. T-Netix also filed a July 26, 2005 summary judgment motion with the Superior Court, asserting that Plaintiffs had not suffered any injury and, therefore, lacked standing.

On September 6, 2005, the Superior Court granted T-Netix’s motion and revoked its referral to the Commission. See: *Judd v. Am. Tel. & Tel. Co.*, King County Superior Court, No. 00-2-17565-5 SEA. The court later clarified that its ruling also applied to AT&T in *Judd*, 136 Wash App 1022. On October 28, 2005, the Commission dismissed the complaints against both AT&T and T-Netix.

On December 18, 2006, the Washington Court of Appeals reversed and remanded to the Superior Court and the Supreme Court of Washington denied review on December 4, 2007. See: *Judd v. Am. Tel. & Tel. Co.*, 162 Wash 2d 1022, 175 P3d 1092 (2007). On March 21, 2008, the Superior Court again referred the matter to the Commission for resolution of the previously referred issues.

During the relevant period, administrative rules defined OSP as “any corporation, company, partnership, or person ... providing a connection to intrastate or interstate long-distance or to local services from locations of call aggregators.” Another rule mandated that OSPs “disclose to the consumer: (A) a quote of the rates or charges for the call, including any surcharge; (B) the method by which the rates or charges will be collected; and (C) the methods by which complaints about the rates, charges or collection

practices will be resolved.”

AT&T entered into a contract with the DOC in 1992 to provide prison telecommunication services and equipment. That contract was amended in 1995 to require AT&T to install certain call control features through its sub-contractor, Tele-Matic Corporation. Subsequently, T-Netix acquired Tele-Matic Corporation, and “T-Netix was retained to provide a computerized platform ... that would feature call control provisions” at the prisons.

“T-Netix treated the name of its platform as highly confidential, yet T-Netix disclosed the name” in a filing. As such, the Commission concluded that “the company had waived its right to designate the information as highly confidential.” Rather, the name – “P-III Premise call platform” – is public information. T-Netix admitted that the “platform had the ability, from June 1996 to December 2000, to provide customers with instructions on how to receive rate quotes and provide consumers with rate quotes.”

The Commission found that “the issue of who owns the platform is at the crux of any determination of which” phone company “acted as the OSP.” Both AT&T and T-Netix denied that it was the OSP, claiming that the other company, instead, was the OSP.

The Commission found “that the P-III platform performed the operator services at the” prisons, and “the owner of the P-III platform ... is the OSP.” Additionally, “the contracts themselves point to the owner of the platform as an OSP,” noted the Commission.

“Of particular importance, the con-

tract between AT&T and T-Netix, which was executed on June 4, 1997, provides that AT&T bought the platform from T-Netix, and took title to it. T-Netix solely provided the technical and training services.” Accordingly, the Commission found that AT&T was the OSP from June 4, 1997 on.

The Commission did not address “the second referral question, whether either AT&T or T-Netix violated the Commission’s rate disclosure regulations,” because the parties did not brief the issue or present evidence in support of their positions. As such, “a prehearing conference will be scheduled to determine how best to address this next phase of the referral.” Even so, the Commission’s Order appears to reveal how that issue will be resolved. Specifically, the Commission found that as “evidenced by a letter dated August 25, 2000, AT&T and T-Netix engaged in negotiations to implement rate disclosures for intrastate inmate telephone calls in the State of Washington. This attempt at compliance with the rate disclosure regulations ... shows that AT&T knew it was ... the OSP and that it had a responsibility to comply with the OSP regulations,” according

to Plaintiffs. The Commission appears to have agreed, finding that “the August 2000 letter from AT&T to T-Netix clearly shows that AT&T had certain responsibility for the implementation of rate quotes using the platform for the Washington State correctional facilities.”

We will report on any further developments in the case.

See: *Judd v. AT&T*, Docket No. UT-042022 (Order 23 dated April 21, 2010 of the Washington State Utilities and Transportation Commission). ■

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Massachusetts Clerk Magistrates and Assistants Pocket Millions in After-Hours Fees

by Matt Clarke

In 2009, 191 of 210 clerk magistrates and assistants in Massachusetts padded their incomes by pocketing over \$2.5 million in after-hours bail fees.

Clerk magistrates and assistants are paid salaries ranging from \$84,000 to \$110,000. Due to a Massachusetts Supreme Judicial Court ruling that bail hearings must be held within six hours of arrest to avoid constitutional issues, the clerk magistrates and assistants are often called after work hours to set or deny bail.

If a bond is set and paid, the arrestee is charged a \$40 fee. During normal business hours that fee goes into the state coffers. However, the fees for after-hours bail settings are pocketed by the clerk magistrates and assistants as a supplement to their salaries.

In 2009, 36% of Massachusetts clerk magistrates and assistants pocketed over \$15,000 each in fees. Twenty-four took in more than \$25,000 each. Further, 87 bail commissioners, appointed by the Superior Court Committee on Bail, pocketed another \$734,000. About a third of the bail commissioners are also employed by the state in other capacities.

"This is a striking amount of money these fees are generating for these clerks," said Michael Widmer, president of the Massachusetts Taxpayers Foundation. "They are paid well. This should be a part of their responsibilities."

Worcester District First Assistant Clerk Brendan T. Keenan, 58, led the pack in 2009, pocketing \$54,990 in after-hours bail fees in addition to his \$92,034 annual salary. Between 2006 and 2009, he made \$266,710 in after-hours fees. The second-highest salary supplementer was Brockton District Clerk Magistrate Kevin P. Creedon, who added \$42,947 in after-hours bail fees on top of his \$110,221 annual salary.

"It's not easy work at all," said Keenan, who is on call one weekend and eleven weeknights per month. "They can call me at 4 in the morning and I'll be there within half an hour."

It is "unrealistic to assume you should ask people to work beyond their normal hours of employment without any sort of compensation," said Keith E. McDonough, vice president of the Association of Magistrates and Assistant Clerks. McDonough,

a clerk magistrate in Lawrence District Court, himself pocketed \$28,927 in after-hours bail fees in 2009.

Michael J. McEaney, the State Bail Administrator, said the supplemental fees were offered to attract personnel to work after-hours, and noted that after-hours bail settings would be impossible without the fee incentive.

But the padding of well-paid state employees' pocketbooks, especially in these budget-strapped times, is not the only issue raised by after-hours bail fees. No fee is paid unless bail is set and the arrestee posts bond. This could improperly influence magistrate clerks and assistants to set bail when it is unwarranted, and to set bail low enough so it can easily be paid by the defendant. In short, there is a fundamental conflict of interest when the official who sets bail has a financial

interest in whether the arrestee makes bail or not.

"It's clearly a temptation. Clearly from the point of view of a purer justice system, you don't want this question to arise," said Widmer. "It doesn't engender trust in the judicial system to have this inherent conflict there."

A 2003 trial court commission recommended that after-hours bail fees be paid into state coffers, which would "eliminate the conflict of interest magistrates face when making a judicial decision that can impact their personal finances." That recommendation was ignored, and the magistrate clerks and assistants continue to claim there is no conflict of interest while supplementing their salaries with millions of dollars in bail fees. ■

Source: *Boston Herald*

Texas Sues Former Prisoner Over Unauthorized Practice of Law

by Matt Clarke

On May 12, 2010, the Unauthorized Practice of Law Committee (UPLC), a nine-member body appointed by the Texas Supreme Court that is responsible for enforcing statutes prohibiting the unauthorized practice of law, filed suit against Tony R. Davis, a former federal prisoner, and his two affiliated companies, International Legal Services, Inc. and ILS Services, Inc., seeking an injunction to prevent them from engaging in the unauthorized practice of law. A state district court judge granted a temporary restraining order the same day it was requested by the UPLC.

Davis was convicted of eight counts of conspiracy, wire fraud, travel and transportation of securities for fraudulent purposes, and money laundering by a federal jury in Austin, Texas in 1988. He served about 66 months of a 97-month sentence, then returned to Austin where he set up his companies, reportedly in his wife's name. Davis said he took paralegal and legal secretary courses and that his businesses employ about 17 people to do legal research. He uses the research

to generate legal documents, which he copyrights. The UPLC claims he sells the copyrighted material to his companies' clients, most of whom are incarcerated.

A 1999 state statute exempts from the definition of "law" for purposes of "unauthorized practice of law" the creation, sale or distribution of materials that clearly and conspicuously state they are not a substitute for the advice of an attorney. The UPLC's suit says Davis goes far beyond that, alleging that he gives legal advice to clients for a fee; advises clients of their legal rights, duties and responsibilities; and engages in the general practice of law.

The UPLC claims that, using newsletters sent to prisoners and Internet advertisements, Davis and his companies solicit clients to purchase legal research and criminal defense theories, and advise clients on how and where to file the documents they generate. The UPLC suit alleges that a "payment of \$10,050 is generally charged by Defendants to process and fill out defensive motions and appellate briefs and other fees are charged for other services."

Kevin Lashus, an Austin attorney who filed the UPLC lawsuit, said the committee had “received complaints about [Davis] for the last year to year and a half, and there is an ongoing investigation.” The UPLC is asking the court to appoint a special master to audit the finances of Davis’ companies.

“We’re going to seek restitution for [his] clients,” Lashus added.

Davis, who is representing himself in the UPLC lawsuit, said he never told anyone he was practicing law but represented his companies as legal research firms and informed clients, “if they need a lawyer, we can refer them to one.”

According to an October 28, 2007 article in the *Austin American-Statesman*, Davis developed a legal argument claiming that federal criminal statutes – and thus all federal convictions – are invalid because Congress failed to correctly pass legislation enacting Title 18 of the U.S. Code. However, he was unable to point to a case where that argument succeeded, and in fact two courts have sanctioned him for filing frivolous pleadings which included that claim.

“This case is unbelievably frivolous,” the Seventh Circuit stated in a Sept. 2007 ruling in a case that raised Davis’ Title 18

argument. See: *United States v. States*, 242 Fed.Appx. 362 (7th Cir. 2007); see also, *United States v. Collins*, 510 F.3d 697 (7th Cir. 2007). Further, the U.S. Supreme Court declined to hear a case based on Davis’ Title 18 legal theory.

Davis has been sued by several clients seeking refunds, including prisoners’ family members, and has filed counter-suits alleging defamation and breach of contract.

The temporary restraining order entered by the court in the UPLC lawsuit – later converted to a temporary injunction – prohibits Davis and his companies from giving legal advice to clients, collecting fees, or circulating newsletters or running ads that imply they can provide legal assistance.

The suit against Davis remains pending; according to the UPLC, several law enforcement agencies are also investigating claims that he engaged in the unauthorized practice of law. See: *The Unauthorized Practice of Law Committee v. Davis*, 250th Judicial District Court (TX), Case No. D-1-GN-10-001514. ■

Additional sources: *Texas Lawyer*, *Austin American-Statesman*



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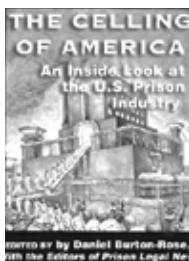


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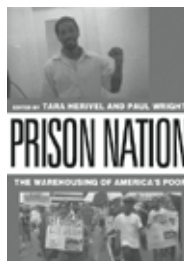
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Oregon Jail Beating Nets \$500 Jury Award Plus \$27,500 in Attorney Fees

by Mark Wilson

In December 2009, a federal jury in Portland, Oregon awarded a hearing-impaired jail prisoner \$500 for a beating inflicted by guards during the booking process. The defendants also paid attorney's fees of \$27,500.

On September 11, 2006, Michael Evans was arrested and booked into the Multnomah County Detention Center (MCDC). Evans, who suffered from a partial hearing impairment, had difficulty hearing the guards' commands.

Deputy Richard Hathaway grabbed Evans' right arm and put his hand in a control hold. Deputy Robert Griffith then grabbed Evans' other arm, as Hathaway kicked Evans in the back of the knee, forcing him to the ground. Once on the ground, Hathaway punched Evans at least seven times. Griffith punched him twice and used his knee to push Evans' head into the floor.

While Evans was restrained on the ground, police officer Ryan Albertson kned him twice, another officer helped pin his legs to the floor and Sergeant Cathline Gorton pointed a Taser at Evans' face, aimed the laser sight in his eyes and threatened to use it on him.

Evans suffered a bloody, broken nose plus abrasions, contusions, severe head and facial swelling, bruising and swelling on his back, and injuries to his knees and back. He was denied medical care for approximately 18 hours, during which time he was forced to use his shirt to soak up blood and apply pressure to his broken nose.

Hathaway issued Evans a misconduct report, charging him with staff assault, disruptive and disrespectful behavior, and disobedience of an order. "Inmate Evans struck me in the nose during booking. A use of force occurred in the booking area. Evans would not follow the directions given to him during booking," Hathaway wrote. Evans was found guilty and sanctioned to 60 days in segregation plus a \$5.00 fine. Hathaway claimed in a use of force report that he hit Evans just three times, when he actually hit him at least seven times.

Evans also was charged with the offense of Assaulting a Public Safety Officer; the charges were dismissed, however, when Hathaway failed to appear under subpoena.

Evans sued Hathaway, Griffith, Albert-

son, Gorton, the Sheriff and Multnomah County in federal court, alleging they had subjected him to excessive force, assault and battery, and malicious prosecution. He sought compensatory and punitive damages plus reasonable attorney's fees and costs.

The case proceeded to trial, and on December 15, 2009 a federal jury found that Hathaway had subjected Evans to excessive force and awarded compensatory damages of \$250 on that claim. On the state assault and battery torts, the jury found that Gorton did not commit an assault against Evans; that Albert-

son committed a battery against Evans but was justified in doing so; and that Hathaway and Griffith committed battery against Evans that was not justified. The jury awarded \$250 in compensatory damages against Multnomah County on the latter claim, but rejected Evans' malicious prosecution claim and found he was not entitled to punitive damages.

The defendants agreed to pay \$27,500 in attorney's fees to Evans' attorney, Benjamin Haile of Portland, Oregon. See: *Evans v. Multnomah County*, U.S.D.C. (D OR), Case No. 3:07-cv-01532-BR. ■

\$4 Million Settlement in R&B Singer's Death from Drug Withdrawal in Ohio Jail for Failure to Pay Child Support

A \$4 million settlement has been reached in a lawsuit that claimed the policies of Ohio's Cuyahoga County Jail (CCJ) and the medical negligence of its contractor, Midwest Medical Staffing Inc., caused the death of R&B singer Sean Levert.

Levert entered CCJ on March 24, 2008 after being sentenced to 22 months in prison for non-payment of \$90,000 in outstanding child support obligations. Prior to entering CCJ, Levert had been prescribed two milligrams of Xanax three times daily for an anxiety disorder. During sentencing, the judge noted the prescription and mentioned it in a personal note to the Sheriff.

At booking, the prescription Levert took with him containing 37 prescribed Xanax was confiscated by jail authorities. "At no time, from the moment Mr. Levert entered [CCJ] until his death six days later, did defendants provide Mr. Levert any of his prescribed Xanax medication," charged the civil rights complaint.

Prior to Levert's entry into CCJ, it was well known that abruptly discontinuing Xanax, a drug classified as a benzodiazepine, can lead to severe, painful and terrifying withdrawal symptoms that often lead to death. Long term users of benzodiazepines can not be safely discontinued unless the medication is tapered off in a slow and deliberate fashion while under the care of medical professionals.

Nurse Christine Main completed the intake medical screening on Levert. The attempt she made to verify the Xanax prescription resulted in incomplete information from the hospital, and neither she nor anyone else made efforts to make that verification.

With CCJ being overcrowded, Levert was forced to sleep on the floor, which exacerbated his medical conditions by depriving him of sleep. His cellmate noticed that Levert was anxious, sleeping sitting up, talking and laughing to himself and was experiencing hallucinations. Levert's request to receive his Xanax was met by CCJ nurses with indifference.

The nurses did not check his vital signs, perform a mental status exam or take any other action to investigate Levert's medical status. On March 30, he was taken to CCJ's psychiatric floor with hallucinations and bizarre behavior. Rather than conduct a mental or physical assessment, Levert was locked in his cell because he was "bumming out" the other prisoners.

For the next 21 hours, he suffered classic signs of Xanax withdrawal. Nurse Jane Lawrence ordered Levert placed on a restraint chair at around 10:45. She failed to administer an injection of haldol, ativan and benedryl as ordered by Dr. Donald Kellon, CCJ's physician.

Levert later died of "Alprazolam [benzodiazepine] withdrawal" according

to the coroner's verdict. The settlement in the lawsuit was reached on June 16, 2010. The plaintiff was represented by attorney Alphonse Gerhardstein.

"My hope is that Cuyahoga County will support Sean's law in an effort to prevent other families from experiencing the pain we have endured," said Levert's widow, Angela Lowe. The law would re-

quire every county to give each prisoner medical, dental and mental health screenings upon entry. CCJ has already changed its policies to require the screenings, and to have a prisoner's prescription verified or scheduled to see a doctor the next day. Of course, the practice of locking up parents who fall in arrears of child support obligations also contributes to

America's burgeoning prison population. It would appear ironic that having had Levert imprisoned for failing to pay child support his ex-wife will now collect a \$4 million settlement. See: *Lowe v. Cuyahoga County*, USDC, N.D. Ohio, Case No: 1:08-cv-1339. 📄

Additional source: *The Plain Dealer*

Illinois Eliminates Computer, Business Classes for Prisoners

Illinois prison officials are eliminating computer education classes for prisoners, and the rationale for the decision to end the classes varies.

The computer program operated at 11 state prisons, with around 900 prisoners participating in the last round of classes. It was run with the assistance of community college instructors and provided computer and business management skills to help prisoners obtain work or start their own businesses upon release.

Prison officials, however, cited a five-year review that found prisoners were not being hired in computer-related positions upon release. "It was determined that offenders were unable to find direct employment in the computer technology arena," said prison spokeswoman Sharyn Elman.

But elimination of the classes may have more to do with fiscal realities, as Illinois is facing a \$13 billion budget gap. One community college, Southeastern Illinois College, announced in May 2010 that it was ending its classes at the Shawnee and Vienna correctional facilities because the

state was delinquent in paying the school for work it performed.

Community colleges provide a variety of education classes to prisoners ranging from automotive repair to horticulture. The estimated 19 instructors who lost their jobs due to elimination of the computer and business management classes were told they could bid for other education jobs in the prison system.

A report by the John Howard Association of Illinois, released in May 2010, found that the state "has allowed its prison vocational and academic programs to wither away. While the prison population has grown, the opportunity for inmates to learn a skill or earn postsecondary academic certificates has shrunk."

This is despite the fact that "Research shows overwhelmingly that vocational or academic education for people in prison mean they are much less likely to commit new offenses when released," according to the report. 📄

Sources: *Herald-Review*, <http://www.the-jha.org/education>




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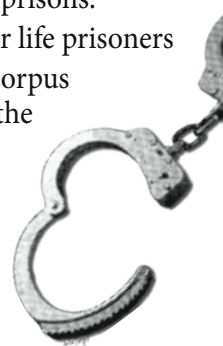
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Class Certification Upheld for Louisiana Toxic Train Derailment Near Prison

On August 21, 2008, a Louisiana appellate court affirmed class certification in a lawsuit involving prisoners and guards who were exposed to toxic chemicals following a train derailment.

The train derailed near Eunice, Louisiana on May 27, 2000, and seventeen of the derailed cars contained hazardous chemicals. Seven were torn open and two exploded. Two other cars were intentionally breached during the clean-up process.

Sixty-nine cars that were not derailed were moved to a siding about a mile from the South Louisiana Correctional Center (SLCC) in Basile, a private prison operated by LCS Corrections Services, Inc. (LCS). One of those train cars, owned by Union Tank Car Company (UTC) and leased to Dow Chemical, began to leak, releasing ethylene oxide for several days. The National Transportation Safety Board determined that inspection procedures by Union Pacific Railroad (UPRR) failed to detect defective track joint bars, leading to the train accident.

Anthony Crooks and John Spellman were Louisiana state prisoners housed at SLCC at the time of the derailment. They filed separate lawsuits against LCS, UTC, Phillips Petroleum, Huntsman Petrochemicals, UPRR, Dow and the State of Louisiana in state district court, alleging among other claims that LCS neither evacuated them nor allowed them to “shelter in place,” and denied them medical treatment after they were exposed to toxic chemicals.

Crooks was denied class certification, so he had many prisoners join his lawsuit, ending up with about 450 plaintiffs. Spellman then filed for class certification. The suits were consolidated and the certification motion granted, with both guards and prisoners present at SLCC during the derailment and cleanup included as separate subclasses. All of the claims against the defendants except UTC and LCS were settled. UTC and LCS appealed the granting of class-action status in the consolidated cases.

The Court of Appeals held the plaintiffs had proven the five prerequisites for class certification set forth in Article 591(A), Louisiana Code of Civil Procedure: numerosity, commonality, typicality, adequate representation and an objec-

tively definable class. It did not matter that Crooks had been made the sole class representative and had been previously denied class certification, or that he had been released from prison, as he still had the same interest as the prisoners and guards at SLCC in winning the case.

Further, the class was represented by competent counsel, both the district court and class counsel had extensive class-action litigation experience, and the class-action forum was the most appropriate way to litigate the claims. Therefore, the Court of Appeals held that the district court did not abuse its discretion in granting the motion to certify the class. The case was returned to the trial court for further proceedings with costs taxed against UTC and LCS. The plaintiffs were represented by Baton Rouge attorney Andre P. LaPlace, Plaquemine attorney Patrick W. Pendley and Gretna attorneys

Michelle H. Hesni, George Hesni II and Davidson S. Ehle III. See: *Crooks v. LCS Corrections Services, Inc.*, 994 So.2d 101 (La.App.1 Cir. 2008), *appeal denied*.

Following remand the case settled, with final approval of the settlement being entered in September 2010. *PLN* was unable to learn the terms of the settlement as none of the lawyers involved in the case would respond to requests for details nor would the court disclose the terms of the settlement. If any of our readers have a copy of the settlement, please send it to us so *PLN* can report the details.

In a separate action related to the May 2000 train derailment, over 10,000 non-prisoner residents in Eunice filed a federal class-action suit against UPR and other defendants that resulted in a \$65 million settlement in May 2004. ■

Additional source: www.morelaw.com

Over \$26 Million Owed for Forfeited Bail Bonds in Harris County, Texas

by Matt Clarke

If you are arrested in Harris County (Houston), Texas, you can usually pay a bondsman 10% of the bail amount to get out of jail. The bondsman pledges the full amount and assures your appearance in court. But what if you are one of the estimated 5% of prisoners who bond out but then don't show up? Who pays the forfeited bail?

Theoretically the bonding company must pay and then attempt to collect the money from the bail jumper. In practice, however, there is little enforcement of judgments against bonding companies or individuals who forfeit bail. A recent review by the *Houston Chronicle* found that 500 bonding companies, some no longer in business, owe the county more than \$26 million in bond forfeitures, some of which are decades old.

On average there are 13,000 criminal defendants on bond in Harris County at any given time. Harris County bonding companies typically hold bail guarantees in excess of \$125 million. This massive business is regulated by the 11-member Harris County Bail Bond Board (HCBBB), which employs just four staff

members to oversee the 86 bonding companies in Harris County and collect outstanding debts. The board has not taken any public disciplinary action against a bonding company in the past seven years.

HCBBB member and Harris County Treasurer Orlando Sanchez was unable to produce a recent payment list for bond-related debts. “It’s convoluted,” he said.

Assistant County Attorney Clyde Leuchtag, HCBBB’s legal advisor, admitted he was unfamiliar with the board’s state law-mandated legal responsibilities. The board has no conflict-of-interest or ethical rules. In one recent case, an HCBBB member reportedly voted to approve his brother’s license.

HCBBB employees lack the personnel and computer technology to track which bonding companies owe large amounts of money to Harris County. And even when an outstanding debt is discovered, it may not be easy to collect. Kathy Braddock, an assistant district attorney who had long been in charge of the D.A.’s Bond Forfeiture Division, noticed a \$200,000 forfeiture by a drug

defendant that was several years old. She sued the bonding company, but the company argued the county was at fault for neglecting the debt for so long. Thus far the litigation has dragged on for two years.

In another case, Geraldine Soileau, a former bonding company owner, accumulated \$650,000 in forfeiture debts. The HCBBB revoked her license in 2003. But when the county attempted to collect, she declared bankruptcy and the federal bankruptcy judge allowed her to discharge the forfeitures, saying the county knew it was accepting risky, bond-related debt.

The bail bond business in Harris County has been driven strongly in recent years by a policy of Harris County judges of not allowing personal recognizance bonds, even for arrestees charged with minor offenses. [See: *PLN*, Jan. 2009, p.30]. District judges have also raised bond rates for repeat minor drug offenders and persons suspected of entering the country illegally.

Former HCBBB member and politically-active bondman Felix Michael Kubosh suggested that the board spend some of the \$4 million in annual bond col-

lection revenues on improving oversight and collecting forfeited bonds.

"I'm for accountability," said Kubash. "I think it keeps out the unscrupulous if the numbers are right and makes sure we are all playing by the same rules."

There are recent signs that issues related to bonding companies in Harris County are being taken more seriously. On September 14, 2010, a grand jury indicted Linda Sue Harrison, a bail bondsman, on seven counts that included theft, forgery, making a false statement to obtain credit, impersonating a public servant and aggravated perjury. Among other things, she is accused of forging the name of a notary public and lying about her primary residence to the HCBBB.

Linda Sue's husband, Edwin Charles Harrison, who serves as Harris County's chief financial officer, was charged with making a false statement to obtain credit, theft, tampering with a governmental record and misapplication of fiduciary property. It is unclear to what extent, if any, those charges are related to his wife's bail bond business. ■

Source: *Houston Chronicle*

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Steep Surcharges for Driving Violations Clog Texas Courts, Create Criminals

by Mike Rigby

A program designed to raise money for highway projects and trauma care by assessing steep surcharges for drunk driving and other traffic violations is clogging Texas courts and causing the dismissal rate for DWI cases to skyrocket, former state district judge David Hodges told the Texas Public Safety Commission on April 26, 2010.

The Texas Driver Responsibility Program, implemented in 2004, has had a “devastating” impact on the state’s court system, said Hodges, who is now a liaison for the Texas Center for the Judiciary, which trains and supports judges. Jurists statewide are reporting a two-year waiting list for pending DWI cases as more defendants invoke their right to trial. In addition to an increase in dismissals, charges in other cases are being reduced – to reckless driving, for example – in order to ease the enormous backlog.

Under the Texas Driver Responsibility Program, those convicted of a first DWI offense are hit with a surcharge of \$1,000 a year for the first three years. The cost soars to \$2,000 a year when a person’s blood alcohol content (BAC) measures twice the legal limit of .08.

Drivers are assessed points for other violations – two points for a moving violation, three points for a moving violation that results in an accident, and two points for a child safety seat violation. Drivers who accumulate six points or more within three years are penalized \$100 for the first six points and \$25 for each additional point. There are also \$250 surcharges for failing to have insurance or driving with an invalid license.

Critics of the program argue that many of the people ordered to pay surcharges are students, single parents and first-time offenders. Further, members of low-income families hit with the heavy surcharges often must choose between complying with the law or paying for necessities such as food, rent or medical bills.

Currently about 1.2 million Texas drivers have failed to pay surcharges assessed under the program, totaling over \$1.1 billion. Most have lost their licenses as a result.

“There is credible research to show that this program has actually created a

new class of criminals that we’re having to deal with,” said Hodges. “Our criminal justice system is supposed to be about making our streets safer, but there is no evidence that this program is making our streets safer.”

Further, the law never worked as the legislature intended; no money from the surcharges has gone to fund highway projects, and trauma centers have received only a small amount of the revenue that was anticipated under the program.

The Texas Department of Public Safety made policy changes in March 2010 designed to ease the burden on low-income violators by reducing the amount of the surcharges. Trauma center officials resisted the changes, since they receive revenue from the program.

“Loss of this funding would shift more of the cost burden from those drivers whose offenses are frequently associated with serious injuries, as well as those driving without insurance, to paying patients and the taxpayers,” said Rick Antonisse, director of the North Central Texas

Trauma Regional Advisory Council.

As a result of extensive criticism, however, the Public Safety Commission approved changes to the Texas Driver Responsibility Program on October 21, 2010, enacting new amnesty and indigence rules. The changes will allow violators to take advantage of an amnesty program that lets them pay only 10% of the assessed surcharges, up to a maximum of \$250, to have their licenses reinstated. People who can prove they are indigent (i.e., who have income at or below 125 percent of the poverty level) can participate in a program with similar provisions. Also, an incentive program that provides for reduced surcharges is being considered for violators with incomes above 125 percent but below 300 percent of the poverty level.

The new rules will be “phased in over several months,” with the amnesty program being implemented by early 2011. ■

Sources: *Dallas Morning News*, <http://gritsforbreakfast.blogspot.com>, Texas Dept. of Public Safety press release

New York Prison Officials Ordered to Produce Prisoner’s Grievances in Discovery

On December 4, 2009, a New York Court of Claims ordered prison officials to produce copies of a prisoner’s grievances, but denied the claimant’s motion to produce grievances filed by other prisoners.

Before the Court was a motion to compel production of documents in a two-count complaint for damages. The complaint was filed by Johnathan Johnson, a prisoner at New York’s Upstate Correctional Facility. Johnson’s claims involved 1) prison officials’ failure to decide grievances filed by him and other prisoners in a fair, impartial and satisfactory manner, and 2) injuries caused by prison officials’ practice of keeping a light on in his cell from nightfall to sunrise.

The Court of Claims held that Johnson’s discovery request for grievances filed by other prisoners from 2007-2009 related to facility conditions and staff conduct, as well as those concerning use of night-

lights, were not relevant to his claims because they were not filed by him.

While the Court denied the request to compel production of those grievances, it held that 177 grievances filed by Johnson himself between 2007 and 2009 were relevant to his claims. Prison officials were ordered to produce those documents and provide Johnson with copies once he had paid the copying fees. As prison officials had since produced a memorandum on the use of night-lights, that discovery issue was deemed moot.

Johnson later filed a motion for “re-hearing” after being informed the copies of his grievances would cost \$297.50. He sought to have the copies “made at the correctional facility law library, presumably at a lesser cost” The Court of Claims denied his motion on June 8, 2010, holding “there is no procedural device that entitles claimant to a ‘rehearing.’” See: *Johnson v. New York*, Albany Court of Claims (NY), Claim No. 116398. ■

Three Top Illinois DOC Officials Sacked; Director Resigns

On March 11, 2010, the administration of Illinois Governor Pat Quinn announced the firing of three top Illinois Department of Corrections (DOC) officials who were close to DOC director Michael Randle.

"As of today, executive assistant to the director Sergio Molina, chief of staff Jim Reinhart and Northern Regional Supervisor Jac Charlier are no longer State of Illinois employees," said DOC spokeswoman Sharyn Elman, who refused to comment further.

The firings were likely the result of a controversial, secretive early release program called "Meritorious Good Time Push" (MGT Push), which had resulted in the early release of about 1,745 state prisoners, some of whom had been incarcerated for as little as three weeks. Hundreds of the MGT Push releasees had been convicted of violent offenses, including 21 convicted of murder, attempted murder or conspiracy to commit murder. A separate, publicized program resulted in the early release of another 233 non-violent offenders. Some of the prisoners who were released early went on to commit additional crimes.

Illinois Comptroller Dan Hayes made the early release programs a major campaign issue when running against Governor Quinn in the primary. Quinn suspended the programs in December 2009; since then, critics have been calling for a shake-up at the DOC.

The only problem is that the wrong people may have been sacked. Molina, who was given no explanation for his firing, noted that neither he, Reinhart nor

Charlier were responsible for the release programs.

"The director stood with the governor and accepted full responsibility for the early release program, and that's precisely where the responsibility lies," said Molina.

Apparently acknowledging that responsibility, DOC Director Randle announced his retirement on Sept. 2, 2010, soon after the release of a commission report that found serious flaws in MGT Push. "The MGT Push program was a mistake," the report stated. "Although focused on reducing costs during a fiscal crisis, it failed to accomplish the overriding goals of the state's Code of Corrections: protecting the public's safety and restoring inmates to useful citizenship."

The report recommended that prisoners be required to spend at least 60 days in custody and demonstrate good behavior to receive credits; that the DOC improve its accountability and transparency in regard to early release programs; and that the DOC develop better communication with local officials concerning early releases.

Following his resignation, Randle will reportedly head a non-profit community corrections facility in Cleveland, Ohio at less than half the salary he earned as DOC director. Governor Quinn appointed Gladys Taylor as acting director of the DOC to replace Randle on September 3, 2010. ■

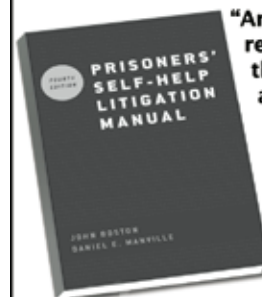
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Maryland Law Counts Prisoners According to Pre-Incarceration Residence

by Mike Rigby

A new Maryland law – the first of its kind – changed the way state prisoners were counted in the 2010 census. Historically, prisoners have been counted according to the location of the facility where they reside, which artificially inflates the populations of prison towns. Under the new law, enacted in April 2010, Maryland prisoners will now be counted as residents of the last place they lived prior to their incarceration.

The statute significantly affects Baltimore, which for decades has been suffering a decrease in population and which produces roughly 6 in 10 of Maryland's prisoners. As a result of the new law, Baltimore's official population could grow by 12,000 – which will benefit the city when congressional and state legislative lines are redrawn following the once-per-decade census count.

Civil rights activists applauded the statutory change. "There's enough people moved around to break how democracy works," said Peter Wagner, executive director of the non-profit Prison Policy Initiative, which has spearheaded a nationwide effort to reform how prisoners are counted in the census.

But officials in rural areas of Maryland with large prison populations opposed the change. Kevin Kelly, a Democrat who represents Allegany County, where 4,500 state and federal prisoners are incarcerated, said the prisoners cost the county money. "When they have to be hospitalized, they're going to be treated in our hospitals," Kelly noted. "My phones ring when the correctional officers are injured or worse, and I deal with the community concerns."

Baltimore officials see it differently, arguing that many areas of the city are unfairly losing political clout. "I don't think fairness and political power are mutually exclusive," said state Senator Verna L. Jones, adding that some of the city's neighborhoods have lost enough population to jeopardize the interests of those who remain. "It's about fairness, because you have these individuals who have families living in these communities, and because the lines are going to be redrawn, Baltimore might have been in danger of losing representation that we could not

afford to lose," she said.

Similar laws specifying that prisoners must be counted as residents of the last place they lived prior to their incarceration have since been passed in Delaware and New York. [See: *PLN*, Oct. 2010, p.18]. Such statutes are seen as a common sense solution to inaccurately counting prisoners as residents of the facilities where they are housed.

"They play no part in our community," said Edward P. Welsh, a Republican county lawmaker from Attica, New York. "They can't vote, they can't take part in the community, and I'm assuming they don't want to be here – so why are they being counted here?"

In February 2010, the Census Bureau agreed to give states more power to address the issue of how prisoners are counted in the 2010 census. The Bureau is expected to provide state officials with block level census data by May 2011, so they can decide how to apply that data to the redistricting process.

"The census is going to say where the prisons are and how many people are in them, which will enable states the practical choice of counting them in the wrong place or not counting them at all," Wagner explained. ■

Sources: *Baltimore Sun*, www.prisonpolicy.org, *New York Times*

Florida: Judgment for Female Prison Staff Alleging Sexual Harassment by Prisoners Affirmed

The Eleventh Circuit Court of Appeals has ruled that the Florida Department of Corrections (FDOC) was properly held liable under Title VII of the Civil Rights Act of 1964 for failing to remedy a sexually hostile work environment created by male prisoners at the Marion Correctional Institution (MCI).

PLN previously reported the verdict in this case, which resulted in 14 female employees at MCI being awarded \$45,000 each. The award came after a jury found the FDOC had failed to remedy sexually offensive conduct by prisoners, including the frequent use of abusive language and pervasive "gunning" – the notorious practice of prisoners openly masturbating in front of female staff – in MCI's close management units between 1999 and 2002. [See: *PLN*, Jan. 2009, p.32].

In affirming the district court's judgment, the Eleventh Circuit held that precedent established that "employers may be held liable under Title VII for harassment by third parties when that conduct creates a hostile work environment."

While prisons cannot eject unruly prisoners like businesses can remove rude customers, the FDOC cannot refuse to adopt reasonable measures to curtail harassment by prisoners, according to

the appellate court. The evidence at trial not only showed the FDOC failed to take such measures, but that guards allowed the offensive activity to continue.

In the wake of this lawsuit the FDOC took steps to curtail "gunning." Prison officials created a new disciplinary infraction to punish intentional masturbation in front of staff members that not only includes segregation time but also can result in suspension of visitation privileges. The FDOC further implemented rules that prohibit prisoners from looking out the door windows of their segregation cells when not addressing staff who have come to their cells.

The May 7, 2010 opinion by the Eleventh Circuit rejected the FDOC's arguments that the harassment was not sex-based and that prison officials were entitled to an affirmative defense requiring the employees to take advantage of any preventative or corrective opportunities provided by the FDOC. That defense only applies when the hostile environment was created by a supervisor, which was not the case here.

The district court's judgment was affirmed. See: *Beckford v. Department of Corrections*, 605 F.3d 951 (11th Cir. 2010). ■

Suspected Norovirus Strikes Oregon Women's Prison

At least two dozen female prisoners in Oregon were overcome by flu-like symptoms, causing prison officials to quarantine their unit and cancel visitation.

On May 12, 2010, Oregon Department of Corrections (ODOC) officials isolated all of the women in a minimum-security unit of the Coffee Creek Correctional Facility (CCCF) after four prisoners suffered severe gastrointestinal problems. Within 24 hours, the number of sick prisoners had grown to at least 24, according to ODOC spokeswoman Jana Wong.

Symptoms included nausea, vomiting, diarrhea and respiratory problems, stated William Keene, senior epidemiologist for

Oregon's Public Health Division. While the cause of the outbreak was not clear, Keene identified norovirus as a prime suspect. He did not believe food poisoning was responsible. "The unit doesn't have its own food preparation," he noted. "If it was being prepared in the kitchen, you'd expect [the illness] to be more spread out."

There have been at least 21 similar outbreaks – known among medical professionals as desmoteric clusters – in Oregon jails and prisons since 2000. Many of those were caused by norovirus, which is transmitted in feces. The disease spreads from person to person but can also live on surfaces for several days.

On May 13, 2010, two public health

officials visited CCCF to interview patients and take stool samples and nasal and throat swabs for testing, according to Keene. No staff members became sick, the illness did not reach the medium-security section of the prison and no prisoners required outside medical care, said Wong.

Prison officials reminded prisoners and staff to take precautions to prevent the spread of illness, such as thoroughly washing hands with soap and water and sanitizing surfaces. They also temporarily closed the minimum-security visitation area which holds visits on Fridays, weekends and holidays. ■

Sources: *The Oregonian*, *Associated Press*

Wexford Pays \$300,000 in Illinois Prisoner's Death

Wexford Health Services paid \$300,000 last year to settle a lawsuit regarding the wrongful death of an Illinois prisoner who died in June 2003 after suffering an asthma attack.

The complaint alleged Wexford failed to properly train and supervise its medical staff and failed to ensure its

medical equipment was up to date. The suit also claimed Dr. Kul Sood did not ensure that an oxygen tank brought to the prisoner's cell was full and properly working; he further failed to provide the prisoner with adequate asthma medication.

With two surviving minor children,

the lawsuit alleged loss of parental services as a result of the prisoner's death. The matter was settled in January 2009. The prisoner's estate was represented by Chicago attorney Kurt D. Lloyd. See: *Cooper v. Wexford Health Services*, Will County Circuit Court, 12th Judicial Circuit (IL), Case No. 05-L-805. ■

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If You Were Strip-Searches During Admission into the Cook County Jail Between January 30, 2004 and March 30, 2009, You May Be Entitled to Money.

A Settlement has been proposed in a class action lawsuit regarding strip searches that were conducted on pre-trial detainees during the initial admission to Cook County Jail. The lawsuit brought several claims under the United States Constitution to challenge the Jail's blanket strip search policy. As a result of the proposed settlement, Cook County and the Office of the Sheriff of Cook County have agreed to pay \$55 million to pay the claims of approximately 300,000 Class Members and to pay the costs of class notice and settlement administration, attorneys' fees and costs, and incentive awards to the Plaintiff Class Representatives. In addition, the Defendants have given the Plaintiffs the right to pursue additional money from the County's insurance companies.

The United States District Court for the Northern District of Illinois authorized this Notice. The Court will have a hearing to decide whether to approve the settlement, so that the benefits may be paid.

Who is included?

You are a Class Member and are eligible to get money if you were:

- (1) A male who was subjected to a strip search and/or a visual body cavity search as a new detainee at the Cook County Jail on or after January 30, 2004 ("**Class I**"); and/or
- (2) A person (male or female) charged with only a misdemeanor or lesser offense not involving drugs or weapons who was subjected to a strip search and/or a visual body cavity search as a new detainee at the Cook County Jail on or after January 30, 2004 ("**Class II**").

What does the Settlement provide?

The Settlement would entitle men who are members of Classes I and II to receive an estimated payment of \$1,000. Men who are members of only Class I would receive an estimated payment of \$700. (Men who are members of Class II are automatically members of Class I. In other words, no man is a member of Class II only.) Women who are members of Class II would receive an estimated payment of \$500. Those amounts could be higher or lower, depending on how many Class Members submit valid Claim Forms. The payment amount is the same regardless of the number of times you were searched.

Additional money may be available from Cook County's insurance policies for this case. If so, that money would be paid out later, in a second check.

How do I get money from the Settlement?

You must fill out and mail a Claim Form postmarked by January 27, 2011 to be eligible for any payment. To get a Claim Form, go to www.cookcountystripsearch.com or call 1-877-314-6057 (toll-free) or 1-312-224-4658 (non-toll-free). You can also write to Cook County Strip Search Settlement, c/o Rust Consulting, Inc., P.O. Box 24660, West Palm Beach, FL 33416.

What are my legal rights?

If you fall into the definition of either Class I or Class II, your rights are affected, whether you act or don't act. Your available options are described further below.

Remain in the Settlement and file a Claim Form for money. In order to get a payment, you must submit a Claim Form postmarked by **January 27, 2011**. If you file a claim for payment, you will give up the right to sue Defendants regarding the strip search of pre-trial detainees during the initial admission process into Cook County Jail between January 30, 2004 and March 30, 2009. You also have the right to appear before the Court and object to or comment on the proposed Settlement. You give up your right to sue and are bound by Court orders in this case even if your objection or comment is rejected. Written objections and comments **must be received by January 27, 2011**.

Exclude Yourself. If you don't want to give up your right to sue or if you don't want to be part of this case, you must mail a letter to the claims administrator requesting to be excluded, and that letter **must be received by January 27, 2011**.

Do nothing. If you don't do anything, you will get no money, and you will give up your right to sue for the claims being settled in this case.

The Court will determine whether to approve the Settlement and attorneys' fees and expenses at a Fairness Hearing on **March 1, 2011, at 9:30 a.m.** at the United States District Court for the Northern District of Illinois, 219 South Dearborn, Courtroom 2103, Chicago, Illinois 60604. The Court has appointed Class Counsel to represent everyone entitled to file a claim. Class Counsel is Michael Kanovitz at Loevy & Loevy, 312 N. May Street, Chicago, Illinois 60607, tel 1-877-722-2928.

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Mailing Address of Class Member _____

City _____ State _____ Zip Code _____ Gender (M/F) (required) _____

Social Security Number or I-TIN (if any): _____ Date of Birth (Mth/Day/Year) (required): _____ Phone of Class Member (optional): _____

Note: If you do not provide a valid social security number or I-TIN, 28% of your payment will be withheld and paid to the federal taxing authorities. You can ask for a refund when you file your tax return.

Any other name(s) or alias(es) used: _____ IR # (not required) _____

If your claim form is approved, please indicate how we should handle your check (expected after April 2011).

- ☐ Mail the check to the address above **OR**
☐ Mail the check to a different address, listed below:

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- ☐ On at least one occasion between January 30, 2004 and March 30, 2009, I was admitted as a pre-trial detainee into the Cook County Jail on only a misdemeanor or lesser charge(s) *not* involving drugs or weapons

NOTE: The number of times you were admitted to Cook County Jail does NOT affect the amount of your potential payment.

I declare under penalty of perjury under the laws of the United States that the information provided on this form is true and correct.

Signature: _____

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Wisconsin Law Prohibiting Hormone Treatment for Prisoners with Gender Identity Disorder Found Unconstitutional

by Matt Clarke

On May 13, 2010, a Wisconsin federal court issued a 68-page decision holding that a Wisconsin state law prohibiting hormone therapy for prisoners with gender identity disorder (GID) was an unconstitutional violation of their equal protection and Eighth Amendment rights.

Andrea Fields, Matthew Davidson (aka Jessica Davidson) and Vankemah D. Moaton, Wisconsin prisoners with male-to-female GID, brought a civil rights action under 42 U.S.C. § 1983 against Wisconsin Department of Corrections (WDOC) officials after their feminizing hormone therapy was discontinued without medical justification. In 2005, the state legislature passed Act 105, which prohibited hormone treatment and sex reassignment operations for prisoners with GID (Wis.Stat. § 302.386(5m)). Fields, Davidson and Moaton challenged Act 105's constitutionality.

The district court recognized that GID, sometimes referred to as transsexualism, is a serious medical need. It is classified as a psychiatric disorder in the current Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The plaintiffs' experts testified that if left untreated, GID can cause serious psychiatric consequences such as anxiety, sleeplessness, inability to concentrate, depression, genital self-mutilation and suicidal thoughts. One in 11,900 genetic males has GID. It is less common among genetic females.

The court noted that the legislative justification for Act 105 was to save money, though the per-prisoner annual cost for hormone therapy (\$300-1,000) was less than the amount commonly paid by the WDOC for treatment using antipsychotics Quetiapine (\$2,555-2,920) or Risperidone (\$2,555).

Likewise, the cost of sex reassignment surgery (about \$20,000) was less than that of coronary bypass surgery (\$37,244), kidney transplant surgery (\$32,897) and other surgeries provided by the WDOC. One expert noted that people with untreated GID will cost additional money due to the serious psychiatric consequences of not treating their condition.

Because the WDOC prohibits prisoners from paying for their own health care,

Act 105 prevented them from receiving hormone therapy or reassignment surgery for GID by the only method available to them. The plaintiffs' experts testified that although not all people with GID were good candidates for hormone therapy or sex reassignment surgery, GID would not go away and was not effectively treatable with psychotherapy alone.

Prison officials presented no GID experts as witnesses. The WDOC's experts, including WDOC Medical Director Dr. David Burnett, testified that they believed Act 105 was medically inappropriate because it interfered with a health care provider's ability to appropriately treat patients.

All three plaintiffs had received hormone therapy before coming to prison and during their incarceration prior to the enactment of Act 105. They had various medical problems after their hormone therapy was terminated following the passage of Act 105, and those problems abated after the court temporarily enjoined the enforcement of the

Act. [See: *PLN*, Aug. 2006, p.28].

The district court found that Act 105 violated the plaintiffs' Eighth Amendment right to adequate medical care. It also violated their Fourteenth Amendment equal protection rights, because it targeted prisoners with GID while no other legislation was passed to prohibit medical treatment for any other group of prisoners. Further, although WDOC officials alleged that having feminized male prisoners in the prison population would disrupt security and lead to assaults on those prisoners, they were unable to show any rational connection between Act 105 and prison security.

Therefore, the court held the plaintiffs were entitled to a permanent injunction barring the enforcement of Act 105, which was found to be unconstitutional and invalid. The parties have since filed cross-appeals. See: *Sundstrom v. Frank*, U.S.D.C. (E.D. Wis.), Case No. 2:06-cv-00112-CNC. ■

Failure of CMS Nurses and Doctor to Properly Treat Broken Leg Overcomes Summary Judgment

The Eighth Circuit Court of Appeals reversed the grant of summary judgment to a doctor and two nurses employed by Correctional Medical Services (CMS). The lawsuit claimed an Eighth Amendment violation related to the treatment of a prisoner who broke his leg just above the ankle during a softball game.

While sliding into second base on August 9, 2002, Missouri prisoner Bryan Croft fractured his leg. CMS nurses Wanda Patton and Pam Tanner later admitted that Croft had an obvious fracture, as his foot was "not at the right angle" and he was in obvious pain. Croft's claim was based on the failure of the nurses to stabilize his leg before moving him. Instead, they tried to move him onto a backboard by holding him by the shoulders and knees. When they did so, his "foot completely spun over backwards and hit the dirt." They then loaded him on a golf cart and took him to the infirmary.

The Eighth Circuit found the "re-

cord showed the nurses' acts conflicted with the emergency nursing protocol for fractures, and it is commonly known that an obviously fractured limb requires immobilization and stabilization, particularly before a person is moved and that failure to splint or otherwise immobilize a fractured limb puts the person at risk for further injury and increased pain." As such, there was sufficient evidence for a jury to decide whether Patton and Tanner were deliberately indifferent to Croft's serious medical needs.

The appellate court further held there was a trial-worthy issue as to whether Dr. Robert Hampton exercised independent medical judgment or if his decision to delay an examination of Croft's injury by an orthopedist for 72 hours was a decision that fell so far below the reasonable standard of care as to amount to deliberate indifference.

The Eighth Circuit's finding was based on Dr. Hampton's failure to follow the

recommendation of an emergency room doctor without examining Croft himself. Because Croft was diagnosed with "an unstable comminuted fracture," he required care within twenty-four hours to avoid neurovascular compromise. It was contested whether the failure to provide treatment and the required surgery within that time period placed him at substantial risk.

The Court of Appeals reversed the district court's grant of summary judgment to Patton, Tanner and Hampton,

but upheld summary judgment in favor of CMS because none of the company's policies were at issue. See: *Croft v. Hampton*, 286 Fed.Appx. 955 (8th Cir. 2008) (unpublished).

The district court ordered the parties to engage in mediation following remand, and the case settled in July 2009 under undisclosed terms. Croft represented himself pro se in this litigation. See: *Croft v. Hampton*, U.S.D.C. (E.D. Mo.), Case No. 2:04-cv-00051-ERW. ■

Sixth Circuit Reverses Summary Judgment for Dentist Who Failed to Provide Temporary Filling

Genuine issues of material fact precluded granting summary judgment to a prison dentist accused of providing deliberately indifferent dental treatment, the U.S. Court of Appeals for the Sixth Circuit found.

Gregory T. McCarthy, while incarcerated at Ohio's Chillicothe Correctional Institute in 2002, had a painful cavity in one of his teeth. Dr. Maitland Place, a contract dentist at the prison, provided McCarthy with ibuprofen for pain but refused to supply a temporary filling. According to Dr. Place, McCarthy had to wait to get a filling until several of McCarthy's other teeth were extracted. McCarthy endured significant pain from his cavity for seven months until Place finally filled the tooth.

McCarthy filed suit in federal court, arguing that Dr. Place's refusal to temporarily fill his tooth constituted deliberate indifference in violation of the Eighth Amendment. According to McCarthy, Place regularly performed temporary fillings on other prisoners. Place's decision, then, to give McCarthy only ibuprofen was deliberate indifference because it was

a "less efficacious treatment route." The district court granted summary judgment to Dr. Place; McCarthy appealed, and the Sixth Circuit reversed.

"McCarthy ... presented evidence that Dr. Place was deliberately indifferent to his serious medical needs by showing that Dr. Place was aware of the significant pain McCarthy was experiencing due to his cavity," the Court of Appeals wrote, "yet he failed to relieve this pain for over seven months." Further, the appellate court held, McCarthy "demonstrated that Dr. Place could have prescribed a temporary filling inasmuch as he had done so for other inmates..." Thus, it was error for the district court to grant summary judgment in favor of Dr. Place.

The judgment of the district court was reversed and the case remanded for further proceedings. See: *McCarthy v. Place*, 313 Fed.Appx. 810 (6th Cir. 2008) (unpublished).

Unfortunately, McCarthy, who had been released from prison, died while the appeal was pending. The district court therefore dismissed the case on June 17, 2009, following remand from the Sixth Circuit. ■



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Former Utah Prison Guard Ordered to Pay Over \$1.4 Million for Raping Prisoner

by Derek Gilna

U.S. District Court Judge Clark Waddoups, in a February 2010 decision, ordered former Utah State Prison guard Louis Poleate to pay \$435,332.50 in compensatory damages and \$1 million in punitive damages to prisoner Priscilla Chavez for a rape that occurred in September 2001. Poleate had already served five years in prison on a third-degree custodial sexual relations charge for raping Chavez, who was 18 at the time.

Chavez's lawsuit alleged that while she was incarcerated at Utah State Prison, Poleate removed her from her cell after telling her they were going to the infirmary. Instead, "Poleate took her to a secluded gatehouse, which was not under surveillance by prison officials ... and viciously raped Ms. Chavez over a period lasting an hour and a half ... [while] her hands and feet were in shackles."

The district court found "... that several considerations unique to this case properly factor into consideration of non-economic damages. First is Ms. Chavez's age at the time of the incident. In addition to her mental health issues, her young age made her particularly vulnerable to abuse by an unscrupulous guard. It [is] also tragic that Ms. Chavez's first experience with sexual intercourse would be a violent rape. Further, Ms. Chavez was shackled during the rape, further compounding her feelings of helplessness and despair. Moreover, Ms. Chavez was in prison for assaulting a guard, which made her even less likely to fight back."

Judge Waddoups noted that the suit was filed pursuant to 42 U.S.C. § 1983, which "creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." The judge analogized the case to another lawsuit in federal court in Colorado, *Hall v. Terrel*, U.S.D.C. (D. Col.), Case No. 08-cv-00999 -DME-MEH, which also involved the brutal rape of a female prisoner by a male guard (and resulted in a \$1.55 million damage award). [See: *PLN*, Nov. 2009, p.12]. Like Poleate, the guard in the Colorado case, Leshawn Terrel, was "allowed to plea to less serious criminal charges."

According to her lawsuit, Chavez had exhausted her available administrative

remedies prior to filing suit by submitting multiple grievances pursuant to the prison's grievance procedure, all of which were either disregarded, ignored or used for retaliatory purposes by prison officials. Chavez claimed that other guards retaliated against her by spilling bleach in her cell and spraying her sheets with chemicals.

"If there is any accuracy to [Chavez's] descriptions of having guards retaliate against her after Mr. Poleate was punished for raping her, those guards will also be given something to think about with this damage award," Judge Waddoups stated.

Randy Phillips, Chavez's attorney, said he was satisfied with the judgment, which was obtained after Poleate represented himself and called the lawsuit "frivolous." It was unclear whether Poleate has any assets that can be used to satisfy the \$1.4 million damage award; although his exact address is unknown, he is reportedly living in Wisconsin and is listed on the national sex offender registry. See: *Chavez v. Poleate*, U.S.D.C. (D. Utah), Case No. 2:04-cv-01104-CW. ■

Additional sources: *Salt Lake City Standard-Examiner*, www.ksl.com, *Deseret News*

Indian Jail Opens Private Outsourcing Program

by Matt Clarke

Authorities at the Cherlapally Central Jail, a 2,100-bed facility near Hyderabad, the capital of the Indian state of Andhra Pradesh, announced in May 2010 that they will open an outsourcing unit. [See: *PLN*, July 2010, p.32].

The program will be privately run by Bangalore-based Radiant Info Systems and employ 210 prisoners in three round-the-clock shifts of 70 workers each. It will specialize in back-office work such as data entry and information processing for banks and insurance companies. The prisoners will be paid between 100 and 150 rupees (\$2.20 to \$3.32) a day, which is much higher than the 15 rupees per day paid to prisoners with more conventional jobs such as manufacturing furniture.

According to Radiant director C. Narayanacharyulu, the jail was chosen due to its unusually high percentage (40%) of educated prisoners. Only 2,000 of the 13,000 prisoners in Andhra Pradesh jails are listed as well-educated. Education is important for the jobs in the outsourcing unit because they involve the use of sophisticated electronic information technology. Software company Tata Consultancy Services is providing equipment for the program.

"We have identified the area in the jail where the unit will come up. It will have computers as well as connectivity," said C.

N. Gopinatha Reddy, Andhra Pradesh's State Director General of Prisons and Correctional Services. "The idea is to ensure a good future for the educated convicts after they come out of jail."

The business process outsourcing (BPO) program will initially concentrate on the Indian market to avoid potential controversy from having prisoners do international work. If successful, the program may expand to include a call center and be extended to other jails in Andhra Pradesh. The BPO at the Cherlapally Central Jail began in November 2010 with an initial 13 prisoners enrolled in a training program.

"We are happy to be involved in establishing the country's first jail BPO, which will be fully operational in about three months," said Gopinatha Reddy.

Of course this is just what is needed for an overpopulated, impoverished country with an insufficient number of well-paying jobs for its work force – competition from its prisoners. Although Narayanacharyulu depicts the program as a win-win proposition with both the prisoners and Radiant making money, there is little doubt where the bulk of the profits will go. ■

Sources: *BBC News*, www.itbusinessedge.com, *Khaleej Times*

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Taser Timeout

by Kelly Virella

In 2005, the sheriff of Kankakee County, Illinois discovered the alchemy necessary to turn the financial burden of operating jails into a financial boon. He rented to other agencies—including Cook County Jail—as many of his 668 beds as possible.

Running a jail—particularly, leasing the beds—is dangerous work. Jails are war zones where detainees and guards fight for power. In 1986, a Kankakee County jail guard was killed while helping escort a violent detainee from a jail community room to a cell. The detainee kicked the guard, Jerome Combs, repeatedly in his chest, according to the *Kankakee Daily Journal*. Within 75 minutes he hemorrhaged, choked on his blood and vomit, and died.

To maintain order in the jail, Kankakee County guards have used persuasion, physical force and, if necessary, nonlethal weapons such as pepper spray. Then, about six years ago, they added another weapon to their arsenal—Tasers.

Tasers shock detainees with a five-second cycle of 1,400 volts of electricity, causing total-body muscle contractions, severe pain and sometimes electrical burns and permanent scarring.

Taser International, the weapon's manufacturer, has adduced several studies indicating that the device isn't lethal. But more than 330 Americans are reported to have died after being shocked with a Taser since June 2001, according to an Amnesty International report. One of the most recent deaths in Illinois occurred March 10 in south suburban Midlothian. The same day, the Chicago Police Department announced it was adding several Tasers to its arsenal. Amnesty International ranked the department the 10th worst in the nation when it comes to law enforcement with the most deaths following Taser use.

To prevent the misuse of their new Tasers, the Kankakee County Sheriff's office implemented a policy requiring guards to delay deploying them until exhausting other tactics or determining other procedures are infeasible. It also implemented this policy to ensure compliance with the law. The U.S. Constitution has traditionally been understood to prohibit detainees from being subjected to an unnecessary risk of injury or unwarranted deadly force.

Similarly, sentenced detainees—typically less than 5 percent of the jail's population—cannot be subjected to cruel and unusual punishment. Pretrial detainees—the other 95 percent of the jail's population—can't be punished at all. Thus, Kankakee's policy is that Tasers, like other devices and techniques, should only be used to gain control—never to punish.

Shortly after Kankakee's new jail, the Jerome Combs Detention Center, opened in 2005, problems emerged. By June 2005, detainees there began to sue, alleging the weapons were being misused.

"I can still see Dion W. Hill [sic] and Randy Rencher faces after they had been electric shock [sic] almost to death," wrote Curtis Smith, a detainee, in a handwritten complaint to the U.S. Department of Justice. "There [sic] mouth was twisted, stretched wide open and closing uncontrollable [sic], shivering with slime coming out of the side of there [sic] mouth, their body shaking, jumping, trembling."

According to an analysis by *The Chicago Reporter*, guards at the Jerome Combs Detention Center were underreporting their Taser use and sometimes using Tasers when it might have been unwarranted—for example, when detainees were in restraint chairs or in handcuffs. By December 2009, a total of 15 lawsuits alleging Taser misuse were filed against staff at the facility, implicating at least 21 employees. Two of the lawsuits have been dismissed. Four of them were filed by Cook County detainees; three by federal detainees. Experts said few U.S. jails are fighting that many Taser-related lawsuits at once.

One Kankakee lawsuit stemmed from an incident that occurred in February 2006. Federal detainee Darryl Lester Lewis was housed at the Jerome Combs Detention Center while awaiting sentencing for being a felon in possession of a firearm. While detained in Kankakee, he began a hunger strike, protesting his placement, he alleged, without due process, in a segregated, maximum-security housing unit.

Eleven days into his hunger strike, Lewis displayed to a security camera in his cell a bottle of Motrin, which jail officials saw as a threat that he would attempt to overdose. Guard Michael

Shreffler and two other guards entered Lewis' cell, where they saw him lying on his bed. Shreffler ordered him to get up. Lewis turned his head toward the guards to explain that he was too weak and sick to move, but, as soon as he did, Shreffler shot him with a Taser, Lewis alleged.

Shreffler and the two other guards allege that Shreffler repeated his order three times, with Lewis refusing—even cursing and yelling—each time. Shreffler resigned April 20, 2009, and began working as a police officer for the city of Kankakee.

Asked about the allegations in the lawsuits, Jerome Combs Detention Center Chief Deputy Ken McCabe said, "We get sued for some of the craziest stuff in the world." He said that incidents involving Tasers are consistently recorded on video, and in many cases exonerate the guards.

But Cynthia Leggett, a former high-ranking Kankakee guard, said there is no doubt that jail guards in Kankakee County occasionally misuse Tasers. "There are a lot of areas where they're isolated and there's no cameras," she said. "You're asking me if I feel as though sometimes the inmates have been treated unfairly? My answer is, 'yes.'"

Leggett served Kankakee County as a jail guard for 33 years and rose to the rank of lieutenant, putting her second in command of the second shift at the detention center for about 18 months. She retired in 2008. Leggett never witnessed anyone misuse Tasers, she said, but several detainees reported it to her and after investigating the incidents, she urged her supervisees to stop. Some did, she said. Others did not.

At least 101 Jerome Combs Detention Center detainees were shocked by a Taser from Aug. 13, 2007 through Dec. 14, 2009, according to a *Chicago Reporter* analysis of incident and supervisory Taser use reports filed by guards during that time.

Eighteen percent of the Taser incidents described in the incident reports occurred after a detainee allegedly displayed a physical threat, such as swinging at guards with a closed fist, according to the *Reporter's* analysis. Ten percent occurred after the detainee allegedly assaulted the guard.

Some of the Taser use occurring at the Jerome Combs Detention Center arouses

troubling suspicions. Most of the firings are unreported, according to data the *Reporter* obtained from the memory of 15 of the jail's Tasers. Only about four percent were actually reported. Essentially, for every Taser firing reported, 27 actually occurred.

A Taser International spokesperson said that the discrepancy between the data from the Tasers and reported firings could be attributed to test firings, a routine practice conducted to ensure the weapons work. Michael Downey, Kankakee County's Chief of Corrections, said he recommends that staff test fire each Taser once a week. But David Parrish, a former Florida county jail warden, who advises jails and serves as an expert witness in use-of-force cases, said testing doesn't justify such extensive underreporting. "If it was for testing, then they ought to have a record of it," he said. "I'd almost equate it with a firearm—you better be able to explain where all the bullets went."

Another troubling aspect of the jail's Taser record is the frequency with which detainees are shocked by a Taser while restrained—handcuffed or strapped into a restraint chair—and ostensibly posing

no threat. About one in four, or 23 percent, of the Taser incidents occurred under this circumstance, according to the *Reporter's* analysis.

In these cases, Downey explained, "It was probably a drive stun [when a Taser is held against the body], trying to get somebody to comply."

Parrish said it's inappropriate to use a Taser on someone who is already restrained. An exception to that categorical ban could be made if the detainee were biting and kicking the guard while being strapped in, he said.

The *Reporter* also found that Jerome Combs Detention Center guards resorted to Tasers earlier than the county's policy says they should. Twenty-eight percent of the Taser incidents occurred before guards applied any physical force, according to the *Reporter's* analysis.

McCabe, the chief deputy, said that's what guards are supposed to do. A few years ago, Downey said, the jail gave guards the green light to preempt physical force, despite what the written policy says. "Usually, after we have tried everything we can, verbally, to try and get somebody to follow directions, that's when the Tasers will at least be brought out and described

as, 'Hey, we're gonna use this or you're gonna do what we're asking you to do here,'" McCabe said.

That's inappropriate policy when guards' orders are trivial and detainees are simply refusing to comply with an order, said Bill Collins, a corrections law attorney who runs a consulting service and newsletter that helps jails and their attorneys comply with the law.

These anomalous patterns and others surface in 10 of the incidents jail officials are litigating. Of the 10, guards failed to document two instances. Four allegedly occurred while the detainees were restrained. Two were allegedly videotaped on one or more of the jail's 200 cameras, but when the plaintiffs asked for copies, the jail allegedly refused to provide any or denied their existence. And two plaintiffs allege they received no orders or warnings before a Taser was used.

Kankakee County began renting jail beds to other Illinois counties in the late 1970s, when its jail was partly vacant. Officials eventually suspended the rentals because the jail became overcrowded with local residents as a drug-induced crime wave rippled through the county.

Yet, even as their local jail popula-

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Taser Timeout (cont.)

tion exploded, Sheriff Timothy Bukowski never lost sight of the potentially lucrative opportunity to rent beds. While working to build their new jail—the Jerome Combs Detention Center—Bukowski planned to reinstitute the deals, the *Kankakee Daily Journal* reported. First Bukowski and the county commission forged an agreement in 2001 to keep the old jail open and rent beds there after opening the new one. A year later, with the ground broken at the site of the new jail, Bukowski and the commission forged an agreement to rent beds there, too, the newspaper reported. Not long after the new jail opened in February 2005, the Kankakee County commission voted to add 144 more beds, partly so they could win another contract.

Coincidentally, Cook County Jail officials were then looking for solutions to their jail's overcrowding and to the gang turf wars that were occurring there. In 2002, the 10,000-bed jail reached an all-time high of 11,336 detainees, and according to at least one detainee, gang conflict intensified.

Cook County Jail officials decided they needed to ship alleged gang ringleaders to another county jail. But the gang violence was not the only reason jail officials began transferring them, detainees said. Jail officials also saw the transfers as a way to pressure the gangs inside the jail to divulge intelligence that might help Cook County prosecutors lock up other gang members, said Anthony Williams, a member of the Gangster Disciples. Williams was among those transferred as he awaited trial on a first-degree murder charge. For seven months, various Cook County officials summoned Williams from his cell every other week for a meeting, offering him items, such as cigarettes, as a quid pro quo for gang intelligence.

In September 2006, more than a year before gaining county approval to do so, the Cook County Department of Corrections began sending detainees to Kankakee as a "relief valve" to solve overcrowding, according to Cook County Jail spokesperson Steve Patterson. The *Kankakee Daily Journal* reported that Cook County paid Kankakee \$75 daily for each detainee. Detainees ran into conflict as soon as they arrived, said Leggett, the former high-ranking guard. Cook County introduced the jail to its first

transsexual, Leggett said. "There was a culture shock," she added. Guards allegedly provoked detainees with racial slurs and at a Kankakee County commission meeting, two commissioners warned that Cook County would attract detainees' families to their area, according to the *Kankakee Daily Journal*. "These people in Cook County are a different breed, especially your criminals up there," said Commissioner Leonard Martin.

Several of the allegedly unjustified Taser incidents meted out to former Cook County detainees stemmed from their resistance to perceived mistreatment and their placement in the potentially hostile environment of Kankakee.

Williams said that about a week after his arrival at the jail in April 2008, he was subjected to a Taser in an isolated area of the jail while strapped into a restraint chair. Guards took him there, he alleges, after he started kicking the door of his cell to protest their refusal to allow him to access his legal papers. When he arrived at the chair, he began to spit up because of an asthma attack, he said. So they placed a translucent mesh hood over his head to prevent him from spitting on them, he alleges. Three guards used a Taser on him at least five times, over a period of six to seven minutes, while taunting him with racial slurs, he alleges.

Roughly five days later, Williams went to the doctor, where he complained about what happened to him. "That doctor didn't even care," Williams said. "He was like, 'Well, we're just here to check and make sure you're alive and go back to your cell.'"

Two of the Cook County detainees suing Kankakee officials were shocked by a Taser after they returned from Cook County in a transport van and protested the repeated searches to which they were subjected at Jerome Combs, according to incident reports guards wrote. Both detainees—Michael Ferguson and Joseph Pettis—were allegedly handcuffed, belted and shackled during their Taser incidents.

Since 2005, Kankakee has earned millions in revenue from housing out-of-county detainees. Of its earnings, \$1.4 million has come from Cook County. This relationship is legitimate, Cook County's Patterson said by e-mail. Cook County pressures gangs to divulge intelligence, he said, but doesn't transfer them if they fail to cooperate with interrogators. "Those who are housed in Kankakee County are

housed there out of concern for our own facility," he said. "Most, if not all, of these detainees were behavioral problems for our staff who had repeatedly refused to obey orders here, may have been subjected to nonlethal restraint here, threatened the lives of staff or threatened the lives of other detainees."

Cook County Jail guards aren't armed with Tasers, but, Patterson said, it's perfectly legal that Kankakee's are. He said that detainees transferred there never told Cook County officials they were being abused with Tasers, and any lawsuits Kankakee County may be facing are none of Cook County's business.

"We are not involved in litigation in Kankakee County and do not wish to express an opinion about it," he said. "We are concerned with whether the Kankakee County Jail is following the Illinois County Jail and Detention Standards. We have not been made aware that the jail is noncompliant with those standards."

Some former Kankakee detainees agree there is no conspiracy. They believe Taser misuse is an isolated problem at the jail, confined primarily to rogue guards who work the second shift, from 3 p.m. until 11 p.m., after the jail's brass have gone home for the day. Nearly half of the Taser incidents at the jail occurred then, according to the *Reporter's* analysis.

The guard who used a Taser the most was two-time defendant Jeremy Most, the *Reporter* found. But the alleged Taser misuse appears too widespread to be the handiwork of a few rogue guards, Collins said.

There are "terribly systemic problems in this jail," said James Rowe, a lawyer for two plaintiffs. "I think it's the result of malicious guards who know that they can act without consequence or without any type of accountability."

Leggett said Downey hires people without the emotional fortitude for the job and promotes the inexperienced. Many of them use their Tasers irresponsibly, she said. According to two detainees, some guards scope detainees, shining their Tasers' red lights on their chests, just for fun.

The jail's use-of-force policy vaguely explains the criteria an incident must meet before a guard resorts to a Taser, but it doesn't outline any prohibitions against the use of Tasers on certain vulnerable populations, such as pregnant women. Nor does it restrict or forbid consecutive or extended Taser shocks.

Downey said that while the policy doesn't explicitly forbid such things in writing, his guards all follow Taser International's guidance. Taser's website, on the other hand, explicitly states, "Each agency is responsible for creating their own use-of-force policy and determining how Taser devices fit into [that] policy." Though an article posted on the site does warn that the devices should not generally be used against pregnant women, the elderly or the visibly frail.

But Rowe and John Paul Carroll, a lawyer for two of the plaintiffs, said their research suggests Downey doesn't know what his guards are doing because he doesn't monitor them adequately. Nor do the other systems designed to find and uproot malicious guards function well, they said. The detainee disciplinary board, a body of one to three guards designed to ensure that detainees are fairly disciplined, doesn't receive every report and receives many late, Leggett said.

Moreover, when a detainee alleges Taser misuse, Carroll and Rowe said, guards are rarely investigated or found at fault. The only guard suspended in connection with Taser misuse is John Juergens. He is a defendant in a case filed by Donald Sampson, but Juergens'

suspension without pay stemmed from his unrelated accidental Taser use on a female detainee.

Most of the detainees suing Kankakee County officials for allegedly misusing Tasers have violent criminal records. Of the 10 incidents being litigated by alleged victims, two allegedly occurred after detainees punched the guards involved. Several of the plaintiffs have been convicted. Their crimes are as serious as first-degree murder. But alleged Taser victims said they didn't deserve their mistreatment.

"They could've went about it a different way," said Deon Hilliard, a Cook County detainee who was subjected to a Taser while fighting another detainee. "I thought, normally, they used it for their protection. I mean, because, we wasn't trying to hurt them or nothing. We wasn't coming at them with physical force or threats of violence."

Plus, Williams pointed out, not everyone shocked by a Taser at the jail is a criminal. As an example he cited Devan Gibbs, an 18-year-old Cook County detainee allegedly subjected to a Taser after mouthing off at guards via the intercom while locked alone inside his maximum-security cell. Following his April 2008

Taser incident, Gibbs was acquitted of the first-degree murder charge against him. Gibbs didn't sue. "He thought it was unjust, unwarranted, but that was just the way things were," said Tommy Brewer, Gibbs' attorney. "That's the way things are—they can't do much about it." ■

Jeff Bierter, Chris Danzig, Tara Garcia Mathewson, Amalia Oulahan, Chris Pratt, Elizabeth Schiffman and R. Thomas helped research this article, which was originally published in The Chicago Reporter. It is reprinted in PLN with permission from the publisher.

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California: 15% Work Credit Limitation Based on Stayed Violent Convictions Applies to Non-Violent Controlling Offense

by John Dannenberg

The California Court of Appeal, Third District, ruled in April 2008 that when a prisoner receives multiple convictions arising from a single act, some of which qualify as “non-violent” while others qualify as “violent” or “serious,” the harsher 15% limitation on earned work credits attaching to violent or serious offenses must be applied to the non-violent offense when it is the controlling case and the violent/serious offenses are stayed. The ruling was upheld by the state Supreme Court in August 2010.

Nathan Pope was convicted of gross vehicular manslaughter while under the influence of drugs and alcohol, plus two counts of alcohol-related driving resulting in great bodily injury (GBI). Under California law, the vehicular manslaughter charge is not considered a violent felony (as defined in Penal Code § 667.5), but the GBI offenses are.

However, under Penal Code § 654, because all counts resulted from a single act, Pope could only be punished for the charge that carried the longest sentence, with the other counts stayed. This resulted in his being sentenced to 6 years on the non-violent vehicular manslaughter offense with the 5-year GBI convictions stayed.

When Pope entered the prison system, the California Dept. of Corrections and Rehabilitation noted that he had been convicted of the violent GBI charges and relied on Penal Code § 2933.1(a) to conclude that its 15% limitation on work credits attached to his non-violent controlling case because he had in fact been “convicted” of the (then stayed) violent offenses. Pope petitioned the superior court for habeas relief, relying on *In re Phelon*, 132 Cal.App.4th 1214 (Cal.App. 1 Dist. 2005) [See: *PLN*, June 2008, p.34].

Phelon held that when the convictions were kidnapping (non-violent) plus assault with intent to commit rape (violent), but the latter count was stayed because the former carried a longer sentence, the prisoner escaped the 15% work credit limitation imposed on violent convictions. The superior court followed *Phelon* and granted Pope’s habeas petition. The state appealed.

The Third District rejected *Phelon*, because in Pope’s case it produced absurd results. That is, since his 6-year controlling

sentence would, according to *Phelon*, earn “halftime” credits (resulting in 3 years of incarceration), the effect of staying the lesser (but violent) terms of five years for GBI put Pope in the position of being rewarded for having injured his victims (i.e., 3 years is less than 4.2 years [5 years reduced by 15% work credits]).

Accordingly, the appellate court concluded that § 2933.1(a) created an exception to the stay provisions of § 654, and that § 2933.1(a)’s 15% work credit limitation applied to Pope’s 6-year non-violent controlling offense. See: *In re Pope*, 70 Cal. Rptr.3d 314 (Cal.App. 3 Dist. 2008).

The California Supreme Court granted review and affirmed the Third District on August 19, 2010, overruling *In re Phelon*

and *In re Gomez*, 179 Cal.App.4th 1272, 102 Cal.Rptr.3d 221 (Cal.App. 4 Dist. 2009).

The Court acknowledged that in Pope’s case the exception created by § 2933.1(a) to § 654 would “lead to the anomalous result that his [prison] term may exceed what he would have served had he been convicted *solely* of the qualifying offenses.” However, the Supreme Court noted that “application of the complex statutory sentence-credit system to individual situations “is likely to produce some incongruous results and arguable unfairness when compared to a theoretical state of perfect and equal justice.”” See: *In re Pope*, 50 Cal.4th 777, 237 P.3d 552 (Cal. 2010). ■

New Jersey Prison Supervisory Officials Found Liable for Prisoner Abuse Claims

by Derek Gilna

Three prison officials were found liable in abuse claims stemming from a month-long lockdown at Bayside State Prison following the killing of prison guard Frederick Baker in 1997, according to former federal judge John W. Bissell, named as Special Master by the U.S. District Court of New Jersey to investigate 200 allegations of abuse. Bissell’s conclusion, reached after extensive fact-finding and review of the prisoners’ complaints, was entered in April 2010.

Previously, federal juries awarded three Bayside prisoners monetary damages totaling more than \$300,000, and in the past year Bissell awarded 23 other prisoners an additional \$117,000, all of which must be paid by the State of New Jersey. [See: *PLN*, Feb. 2005, p.28; Nov. 2003, p.10].

In his April 2010 report, Bissell determined that “William Fauver, Gary Hilton and Scott Faunce bear supervisory liability for the claims proven before me resulting from the lockdown at Bayside State Prison for the period July 30, 1997 through September 3, 1997.” Bissell further wrote that he was “satisfied that the lockdown at Bayside, both as designed and thereafter implemented, violated the Eighth Amendment rights of inmates....

The lockdown and all ... its features was indeed a ‘policy or practice [which] created an unreasonable risk of ... Eighth Amendment injury.’”

Shortly after the lockdown began, the *Philadelphia Inquirer* reported that prisoners claimed they had been mistreated by a Special Operations Group (SOG) consisting of 57 guards from across New Jersey who initially interrogated them and searched their cells for weapons. The guards were decked out in full riot gear, carried batons and mace, and did not wear name badges. According to the *Inquirer*, prisoners reported they were “threatened with dogs, and paraded through a gauntlet of SOG officers who beat them with nightsticks.” As stated by Bissell, “no persuasive evidence in the record before me has established that the lockdown as designed and continued was necessary for that penological purpose.”

“Once the isolated nature of [the] attack [on Baker] ... was clear, a full lockdown with SOG’s intimidating presence was not only unnecessary, but dangerous to the safety and well-being of the inmates. It must be remembered that, for the most part, the inmates at Bayside had either medium or minimum [security] status with

freedom of movement, unescorted, throughout the grounds, for their duties and activities,” Bissell added.

“The presence of SOG, and particularly its autonomy and virtual immunity from meaningful scrutiny or discipline, exacerbated the risks exponentially ... by the very nature of the SOG deployment, there was an inherent and obvious potential for abuse of the rights of inmates ... [that] enhanced the atmosphere of tension, unrest, uncertainty and thus danger to inmates.”

Bissell also noted that SOG personnel threatened prisoners against whom they had perpetrated assaults with additional beatings if they made any complaints to either medical or administrative staff. According to Bissell, “these threats, eminently foreseeable by those who deployed the SOGs to Bayside, further imperiled the health of inmates by dissuading them from seeking necessary medical attention, ... and effectively rendered any administrative remedy process ‘unavailable’ at Bayside to injured inmates.”

The monetary judgments awarded to Bayside prisoners by Bissell and federal juries are not the only expenses incurred by the State of New Jersey as a result of the lockdown at the prison. According to Peter Aseltin, a spokesman for the state Attorney General’s Office, almost \$4 million has been paid to private lawyers for defense work related to those cases. Further, the district court has granted attorney fees of more than \$80,000 to the prisoners’ counsel since 2004.

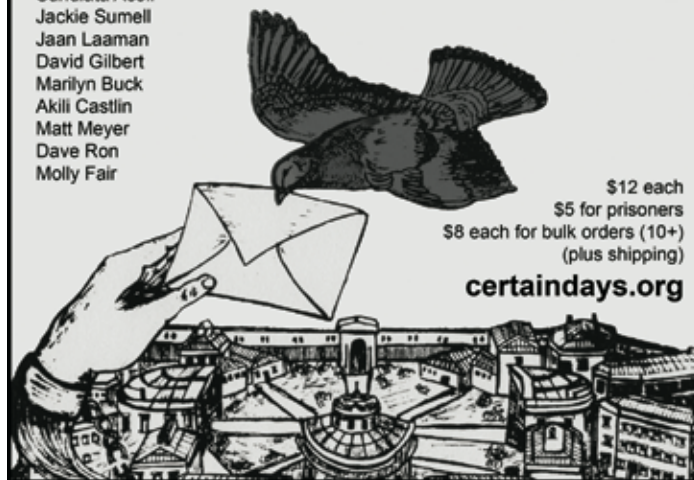
Around 30 more prisoner claims related to the Bayside lockdown are still pending, and 10 prisoners have elected to go to trial. The case remains ongoing. See: *In re Bayside Prison Litigation*, U.S.D.C. (D.N.J.), Case No. 1:97-cv-05127-RBK-JS. ■

Additional sources: www.correctionsone.com, *Philadelphia Inquirer*

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California: Prison Industry Board Not Exempt from Civil Service Rules

by Michael Brodheim

In response to the California Prison Industry Board's request for an opinion, the Attorney General's office concluded that while the Board may create a personnel system separate from the state's constitutionally-protected civil service system, sufficient evidence had not been advanced by the Board or the state legislature to justify a wholesale departure from the civil service mandate for the Board's non-prisoner employees, which number around 700.

The 11-member Board administers the Prison Industry Authority (PIA), a state agency operating under the auspices of the California Department of Corrections and Rehabilitation (CDCR). The PIA's purpose is to develop and operate industrial, agricultural and service enterprises modeled on business practices in the private sector, while providing training and employment opportunities to CDCR prisoners. The PIA employs approximately 6,000 prisoners statewide – about 4 percent of the total CDCR population. Prisoners who work in PIA jobs earn wages, typically around \$100 per month, that far exceed those earned by prisoners employed in non-PIA jobs.

By statute the PIA is supposed to be a self-supporting entity, with revenues from the sale of products and services intended to cover all of its operating costs. The PIA sells many of its products and services directly to the CDCR, such as meat, milk, coffee, peanut butter, furniture and eye glasses. The PIA also binds books and makes license plates.

The Attorney General's office analyzed the extent to which the Board – which, by statute, has “all of the powers and [does] all of the things that the board of directors of a private corporation would do” pursuant to Penal Code § 2808 – can operate, in regard to employment and personnel matters, outside the state's civil service rules. In particular, the Attorney General considered whether Penal Code § 2809, which purports to carve out an exemption to civil service rules for the PIA's non-prisoner employees, can override the civil service mandate in Article VII of the California Constitution.

Relying on state Supreme Court precedent, the Attorney General's office held that in the absence of reasonable findings supported by substantial evi-

dence, it can not. Also, because the legislature had failed to make factually supported findings when it enacted Penal Code § 2809, the PIA could not override the state's civil service system for its non-

prisoner employees. ■

Source: *Opinion of Edmund G. Brown, Jr., California Attorney General, No. 07- 404 (April 9, 2010)*

Ohio: Former Corrections Director Prohibited from Consulting on Jail Issues for 12 Months After Retirement

Responding to a request for an advisory opinion from Terry J. Collins, who retired as Director of the Ohio Department of Rehabilitation and Corrections (ODRC) effective January 31, 2010, the Ohio Ethics Commission concluded that the state's Revolving Door Law, R.C. 102.03(A)(1), which was designed to prohibit former public officials from realizing personal gain at public expense by the use of “insider” information, prohibited Collins from serving as a consultant in a case involving a county jail for one year after his retirement.

After announcing his plans to retire, Collins was contacted by an attorney who requested that he consider serving as an expert consultant (after leaving state service) in a case where he would be required

to render an opinion on the adequacy of a county jail's procedures for classifying prisoners based on their security needs. Noting that Collins' role as ODRC Director had included the development and promulgation of mandatory operational standards for Ohio jails, the Ethics Commission had little trouble concluding that his proposed employment as an expert consultant fell within the ambit of the Revolving Door Law, and thus would be prohibited.

To his credit, Collins had sought the advisory opinion from the Ohio Ethics Commission before the effective date of his retirement. ■

Source: *Ohio Ethics Commission letter dated March 10, 2010*

California: *Gilmore* Injunction Over Prison Libraries Terminated After 38 Years

Four months after adopting regulations setting forth a statewide mandate that “[a]ll inmates, regardless of their classification or housing status, shall be entitled to physical law library access that is sufficient to provide meaningful access to the courts” (Cal. Code Regs., tit. 15, § 3123), the State of California successfully moved to terminate an injunction imposed 38 years earlier in a case, *Gilmore v. California*, initially brought by San Quentin prisoners in 1966, concerning access to law books and the courts. Although no class was ever certified, in 1972 the U.S. District Court in San Francisco issued an order requiring that all California prisons maintain a specified list of legal research material in their libraries. The new regulations require that prisons maintain, at a minimum, the materials specified in the

Gilmore injunction. And, under California law, such regulations have the force and effect of law; accordingly, the rights conferred by those regulations can be enforced by state courts.

The State moved to terminate the 1972 injunction in October 2009, pursuant to the Prison Litigation Reform Act and Fed.R.Civ.P. 60(b)(5), before the new regulations had been implemented. The Prison Law Office (PLO), representing prisoners' interests, filed a motion in opposition two months later. After conducting discovery, however, the PLO concluded that whatever complaints remained regarding prisoners' access to law libraries and to the courts, those complaints were now better addressed in the state courts. In April 2010, it withdrew its opposition to the State's motion. See: *Gilmore v. California*, USDC ND CA, No. CV 66-45878 SI. ■



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U.S. Supreme Court Holds Eighth Amendment Prohibits Life Without Parole for Juveniles Not Convicted of Homicide

by *Brandon Sample*

The Eighth Amendment's Cruel and Unusual Punishments Clause bars juveniles from receiving life without parole for nonhomicide crimes, the U.S. Supreme Court decided May 17, 2010.

Terrance Graham received probation for an attempted robbery committed at age 16. Six months after starting his probation, Graham got into trouble again, committing a series of armed home invasions. A Florida judge revoked Graham's probation and imposed a life term of imprisonment.

Graham appealed the sentence arguing that it violated the Eighth Amendment. Denying relief, the First District Court of Appeal concluded that Graham's sentence was not "grossly disproportionate" to his crimes and that Graham was unable to be rehabilitated. The Florida Supreme Court denied review, and the Supreme Court granted certiorari.

In an opinion by Justice Kennedy, the court adopted a bright-line rule barring life without parole for nonhomicide crimes committed by offenders under age 18.

Looking at actual sentencing practices across the country, the court found that it was "exceedingly rare" for juveniles not convicted of murder to receive life without parole. According to a 2009 study on the issue, for instance, only 129 juveniles were serving life without parole for nonhomicides, 77 of which were from Florida. The rest were in only 10 states -- California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. The remainder of the states that authorize life without parole sentences for nonhomicides do not use the sentence. Thus, the court concluded, "it is fair to say that a national consensus has developed against it."

Nonetheless, while national consensus on a punishment is "entitled to great weight," it is not determinative of whether a punishment is cruel and unusual, the court wrote. Other factors, however, supported the conclusion that the punishment was indeed cruel and unusual.

First, the court pointed to the nature of juveniles and "developments in psychology and brain science [that] continue to show fundamental differences between

juvenile and adult minds." Juvenile brains, for instance, do not mature until late adolescence, and juveniles "are more capable of change than are adults," the court explained.

Retribution and deterrence could not support the sentence, either. "Retribution is a legitimate reason to punish, but it ... does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender." Likewise, deterrence did not justify the sentence "[i]n light of juvenile nonhomicide offenders' diminished moral responsibility," the court held.

Incapacitation and rehabilitation were inadequate bases for the sentence as well. "[A] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity," the court wrote. The court also

noted an international consensus against the punishment.

Accordingly, the court held that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." The court, however, emphasized that a state must "not guarantee the offender eventual release." Rather, "if it imposes a sentence of life, it must [only] provide him or her with some realistic opportunity to obtain release before the end of that term."

Thus, in the end, juveniles convicted of nonhomicides may still remain in prison for their natural lives as the court afforded a right without a remedy. Indeed, the Attorney General of the State of Florida has said that he intends to try to keep Graham in prison for at least 40 years. See: *Graham v. Florida*, 130 S.Ct. 2011 (2010). ■

U.S. Prison Population Declines in Second Half of 2009

In June 2010, the Bureau of Justice Statistics of the U.S. Department of Justice released year-end prisoner counts for state and federal prisons in 2009. The counts reported 1,613,656 prisoners in state and federal prisons, up 0.2% from year-end 2008. However, the count for the second half of 2009 indicated a decrease of 3,822 prisoners, the first decline in a half-year period since 2001. The significance of the decrease is unknown since second-half statistics over the past decade usually show a lower rate of increase or, in 2001, a slight decline, compared to a stronger increase in the number of prisoners during the first half of the year.

Since 2006 there has been a clear trend of reduced rates of increase in the prison population such that, if the trend continues, there should be an overall reduction in the nation's prison population by year-end 2010. For example, in 2006 the prison population increased by 42,016 prisoners. In 2007 the increase was 28,300 prisoners. There was an increase of 11,514 prisoners in 2008 and 3,897 in 2009 – by far the lowest annual increase in the past decade as measured by year-end population counts.

One factor that impacts prison populations is a change in parole revocation policies, since in most states a significant number of prison admissions are not offenders who have committed new crimes but parolees who have been revoked for non-criminal violations.

Overall, the population in state prisons decreased by 2,941 prisoners (0.2%) in 2009. That reduction was offset by an increase of 6,838 federal prisoners (3.4%). Thus, there was a net increase in the nation's prison population as a whole in 2009 despite the second-half decrease.

Twenty-four states reported decreases totaling 15,233 prisoners in 2009. Six states accounted for 71.5% of those reductions: Michigan (-3,260), California (-2,395), New York (-1,660), Mississippi (-1,272), Texas (-1,257) and Maryland (-1,069).

Other states reported increased prison populations totaling 12,282 prisoners. Five states accounted for 60.7% of that increase: Pennsylvania (2,214), Florida (1,527), Louisiana (1,399), Alabama (1,282) and Arizona (1,038).

In six states – Alaska, Connecticut, Delaware, Hawaii, Rhode Island and Ver-

mont – jail detainees were included in the prison population counts, because those states' prisons and jails comprise one integrated system. However, those six states accounted for only 43,580 of the nation's 1,613,656 prisoners at year-end 2009.

The report is available online at <http://bjs.ojp.usdoj.gov>, and is also posted on PLN's website. 📖

Source: *Prisoners at Yearend 2009 – Advance Counts, NCJ 230189 (June 2010)*

Iowa Prisoners Perform Private Sector Work for Parole Board Member

In order to avoid interfering with private sector commerce, Iowa Prison Industries (IPI) is supposed to only perform work for governmental and non-profit organizations. That does not always happen, though.

In April 2010, a crew of prisoners installed several cubicles at Washington Title and Guaranty Company, a business owned by Richard Bordwell, a member of the Iowa State Parole Board.

The crew of three prisoners from Newton Correctional Facility was supervised by Dan Crook, an ironically-named IPI technician. The pieces for the cubicles were made by prisoners at different Iowa prisons. The desks and partitions, for example, were produced at the prison in Anamosa.

"These guys are all in for non-violent offenses," said Crook. "They have less than three years remaining on their sentence. This gives them a chance to get out of the prison for a while. They all seem to enjoy it. They have a great work ethic. I've been with Prison Industries for two years now, and I've never had an incident with any of the guys. They're good guys to work with; they just happened to take a wrong turn in life."

While extolling the virtues of the IPI prisoner workers, Crook did not address whether it was proper for a parole board member to be using state prison labor for the benefit of his private business. 📖

Source: www.goldentrianglenewspapers.com



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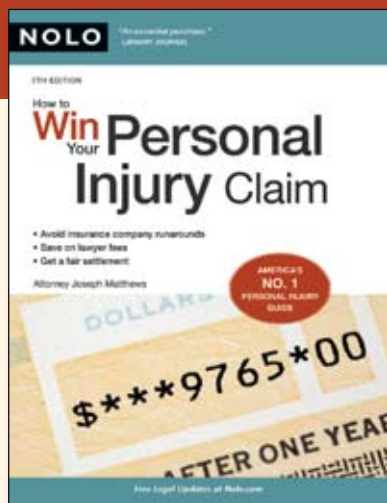
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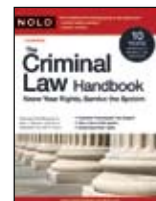
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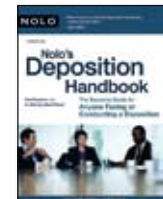
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U.S. Supreme Court Holds Federal Civil Commitment Statute Lawfully Enacted

by *Brandon Sample*

Congress did not exceed its powers under the Necessary and Proper Clause in authorizing the federal civil commitment of “sexually dangerous” federal prisoners upon the completion of their sentences, the U.S. Supreme Court decided May 17, 2010.

Shortly before Graydon Comstock’s sentence was to expire, the government filed a certification with the US District Court in North Carolina designating Comstock as a “sexually dangerous” prisoner, the first step in the federal civil commitment process. 18 U.S.C. § 4248(a). The government’s certification automatically stayed Comstock’s release until a hearing could be held to determine whether Comstock met the statutory requirements for civil commitment.

The district court, however, dismissed the civil commitment proceeding against Comstock, holding the statute exceeded Congress’ legislative powers under the Commerce Clause and Necessary and Proper Clause. In addition, the court held that the statute impermissibly lowered the burden of proof required for civil commitment from proof beyond a reasonable doubt to proof by clear and convincing evidence. The Fourth Circuit agreed with the district court that § 4248 exceeded Congress’ authority. The U.S. Supreme Court granted certiorari and reversed.

In a 7-2 opinion written by Justice Breyer, the Supreme Court held that § 4248 was a valid exercise of Congress’ authority under the Necessary and Proper Clause. Five considerations informed this conclusion.

First, while the power to authorize civil commitment is not specifically enumerated in the Constitution, the statute represented a “reasonably adapted” means to “the attainment of a legitimate end under the commerce power or under the powers that the Constitution grants Congress the authority to implement,” the court wrote.

In so holding, the court likened § 4248 to situations where Congress has acted in the absence of “explicitly mentioned” authority in the Constitution, such as when it has enacted criminal laws, and laws related to prisons and prisoners. In each of these situations, Congress possessed

“broad authority” to do these things “in the course of ‘carrying into Execution’ the enumerated powers ‘vested by’ the ‘Constitution in the Government of the United States,’ Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause,” the court wrote.

Section 4248 was also a proper exercise of Congress’ authority because it was only a “modest addition” to existing law. Current law already allows the commitment of mentally-ill prisoners, the court noted.

Furthermore, as “the custodian of its prisoners,” the federal government “has the constitutional power to act in order to protect nearby (and other) communi-

ties from the danger federal prisoners may pose,” the court wrote.

Finally, the statute was a permissible exercise of Congress’ authority because it requires the Attorney General to seek state placement of civilly committed offenders, and because it is not “sweeping in scope.” The law only applies to federal prisoners, and has only been invoked against a few prisoners, the court emphasized.

The judgment of the court of appeals was accordingly reversed. The court did not pass judgment on Comstock’s other challenges to the law, leaving them for resolution in the courts below. See: *United States v. Comstock*, 130 S.Ct. 1949 (2010). ■

7,000+ Federal Prisoners Given Pink Slips

by *Mark Wilson*

Prisoners are not exempt from the nation’s unemployment crisis. Since 2008, over 7,000 federal prisoners have been laid off, and up to 800 more are expected to lose their jobs in the coming months according to Federal Prison Industries (FPI).

FPI, also known as UNICOR, is a government corporation created by Congress in 1934 to provide job training to federal prisoners, who earn up to \$1.15 per hour. A large portion of their wages goes toward paying child support, fines, restitution and other court-ordered obligations.

In 2008, FPI employed 23,152 of the nation’s 201,280 federal prisoners (11.5 percent) to provide about 80 products and services for the government. However, a \$65 million budget shortfall has compelled federal prison officials to stop or scale back operations at prison recycling, furniture, cable and electronics assembly factories.

“We’re feeling the same pressures that are present in the overall economy,” stated FPI spokeswoman Julie Rozier. She said the current workforce cuts are among the largest reductions in FPI’s 75-year history.

As of July 2010, just 16,115 of 211,146 federal prisoners (7.6 percent) were employed by FPI. In other words,

while the federal prison population increased 4.9 percent, the FPI workforce decreased by 30 percent. Cuts announced last July will close another nine prison factories and require staff reductions at 11 other FPI sites, said Rozier.

Prison officials noted that the FPI job cuts result in a dramatic reduction in job training for prisoners; lost wages that prevent prisoners from paying child support, fines and other court-ordered financial obligations; and increased tension in overcrowded federal prisons. Of course, if prison officials were really concerned about prisoners being able to pay child support, court fines and restitution, they would ensure that prisoner workers receive at least minimum wage and not token slave wages.

“Anytime we have a loss of inmate jobs ... it becomes more challenging to keep inmates constructively occupied,” said Federal Bureau of Prisons (BOP) spokeswoman Traci Billingsley. BOP records suggest a potential correlation between the FPI layoffs and increased violence in the federal prison system. In 2009 there were 105 serious staff assaults, compared with 100 in 2008, and prisoner-on-prisoner assaults rose from 475 in 2008 to 524 in 2009.

“This is a big concern for us,” admitted Bryan Lowry, president of

the Council of Prison Locals for the American Federation of Government Employees. Noting that the federal prison system is 37 percent over capacity and in some places there is a ratio of just one guard to every 150 prisoners, Lowry

said guards and other staff members fear that FPI layoffs could lead to increased prisoner unrest. "It's not a good situation," he observed. 📖

Source: *USA Today*

Florida Disciplinary Record Must Prove Constructive Possession of Contraband

Florida's First District Court of Appeal granted a writ of certiorari to a prisoner who challenged a circuit court's denial of his mandamus petition that sought to reverse a prison disciplinary conviction. The First District held there was insufficient proof in the record to find the prisoner guilty of constructive possession of contraband.

The basis of the contraband charge against state prisoner Terry D. Bujno was that a pornographic magazine was found hidden in a squad cart that Bujno was riding in along with another prisoner and two staff members. Bujno argued in administrative hearings and to the circuit court that there was no evidence he had hidden the contraband or was even aware of its existence. Moreover, because the cart was

kept in an unsecured area and was readily accessible to a large number of prisoners and staff, the evidence was insufficient to establish constructive possession.

After citing the law on constructive possession, the Court of Appeal found the circuit court had departed from the essential elements of law by failing to issue an order to show cause that would establish an adequate record of the disciplinary proceeding and the evidence considered by the disciplinary team to determine if Bujno had constructive possession of the contraband.

Thus, the circuit court's order was quashed and the case remanded for further proceedings. See: *Bujno v. Department of Corrections*, 1 So.3d 1138 (Fla.App. 1 Dist. 2009). 📖

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Michigan Prison System Exceeds Budget, Again

In two of the last three years, the Michigan Department of Corrections' (MDOC) budget has "blown through its caps," according to state Rep. John Proos. A May 27, 2010 letter from Robert Emeron, director of the state budget office, informed lawmakers that the MDOC had exceeded its budget by \$46.25 million.

Several factors contributed to the cost overruns. "One, the MDOC is run in an inefficient manner; and two, I believe our salary and benefit scales are out of whack with surrounding states," said Rep. Proos. While states bordering Michigan spend \$70 per prisoner per diem, on average, MDOC spends more than \$90.

Proos blamed the Office of the State Employer, which negotiates contracts, as well as the governor's office. He noted that since 2003, MDOC officials have received an average 3% pay increase annually.

Additionally, inefficiencies exist in the handling of prescription drugs and food service. "On average, prisoners have 10 prescription drugs," Proos stated. The medications are handled by dozens of people from the time they arrive at central receiving to when they are distributed to prisoners.

The MDOC also has different menus in each prison. "Because of that we can't harness the power of buying [in bulk]," said Proos. He believes the MDOC can save \$6 million a year by standardizing its menus, but "the department has refused."

MDOC spokesman John Cordell, however, said prison officials are looking into standardization. "The MDOC is currently piloting a program that would standardize menus statewide to help lower overall costs," he noted. "We are seeing savings in the pilot and the department is committed to realizing cost-saving measures through supply chain management in both food service and prisoner transportation."

Another reason for the MDOC's cost overruns is the department's failure to close the Standish and Muskegon prisons

on schedule. "We knew that there would be additional costs as a result of keeping [those] facilities open past September 30," Cordell admitted. "The Department was working with all interested parties in an attempt to keep from having to close the facilities by bringing prisoners from other agencies into the prisons."

The Muskegon Correctional Facility was saved by a contract with Pennsylvania, which sent 1,300 prisoners to the facility. Efforts to fill the Standish prison with "enemy combatants," who would have been transferred from the U.S. military prison in Guantanamo Bay, Cuba, were unsuccessful.

With Michigan enduring the brunt of the ongoing economic downturn, lawmakers are concerned and want answers. "I think [MDOC] Director [Patricia] Caruso needs to provide answers. She is

ultimately responsible, as is the governor," said Proos.

"There is a cost to doing business," Cordell countered. "Corrections is unlike any other state agency in that we house over 45,000 people. While we have been able to control our population, there are things that are out of our control and that creates an underfunded situation. Utilities, fuel, health care costs, food costs, and employee compensation costs including overtime, step increase costs (wage and salary increases mandated by contract), and workers' compensation all create pressures on the corrections budget."

Meanwhile, prison officials are requesting an additional \$28 million in state funding to deal with the MDOC's budget shortfall. ■

Source: www.michiganmessenger.com

\$195,000 Award for Injury Resulting from NY Prison Garbage Detail

A New York Court of Claims has awarded a former prisoner \$195,000 for injuries she sustained while working on a garbage detail. In an April 29, 2008 order, the court found the State of New York 100% liable. The damages award came after a trial in May 2009.

Melissa Fonseca was a prisoner at Bayview Correctional Facility on November 6, 2006, working the garbage detail at 5:30a.m. While working in her assigned job, "a large dumpster slammed her left hand against the wall." Her left pinky finger was stuck between the dumpster and the wall from the knuckle up. Attempts to free her hand were unsuccessful. She was not freed until two other prisoners helped her several minutes later.

After the accident, Fonseca complained of pain and a burning feeling in her arm. She was ultimately sent to a local hospital to receive "seven sutures to her finger." Prison officials again sent her to the hospital on December 20, 2006, "to further examine [her] tendon and nerve, as [she] could not flex her pinky finger, had a reduced range of motion, and continued to complain of a burning sensation in her left forearm."

Other than an examination, Fonseca received no further treatment while incarcerated. A job she obtained after parole in

April 2007 disqualified her for Medicaid, but when she obtained insurance from her employer the following year she began treatment, which was discontinued in August 2008 because she could not afford a co-payment and the insurance company denied coverage of her pre-existing condition.

At the damages trial, Fonseca's expert, Dr. Gerard A. Bertuch, said she suffered from decreased cervical lordosis and "diminished spacing in the region of her cervical discs." He opined the November 6, 2006 injury to her finger was the cause, "explaining that when [she] pulled and tugged on her trapped hand, a traction type of injury occurred, damaging her cervical spine, tugging the nerve root and causing permanent injury."

As a result, Fonseca "suffered functional impairment." Dr. Bertuch testified "that the left wrist impairment was 23%, the left hand impairment was 22%, the left arm (combined) impairment was 75%, and the whole body impairment, upper body was 59%."

The court gave Dr. Bertuch's "testimony and report great weight." It found the State's "experts testimony" to be of little probative or persuasive value in regard to the determination of damages.

The court's May 11, 2009 damage

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award of \$60,000 for past pain and suffering, and \$135,000 for future pain and suffering, included interest from the date of the liability finding. Fonseca

was represented by New York attorney Gary E. Divis. See: *Fonseca v. New York*, New York Court of Claims, Claim No. 113278. ■

Maricopa County, Arizona Settles Prisoner Suicide Claim for \$125,000

On March 31, 2010, the Maricopa County Board of Supervisors voted 4-0 to pay \$125,000 to settle a claim against the county made by the family of a jail prisoner who killed himself in 2008.

According to the notice of claim, filed by Phoenix attorney Joel Robbins, on January 24, 2008, James Cole committed suicide by slashing his wrists with a razor that he received from jail personnel. The notice stated that Cole was providing evidence against a gang, which may have led him "to the point that he took his own life to prevent others from doing it." The notice cited issues related to Cole's classification, his being provided with a razor, and an inadequate response to the potential threat caused by his assisting law enforcement.

"It's like any other settlement we

enter into," said Maricopa County Risk Manager Peter Crowley. "We estimate the potential exposure, the potential verdict, the chances of losing a trial, the cost of trying it. We reach a decision on the value of the case, and we tried to settle based upon that value."

Because no lawsuit was filed, there is no court information for this case. ■

Source: *Arizona Republic*

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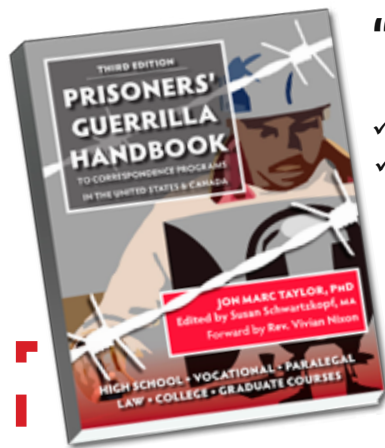
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\$850,000 Verdict in Nebraska Prisoner's Suicide

A Nebraska federal jury has awarded \$850,000 to the estate of a prisoner who hanged himself with a bed sheet in his cell at the Dodge County Correctional Facility (DCC). The estate's attorney, Maren L. Chaloupka, hailed the verdict as a wake-up call for jail officials.

After Troy Sampson was booked into DCC on July 30, 2006, his mother, Sherry Luckert, called Doug Campbell, DCC's director, to advise him that Sampson had "attempted suicide about two weeks ago – he tried to hang himself."

Based upon that information and the fact that there had been two other suicides at DCC since 2001, Campbell ordered Sampson placed on twenty-minute watch. The next day Cynthia Julian, DCC's nurse, assessed Sampson and found he had a number of mental problems, including post-traumatic stress disorder, depression and anxiety attacks.

Despite that determination, Julian "did not believe at that time that [Sampson] was a danger to himself or others." Thus, she changed his suicide watch from twenty to thirty minutes. Julian then took action to have medication prescribed for Sampson, which was done by his regular treating physician until DCC's doctor could review the matter.

On August 2 and 7, 2006, Sampson submitted several request forms asking to be placed in "solitary" without a T.V. or window, but with access to a phone. He indicated the T.V. was making him go insane. Julian responded, "No cells like that are available. Sorry. We are full." In other words, overcrowding at the facility prevented the move.

Sampson was found hanging from a bed sheet attached to a vent in his cell on August 10, 2006. The guards on duty had not received training in suicide prevention. A civil rights complaint filed by Sampson's estate charged deliberate indifference to his serious mental health needs and failure to properly train staff.

Following an eight-day trial that concluded on June 28, 2010, the jury found Dodge County, Campbell and Julian liable. It awarded \$750,000 in actual damages plus punitive damages of \$75,000 and \$25,000 against Campbell and Julian, respectively.

"This verdict means Troy Sampson did not die in vain because, hopefully, Dodge County will listen and change how

they handle the mentally ill in the future," said Chaloupka. "This is a victory for all mentally ill inmates in our state because jailers will have to take notice."

The case remains pending on post-

trial motions, including Chaloupka's motion seeking \$113,134.70 in attorney's fees and costs. See: *Luckert v. County of Dodge*, U.S.D.C. (D. Neb.), Case No. 8:07-cv-05010-JFB-TDT. ■

PLN Wins Public Records Ruling Against California Prison System

by Matt Clarke

On December 23, 2009, a California superior court ruled that the California Department of Corrections and Rehabilitation (CDCR) had to produce records requested two years earlier by Prison Legal News.

PLN made the request for documents related to "Paid Adult Legal Claims" from 2002-2007 resulting in payments that exceeded \$25,000. CDCR identified 272 such cases, but refused to fulfill the request because it was too burdensome. PLN challenged the refusal in superior court.

The court held that CDCR's claim that its own records might include only incomplete or non-final versions of the documents, the final versions of which were in the possession of outside litigation counsel, failed because CDCR never attempted to obtain copies of the documents from its litigation counsel. CDCR's argument that the documents were better obtained from the federal PACER docket system or from the state courts in which the cases were filed also failed because CDCR had not provided PLN with the

relevant case numbers for most of the cases, making it impossible for PLN to check to see if the documents were available elsewhere.

Clearly impatient with CDCR's delaying tactics, the superior court ordered CDCR to provide PLN with the case numbers of all 742 cases in which any claims were paid so that PLN could check whether they were available through PACER. The court also ordered CDCR to produce records in the 272 identified cases that resulted in payments over \$25,000, either by obtaining them from outside litigation counsel or by searching its own files.

On September 30, 2010 the superior court approved a stipulation by the parties whereby PLN was awarded \$155,000 in attorney fees and costs for successfully litigating the case. PLN was ably represented in this litigation by the San Francisco law firm of Rosen, Bien and Galvan. See: *Prison Legal News v. Tilton*, Sacramento County Superior Court (CA), Case No. 34-2007-00883573-CU-PT-GDS. ■

AMA Passes Resolution Prohibiting Shackling of Pregnant Prisoners in Labor

On June 15, 2010, the American Medical Association (AMA) adopted a resolution prohibiting the use of restraints on a female prisoner "in labor, delivering her baby or recuperating from the delivery," absent compelling grounds to believe that she poses a threat of harm to herself or others or poses a "substantial" escape risk and "cannot be reasonably contained by other means." The resolution also urges jail and prison officials to use "the least restrictive restraints necessary" on female prisoners during the 2nd and 3rd trimester of pregnancy.

While not binding or enforceable, the AMA resolution lends moral, ethical and

medical force to a growing body of opinion that the practice of shackling pregnant prisoners, particularly during labor, is, in the words of Erin Tracy, MD, an Ob/Gyn from Massachusetts, "dehumanizing" and "counter to our values" as a society. The resolution may lead hospital administrators to develop anti-restraint policies, which in turn would put pressure on prison and jail officials to adopt practices consistent with those hospital policies.

The AMA itself plans to write draft legislation that states can use as a model to develop anti-shackling laws. Only eight states – New York, California, Texas, Illinois, New Mexico, Vermont, Washington and Colorado – have laws barring or

discouraging the shackling of pregnant prisoners during labor. Those states, according to Cynthia Geto, MD, an Ob/Gyn from Hawaii, have not reported any safety issues arising from the practice of not restraining pregnant prisoners. Understating the obvious, Geto observed that women in labor are unlikely to be able to overcome

guards or escape from the delivery room.

The AMA resolution referred to a *New York Times* editorial that, in the AMA's view, "highlighted the need for an end to the barbaric and medically hazardous practice of shackling female patients in labor." That practice, the resolution observed, was contrary to AMA Policy

H-430.997, "Standards of Care for Inmates of Correctional Facilities," which calls on correctional and detention facilities to "provide medical care that meets prevailing community standards." ■

Sources: www.corspecops.com, *AMA Resolution 203(A-10)*

U.S. Supreme Court Holds Significant Injury Unnecessary for Excessive Force Claims

by Brandon Sample

More than de minimis injury is not required to state an excessive force claim, the U.S. Supreme Court unanimously decided on February 22, 2010.

In *Hudson v. McMillian*, 503 U.S. 1 (1992) [PLN, May 1992, p.3], the Supreme Court recognized that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury."

In spite of this holding, since *Hudson* was decided several lower courts have required prisoners to allege more than "de minimis" injury in order to state an excessive force claim.

Such was the case with Jamey L. Wilkins, a North Carolina state prisoner who sued a guard for "maliciously and sadistically" assaulting him "[w]ithout any provocation." According to Wilkins' complaint, the guard, identified only as "Officer Gaddy," became incensed after Wilkins asked for a grievance form. Gaddy allegedly "snatched [Wilkins] off the ground and slammed him onto the concrete floor," and

"then proceeded to punch, kick, knee and choke [Wilkins] until another [guard] had to physically remove him from [Wilkins]." Wilkins claimed he suffered numerous injuries, including "a bruised heel, lower back pain, increased blood pressure, as well as migraine headaches and dizziness" as a result of the attack.

Wilkins' allegations, however, were not sufficient enough for the district court. Relying on existing Fourth Circuit precedent, the district court, on its own motion, dismissed Wilkins' complaint, holding that he had failed to state an excessive force claim because his injuries were not more than de minimis.

Following summary affirmance by the Fourth Circuit Court of Appeals, the Supreme Court granted certiorari and vacated the lower court's judgment in a per curiam opinion.

"In requiring what amounts to a showing of significant injury," the Supreme Court wrote, "the Fourth Circuit ha[d] strayed from the clear holding of [the] Court in *Hudson*."

Hudson, the Supreme Court explained, sought to "shift the core judicial inquiry from the extent of the injury to the nature of the force – specifically, whether it was nontrivial and was applied ... maliciously and sadistically to cause harm." This shift was necessary because "[o]therwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury."

By concluding that the "absence of 'some arbitrary quantity of injury' requires automatic dismissal of an excessive force claim," the district court and the Fourth Circuit had bypassed this core inquiry. "An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury," the Supreme Court explained.

The judgment of the lower court was accordingly reversed and the case remanded for further proceedings. See: *Wilkins v. Gaddy*, 130 S.Ct. 1175 (2010). ■



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News In Brief:

Arizona: When Clayton Thornburg, 24, tried to escape from the Durango Jail in Phoenix on September 29, 2010, he left his clothes – and dignity – behind. Thornburg climbed over five fences topped with razor wire, which shredded his black-and-white striped jail clothes and left him only in a pair of socks. Jail-issued pink socks. He was spotted naked and bleeding, running from the jail, and was caught within minutes. “We got him after he hopped the last fence,” said Maricopa County Sheriff Joe Arpaio. “But can you imagine this guy running down the street with no clothes? Where was he going to go?” Thornburg faces a felony escape charge.

Arizona: Jeffrey Landrigan, 50, who was executed on October 26, 2010, gave a final statement that included what was a cryptic phrase to some: “Boomer Sooner.” Originally from Oklahoma, Landrigan was referring to a football fight slogan for the University of Oklahoma’s Sooners. He had served two decades on death row for a 1989 murder in Phoenix.

California: On November 23, 2010, a truck transporting 12 prisoners who worked on a Los Angeles County fire crew was involved in a serious accident that resulted in two fatalities. The 83-year-old driver of the other vehicle in the accident reportedly drove into oncoming traffic, hitting the truck carrying the prisoners head-on. That driver was killed, as was prisoner Fernando Julio Sanchez, 25. A county firefighter driving the truck was hospitalized; the other 11 prisoners who survived the accident also suffered injuries. The prisoners were part of a work crew that clears brush to prevent fires.

Dubai: A detainee at the Hatta Police Station, identified only as “K.A.,” broke the lights in his cell and ate the glass shards, according to a November 11, 2010 news report. The 30-year-old prisoner reportedly had mental problems and wanted to kill himself when he consumed the broken glass. “He was bleeding profusely from the mouth and said he wanted to end his life,” a police officer stated. In addition to the drug charges that landed K.A. in jail, he now faces a charge of attempted suicide.

El Salvador: A fire that broke out at a youth prison in Ilobasco on November 10, 2010 left 20 people dead. The last prisoner to die, Moises Vasquez, suffered “multiple complications after sustaining second- and third-degree burns,” a hospital spokesman said. At least 18 other

prisoners were injured during the fire; three were listed in critical condition. The facility houses prisoners over the age of 18 who committed crimes when they were minors and who cannot be sent to the adult prison system. The fire was reportedly accidental and may have been caused by a short circuit.

Florida: James Poulin, 45, incarcerated at the Brevard County Detention Center, accused the sheriff’s department of torture for showing the same movies over and over. According to a November 16, 2010 news article, Poulin complained that he had “seen ‘Black Hawk Down,’ ‘Pearl Harbor,’ ‘Saving Private Ryan’ and ‘Battle Front’ hundreds of times each, sometimes two or three times a day.” Jail administrator Susan Jeter countered that prisoners were not forced to watch the movies. “The jail provides a voluntary, video-programmed educational opportunity for the inmates,” she noted. “This program is available in the dayroom area ... They can go to their cells and read a book if they so choose.”

Florida: Salvatore James Zambuto, 22, incarcerated at the Charlotte County Jail, was found to have marijuana, pills and tobacco hidden in his rectum on November 17, 2010. A jail guard became suspicious when he saw Zambuto “walking awkwardly.” The guard followed him to a bathroom, where Zambuto was found on the floor with latex bags filled with the drugs and tobacco. He was charged with introduction of contraband into a correctional facility and drug possession.

Georgia: On November 19, 2010, more than 70 protestors marched from downtown Lumpkin to the Stewart Detention Center in Stewart County to draw attention to immigration detainees held at the prison, which is run by Corrections Corp. of America. The demonstrators chanted the names of people who had died while in the custody of Immigration and Customs Enforcement (ICE), and demanded that the facility be closed. The protestors included members of Georgia Detention Watch and the ACLU of Georgia; eight crossed a “do not enter” line in front of the prison and were arrested during the non-violent protest.

Georgia: Former Hall County jail guard Eric Miller, 33, was fired on November 15, 2010 and later arrested on charges of taking bribes from prisoners in exchange for allowing them to use drugs and

visit their girlfriends while on work details. Miller had been assigned to oversee prisoners who worked at a recycling center; Sheriff’s officials began investigating him after a bag of marijuana was found in the coat pocket of his uniform.

Haiti: A cholera outbreak in Port-au-Prince has spread to the national prison. The BBC reported on November 19, 2010 that 30 prisoners had been infected and 13 had died. Jean Roland Celestin, the head of Haiti’s prison service, described the situation as “serious,” and the International Committee of the Red Cross was working to contain the spread of the disease at the prison. Nationwide, almost 1,200 people have died due to the cholera outbreak.

Michigan: According to Macomb County Sheriff’s Captain Anthony Wichersham, the Sheriff’s department is looking into allegations that a deputy was texting on a cell phone when he was involved in an accident while transporting prisoners to the county jail. Deputy James Randlett was driving a van carrying 13 prisoners on October 4, 2010 when he rear-ended another vehicle. Seven prisoners were sent to a hospital to be examined. “Right now there is this allegation that he may have been texting. We’re looking into that,” said Wichersham. Randlett denied he was texting while driving, which is against the law in Michigan.

New Hampshire: Prisoners at the Northern NH Correctional Facility turned cranky on November 17, 2010 after there was delay in delivering coffee to the prison due to the Veterans Day holiday. An altercation involving minimum-security prisoners and prison staff resulted in one employee being treated for a minor injury.

New York: Monroe County Sheriff’s Captain Catherine McLaughlin, 53, was arraigned on charges of rape and official misconduct on November 18, 2010. She is accused of having sex with a male prisoner at least three times at the county jail in Rochester. McLaughlin, a 23-year veteran with the sheriff’s department, was suspended without pay in September pending an investigation. Following her arrest she was released on her own recognizance.

Ohio: In September 2010, nurses at a jail in Cincinnati who examined pregnant prisoner January Newport, 24, found more than a baby. Newport, who was being prepared for a Cesarean section, had

15 anxiety pills concealed in her vagina. She had been arrested on a theft charge, and later pleaded guilty to theft and illegal conveyance of drugs of abuse.

Ohio: Ronald McCloud, while held at the Loraine County Justice Center in Elyria, managed to slip out of his handcuffs and assault another prisoner in a holding cell. McCloud removed his restraints and punched Kevin Kimbrough in the face after Kimbrough called him a snitch. Kimbrough's hands were shackled to his belt at the time. Both men are facing unrelated murder charges, and a separation order should have kept them apart. "How they ended up in the same room, I don't know," said Ken Lieux, Kimbrough's attorney.

torney. "This certainly should have never happened. The transporting officers had a duty to keep them apart."

Oklahoma: David Bryan Crawford was accused of driving a stolen SUV to the Oklahoma County Jail when he reported to serve time on municipal violations. The SUV, belonging to an attorney, was stolen on October 10, 2010. The vehicle was parked at the jail when the attorney noticed it on October 18 when he visited the facility to see a client. Paperwork left in the vehicle belonged to Crawford, and keys to the SUV were found in the personal property he had checked in at the jail. He was charged with grand larceny of a vehicle.

Oklahoma: Rowdy Offield, 39, escaped from the Cleveland County Jail on October 18, 2010 by pretending to be his cellmate. Offield, serving a 30-year sentence for armed robbery and kidnapping, reportedly shaved his head and facial hair and drew tattoos on his face and arms with a pencil or marker to look like his cellmate. He then threatened his cellmate, who had made bond, to keep quiet. "Basically when the time for release came, and the door was opened, and this inmate's name was spoken and was supposed to be released, Mr. Offield got up and walked out and said it's me," said Undersheriff Rhett Burnett.

Oregon: A warning shot from a tower

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News in Brief (cont.)

guard stopped a brawl that broke out between two death row prisoners at the Oregon State Penitentiary in Salem. The prisoners, who were not identified, were in a recreation yard when they began fighting on November 19, 2010. Both suffered minor injuries and received medical treatment.

Pennsylvania: The November 15, 2010 death of Crawford County Correctional Facility guard Gary M. Chaplin, 49, has been ruled a homicide. Chapin was attacked by prisoner Gregory G. Brown on October 13; according to an autopsy, Chapin died "due to complications from blunt force trauma to the head." Coroner Patrick McHenry said it appeared that Chapin was seriously injured when he was

"lifted up and pile driven into the floor" during a fight. He was transported to a hospital and did not regain consciousness before he died. Brown was charged in connection with the assault, and may face additional charges following Chaplin's death.

Tennessee: In November 2010, Hamilton County jail prisoner Charles Douglas Mundy reported he was a victim of rape. Detectives with the Criminal Investigations Division of the Hamilton County Sheriff's Office conducted an investigation, including interviews with Mundy and several witnesses. They concluded that Mundy had made up the allegation because he didn't like his cell assignment and wanted to be moved. He was charged with filing a false report.

Washington: The Department of Corrections announced on November

19, 2010 that the McNeil Island Corrections Center in Pierce County would close by April 2011. The closure of the island prison, which was originally opened in 1875, was reportedly due to \$53 million in budget cuts. Prisoners and staff at the facility will be transferred elsewhere. "It is a decision we have weighed and gone back and forth on," said Corrections Secretary Eldon Vail. "It seemed inevitable." The Special Commitment Center, which houses civilly-committed sex offenders, will remain open on the island, thus shifting the costs of operation entirely to the Department of Social and Health Services. McNeil Island is the third, and by far the largest, state prison to close – the minimum-security Athanum View Corrections Center and Pine Lodge Corrections Center for Women were shut down earlier this year. ■

Other Resources

ACLU National Prison Project

Handles state and federal conditions of confinement claims affecting large numbers of prisoners, as well as sexual assaults against prisoners. Publishes the bi-annual NPP Journal and the online Prisoners' Assistance Directory. Contact: ACLU NPP, 915 15th St. NW, 7th Fl., Washington, DC 20005 (202) 393-4930. www.aclu.org/prisons

Amnesty International

Compiles information about prisoner torture, beatings, rape, etc. to include in reports about U.S. prison conditions; also works on death penalty issues. Contact: Amnesty International, 5 Penn Plaza, New York NY 10001 (212) 807-8400. www.amnestyusa.org

Center for Health Justice

Formerly CorrectHELP. Provides information related to HIV – contact them if you are not receiving proper HIV medication or are denied access to programs due to HIV status. Contact: CHJ, 8235 Santa Monica Blvd. #214, West Hollywood, CA 90046. HIV Hotline: (323) 822-3838 (collect calls from prisoners OK). www.healthjustice.net

Children of Incarcerated Parents

Works to stop intergenerational incarceration. Provides resources in three areas: education, family reunification, and services for incarcerated parents and their children. Contact: CCIP, P.O. Box 41-286, Eagle Rock, CA 90041 (626) 449-2470. www.e-ccip.org

Critical Resistance

Seeks to build an international movement to abolish the Prison Industrial Complex, with offices in California, New York and New Orleans. Publishes The Abolitionist newsletter. Contact: Critical Resistance, 1904 Franklin Street #504,

Oakland, CA 94612 (510) 444-0484. www.criticalresistance.org

Family & Corrections Network

Primarily provides online resources for families of prisoners related to parenting, children of prisoners, prison visitation, mothers and fathers in prison, etc. Contact: F&CN, 93 Old York Road, Suite 1 #510, Jenkintown, PA 19046 (215) 576-1110. www.fcnetwork.org

FAMM-gram

Quarterly magazine of FAMM (Families Against Mandatory Minimums), which includes info about injustices resulting from mandatory minimum laws with an emphasis on federal laws. \$10 yr for prisoners. Contact: FAMM, 1612 K Street NW #700, Washington, DC 20006 (202) 822-6700). www.famm.org

The Fortune Society

Provides post-release services and programs for prisoners in the New York City area and publishes Fortune News, a free publication for prisoners that deals with criminal justice issues. Contact: The Fortune Society, 29-76 Northern Blvd., Long Island City, NY 11101 (212) 691-7554. www.fortunesociety.org

Innocence Project

Provides advocacy for wrongly convicted prisoners whose cases involve DNA evidence and are at the post-conviction appeal stage. Maintains an online list of state-by-state innocence projects. Contact: Innocence Project, 100 Fifth Avenue, 3rd Fl., New York, NY 10011 (212) 364-5340. www.innocenceproject.org

Just Detention International (formerly Stop Prisoner Rape)

Seeks to end sexual violence against prisoners. Provides counseling resources for imprisoned

and released rape survivors and activists for almost every state. Specify state with request. Contact: Stop Prisoner Rape, 3325 Wilshire Blvd. #340, Los Angeles, CA 90010 (213) 384-1400. www.justdetention.org

Justice Denied

Only magazine dedicated to exposing wrongful convictions, and how and why they occur. Six issues: \$10 for prisoners, \$20 all others, \$3 for sample issue or a first class stamp for more info. Contact: Justice Denied, P.O. Box 68911, Seattle, WA 98168 (202) 335-4254. www.justicedenied.org

National CURE

Citizens United for Rehabilitation of Errants (CURE) is a national organization with state and special interest chapters that advocates for rehabilitative opportunities for prisoners and less reliance on incarceration. Publishes the CURE Newsletter. Contact: CURE, P.O. Box 2310, National Capitol Station, Washington, DC 20013 (202) 789-2126. www.curenational.org

November Coalition

Publishes the Razor Wire newsletter four times a year, which reports on drug war-related issues, releasing prisoners of the drug war, and restoring civil rights. Yr sub: \$6 for prisoners, \$25 all others. Contact: November Coalition, 282 West Astor, Colville, WA 99114 (509) 684-1550. www.november.org

Partnership for Safety and Justice

Publishes Justice Matters, a quarterly newsletter that reports on criminal justice issues in OR, WA, ID, MT, UT, NV and WY. \$7 yr prisoner, \$15 all others. Contact: PSJ, P.O. Box 40085, Portland, OR 97240 (503) 335-8449. www.safetyandjustice.org

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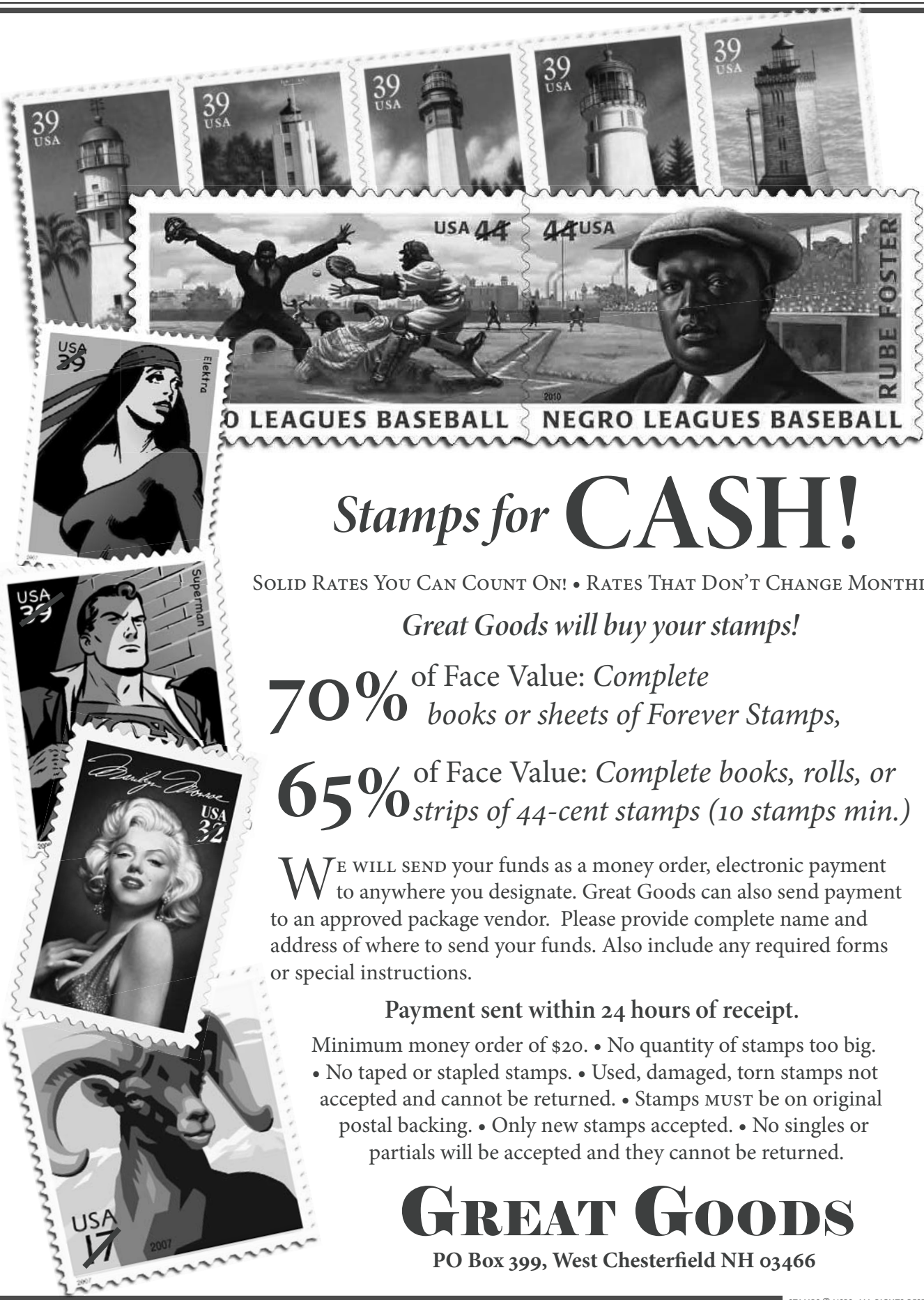
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